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Cause No. 048-112330-19

TINSLEE LEWIS, A MINOR AND MOTHER, TRINITY LEWIS, ON HER BEHALF	§	**IN THE DISTRICT COURT**
PLAINTIFFS,	§	
V.	§	**TARRANT COUNTY, TEXAS**
COOK CHILDREN'S MEDICAL CENTER,	§	
DEFENDANT.	§	**48TH JUDICIAL DISTRICT**

PLAINTIFFS' POST-HEARING BENCH BRIEF IN SUPPORT OF THEIR APPLICATION FOR TEMPORARY INJUNCTION

TO THE HONORABLE COURT:

Tinslee Lewis ("Tinslee"), and mother, Trinity Lewis ("Trinity"), on her behalf, file this Post-Hearing Bench Brief in Support of Their Application for Temporary Injunction, as they seek injunctive relief against Defendant Cook Children's Medical Center ("Defendant" or "Cook") as follows:

I.

SUMMARY OF THE ARGUMENTS

Section 166.046 of the Texas Health & Safety Code violates Tinslee's right to due process of law guaranteed her by the Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the Texas Constitution. 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.[1] Defendant implemented §166.046 and scheduled the discontinuation of Tinslee's life-sustaining treatment over the objection of her mother and without due process of law. But for a temporary restraining order, Tinslee would have died on November 10, 2019.

Plaintiffs now seek a temporary injunction declaring that §166.046 is facially, and as applied, unconstitutional and enjoining Defendant from utilizing it against Tinslee and any other patients. Plaintiffs have met all of the requirements that entitle them to the relief requested. Tinslee Lewis faces immediate irreparable harm of death if her life sustaining treatment is discontinued prematurely. Section 166.046 violates Tinslee's due process rights under both the United States Constitution and the Texas Constitution and violates Trinity's due process rights as decision maker for Tinslee under the United States Constitution and the Texas Constitution. Trinity Lewis also asserts the Defendant's action and §166.046 ultimately results in an inappropriately interference with her parent-child relationship, stripping her of medical decision making for her child – a parental right – without adjudication in

[1] Further, in this case, §166.046 allows the hospital the ultimate guardianship decision, death, without obtaining guardianship rights through a formal guardianship proceeding.

front of a neutral and unbiased judicial body. Plaintiffs have met all of the requirements to support the requested temporary injunction in this case.

II.

BACKGROUND FACTS & PROCEDURAL HISTORY

There are few disputed facts in this case. Tinslee is the daughter of Trinity and a patient at Defendant Cook Children's Medical Center ("Cook"). Cook utilized §166.046 to terminate life-sustaining care once a dispute over continued treatment existed between Cook and Trinity Lewis. Without the life-sustaining treatment provided by Cook, Tinslee would die.

III.

ARGUMENTS & AUTHORITIES

The law of temporary injunctions and the particulars of §166.046, and how it is devoid of both substantive and procedural due process, were discussed in Plaintiffs' initial Bench Brief. Plaintiffs will now go into more detail about (1) how Cook is a state actor; (2) how Cook has no right to act as they have under common law and, but for the statutory authority in §166.046, it could not withhold this care; (3) §166.046 is not a mere immunity statute but is the very legal substance that provides Cook with this incredible authority – with complete immunity – to deprive

an individual of their right to life by withdrawal of their life-sustaining treatment; (4) how Cook is further depriving Trinity of her parental rights and interfering with such parental rights without due process of law – thereby acting as the state in a way no private entity has the authority to act – and providing the ultimate termination of parent rights – the death of a child through the cessation of life-sustaining treatment; and (5) neither Cook nor the *Amici* have even attempted to argue, much less shown, how §166.046 comports with due process.

A. Plaintiffs Met Their Burden to Obtain a Temporary Injunction

Plaintiffs asked the trial court to (1) declare §166.046 unconstitutional both facially and as applied to Tinslee; and (2) find that Defendant deprived Tinslee of her civil right to due process under color of state law, 42 U.S.C. §1983, by utilizing §166.046.[2] The evidence actually showed that every element of due process was missing in this case both as it was applied to Plaintiffs and because of the manner in which the statute was written; *i.e.,* this statute is facially unconstitutional as a matter

[2] Defendant (as well as the *Amici*) has chosen – repeatedly – not to defend the constitutionality of the statute. It states only in the most conclusory fashion that this statute's constitutionality cannot be challenged and, "even if TADA somehow could be constitutionally challenged in the method Plaintiffs assert – which it cannot – due process has not been violated here. As the evidence will show at the hearing, Plaintiffs have been properly treated under any standard." *Def. Brief in Response to Plaintiff's Request for Injunctive Relief at 21.*

of law. By failing to address due process explicitly, Defendant has waived that argument and has acknowledged the statute is void of due process.[3]

In the context of a temporary injunction "the only question before the trial court is whether the applicant is entitled to preservation of the status quo pending a trial on the merits." *Khaledi v. H.K. Global Trading, Ltd.*, 126 S.W.3d 273, 280 (Tex. App.—El Paso 2003, no pet.) citing *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993) (other citation omitted). Further, "[s]tatus quo is defined as 'the last, actual, peaceable, noncontested status which preceded the pending controversy.'" *Id.* at 284 citing *Transport Co. of Tex. v. Robertson Transports, Inc.*, 261 S.W.2d 549, 553-54 (Tex. 1953). Importantly, "[a]n injunction is not improper merely because the evidence presented below conflicted; it need only reasonably support the movant's complaints." *Id.* at 281 (other citation omitted).

In this case, not only did Plaintiffs meet their burden, but there is actually no controverting evidence particularly with regard to the lack of due process in this statute facially and as applied to Tinslee and Trinity in this case. Plaintiffs more than met their burden and are entitled to the preservation of the status quo pending a trial

[3] Defendant also makes the incredible assertion that because there is no explicit right to challenge the statute's constitutionality contained within the statute, Plaintiffs have no right to do so. That is, of course, absurd. A statute cannot deprive you of the right to challenge it even as it deprives you of constitutional rights. *See Def. Brief at 7.* It is also important to note that Cook failed to address the hospital itself as the state actor and only focused on whether a doctor could be a state actor. Cook addresses an argument no one made and ignores the ones that were made. Accordingly, Cook has conceded that it is a state actor in this case.

on the merits. In this case, the status quo is Tinslee's continued care without the unconstitutional §166.046 being used to terminate her life-sustaining care against her mother's will without due process of law. The status quo may only be maintained if this statute is declared unconstitutional in this temporary injunction and at least Cook (if not all hospitals in Texas) be prohibited from utilizing §166.046 again. If Tinslee should be released to home health care, she may have a medical circumstance necessitating hospitalization. Cook – or another hospital in Texas – could utilize this statute against her again and thereby take her life and her mother's right to determine medical care against their will without due process of law.

1. The Court should find, pursuant to Chapter 37 of the Civil Practice & Remedies Code (UDJA), that §166.046 is facially unconstitutional.

Section 166.046 allows a hospital to make an arbitrary and unreviewable decision to terminate life-sustaining treatment without due process.[4] The statute states: "If an attending physician refuses to honor a patient's advance directive or a health care or treatment decision made by or on behalf of a patient, the physician's refusal shall be reviewed by an ethics or medical committee…"[5] If a conflict exists, the statute then gives a patient these rights:

[4] To comport with due process, a person facing deprivation of life, liberty, or property must be confronted with reasonable notice of the claims against him so as to be able to mount a proper defense. *In re R.M.T.*, 352 S.W.3d 12 (Tex. App.—Texarkana 2011, no pet.); *Pickett v. Texas Mut. Ins. Co.,* 239 S.W.3d 826 (Tex. App.—Austin 2007, no pet.).
[5] Tex. Health & Safety Code §166.046(a).

(b) The patient or the person responsible for the health care decisions of the individual who has made the decision regarding the directive or treatment decision:

(1) may be given a written description of the ethics or medical committee review process and any other policies and procedures related to this section adopted by the health care facility;

(2) shall be informed of the committee review process not less than 48 hours before the meeting called to discuss the patient's directive, unless the time period is waived by mutual agreement;

(3) at the time of being so informed, shall be provided:

(A) a copy of the appropriate statement set forth in Section 166.052; and

(B) a copy of the registry list of health care providers and referral groups that have volunteered their readiness to consider accepting transfer or to assist in locating a provider willing to accept transfer that is posted on the website maintained by the department under Section 166.053; and

(4) is entitled to:

(A) attend the meeting;

(B) receive a written explanation of the decision reached during the review process;

(C) receive a copy of the portion of the patient's medical record related to the treatment received by the patient in the facility for the lesser of: (i) the period of the patient's current admission to the facility; or (ii) the preceding 30 calendar days; and

> (D) receive a copy of all of the patient's reasonably available diagnostic results and reports related to the medical record provided under Paragraph (C).[6]

As written, §166.046 denies patients constitutional due process before a life-terminating decision is made. There is no reasonable time to prepare for the committee hearing or for a patient's advocate to be heard.[7] There is no right to be heard by the committee. There is no standard set in the statute by which the committee is required to make a decision (such as clear and convincing evidence). There is no medical standard the committee applies (such as within reasonable medical probability). There is no standard as to who sits on the committee. There is no requirement of an impartial decision-maker. There is no record made of the committee's meeting. There is no requirement the committee substantiate its decision in writing. There is no right to an impartial panel. And, there is no right to review the committee's decision or of appeal. All of this was proven to be true as this statute was applied to Tinslee and her mother as well through the testimony of Cook employees, Dr. Foster, and Dr. Duncan.

By statutorily immunizing the hospital's committee and providing it the opportunity to deprive an individual of necessary medical care without any one of these rights, the statute guarantees a constitutional violation. A substantive due

[6] Tex. Health & Safety Code Ann. § 166.046 (West 2017).
[7] The Court will recall that Cook asserted that Trinity failed to provide the ethics committee with controverting medical evidence, as if she could have done so within 48 hours.

process violation occurs when the government deprives individuals of constitutionally protected rights by an arbitrary use of its power.[8] Here, there are simply no standards and no specific procedures to protect against a deprivation of due process. Again, this was proven in the testimony elicited from Dr. Foster who was confused even as to what such a standard might mean. Rather, the procedures outlined in §166.046(b)(1)-(4) expose patients to a risk of mistaken or unjustified deprivation of medical care without due process protection, and, in this case, an unjustified deprivation of life cannot be corrected.

For example, the time period in which notice is guaranteed falls short of any due process standards. Pursuant to the statute, the patient or person responsible for the health care decisions of the individual "shall be informed of the committee review process not less than 48 hours before the meeting called to discuss the patient's directive, unless the time period is waived by mutual agreement."[9] This brief statutory notice period of two days – or even the five days that Cook claims it gave Trinity – does not afford a patient or surrogate with adequate opportunity to prepare for a meeting where the subject at stake is the individual's life.[10] The State sets an unreasonable time period in which individuals must: evaluate available

[8] *Byers v. Patterson,* 219 S.W.3d 514, 525 (Tex. App.—Tyler 2007, no pet.) (citing *Simi Inv. Co. v. Harris Cnty.,* 236 F.3d 240, 249 (5th Cir. 2000)).
[9] §166.046(b)(2).
[10] Compare, for example, the right to file a general denial on the Monday following the expiration of 20 days.

options (if any); determine and confirm persons or entities willing to assist; gather needed medical records; seek and secure counsel to attend the meeting. Effectively, the patient can be served with 48-hour notice on a Friday evening and be required to defend their life on a Sunday evening at a meeting at which they are only statutorily allowed to "attend."

Similarly, the statute fails to require hospitals to provide notice as to why the institution has decided to unilaterally seek the withdrawal of life-sustaining treatment. The statute instead provides that the patient or surrogate: "**may** be given a written description of the ethics or medical committee review process and any other policies and procedures related to this section adopted by the health care facility."[11] While the statute does not require hospitals to have policies or procedures, unpublished and unknown guidelines, criteria, or medical information undoubtedly leave patients and their families guessing at how to advocate on behalf of the patient. Without notice of the standards on which a hospital seeks to remove life-sustaining treatment or the process and procedure by which it makes its decision, the patient is not able to prepare for an ethics committee meeting. Ultimately, the statute allows for a life or death determination without any criteria or benchmarks for which patients are susceptible. Section 166.046 fails to provide patients with a reasonable

[11] §166.046(b)(1). (Emphasis added.)

opportunity to prepare for the crucial hearing where deprivation of life is being determined.

Section 166.046(b)(4) entitles the patient or their surrogate to "(A) attend the meeting." Attendance at a hearing in which the constitutional right to life is deliberated fails to meet a constitutional threshold of due process. "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations [of property interests] can be prevented."[12] Incredibly, Cook made an argument that Trinity did not provide evidence at the hearing of some "magical cure found on the internet" or provide testimony from a doctor. When asked if that would be allowed, Dr. Foster said she did not know, it would have to be discussed. When asked if Trinity could even have an attorney or patient advocate attend with her, Dr. Foster testified that that had not been their "practice" and that it would have to be discussed. In other words, "No," is the answer to both.

Section 166.046 also fails to provide a patient a neutral or impartial decision-maker. Instead, §166.046 allows the hospital to appoint the committee members, without enforcing any standards of impartiality. A lack of neutrality is a deprivation

[12] *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . (And n)o [sic] better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (citing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring).

of due process as a matter of law. In this case, there was testimony from Dr. Foster that of the 22 members of the ethics committee in attendance for the hearing on Tinslee's case, 19 of them were Cook employees. This means that 86% of those who voted unanimously to withdraw Tinslee's life-sustaining care which would – as Dr. Duncan admitted – result in her immediate death receive their paychecks from Cook.

As the United States Supreme Court said in *Marshall v. Jerrico, Inc.,*

> This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals.[13]

Finally, there is no right of appeal or review of the hospital's decision. Due process cannot be ensured without a review of a life-depriving decision.[14] Otherwise, all other due process safeguards are illusory. In this case, Cook even argues that a challenge to the constitutionality of the statute itself is prohibited by the very same statute.

Due to the statute's failure to provide substantive or procedural due process, the Court should grant summary judgment pursuant to Civ. Prac. & Rem. Code §37, holding that the §166.046 is facially unconstitutional and was unconstitutionally applied to Tinslee.

[13] 446 U.S. 238, 242 (1980).
[14] *Parham v. J.R.*, 442 U.S. 584, 591 (1979).

2. The two elements to make a claim as required by 42 U.S.C. § 1983 are met in this case—deprivation of federal rights under color of state law.

42 U.S.C. §1983 allows an individual to bring a civil action to recover damages sustained as a result of the violation of their constitutional rights. The statute serves as the vehicle to redress the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws by any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."[15] To state a claim under the statute, a plaintiff must allege that (1) defendant deprived plaintiff of a federal right secured by the laws of the United States or by the Constitution and (2) acted under color of state law.[16] "Thus, a threshold inquiry in a 42 U.S.C. §1983 cause of action is whether plaintiff has alleged a violation of a constitutional right or of federal law."

(a) Cook deprived Plaintiffs of due process.

As discussed above in the section discussing the Declaratory Judgment Act, due process requires a fair and impartial trial, accomplished by providing: (1) an opportunity to be heard (2) a reasonable opportunity to prepare for a hearing, (3) a reasonable notice of the claims against them, and (4) a decision to be reached through

[15] *Gomez v. Toldeo*, 446 US 635, 638 (1980).
[16] See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Schreiber v. City of Garland*, Tex., CIV.A. 3:06-CV-1170-O, 2008 WL 1968310, at *4 (N.D. Tex. May 7, 2008) (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Bass v. Parkwood Hosp*., 180 F.3d 234, 241 (5th Cir.1999)).

an impartial tribunal.[17] To constitute a competent trial, the trial (hearing) must be conducted before an unbiased judge.[18] Procedural due process rules are meant to protect persons not only from the deprivation, but from the mistaken or unjustified deprivation, of life, liberty, or property and interests protected by the Fourteenth Amendment.[19]

The right to due process is absolute. It does not turn on the merits of a claim, rather, "because of the importance to organized society," procedural due process must be observed.[20] Denial of the right to due process requires the award of nominal damages even without proof of actual injury.[21] Here, §166.046 – both as it is written and as it was applied here – violates multiple facets that make up the constitutional right to due process by: (1) failing to provide a patient (or their surrogate decision-maker) an opportunity to be heard, (2) failing to give a reasonable opportunity to

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[17] *In re R.M.T.*, 352 S.W.3d 12 (Tex. App.—Texarkana 2011, no pet.); *Pickett v. Texas Mut. Ins. Co.,* 239 S.W.3d 826_Tex. App.—Austin 2007, no pet.); It is important to note, that while the Texas Constitution is textually different in that it refers to "due course" rather than "due process," the terms are regarded without meaningful distinction. *Mellinger v. City of Houston,* 68 Tex. 37, 3 S.W. 249, 252–53 (1887). Consequently, Texas has "traditionally followed contemporary federal due process interpretations of procedural due process issues." *Univ. of Texas Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995); *Mellinger*, 3 S.W. at 252-53.

[18] *Johnson v. Mississippi*, 403 U.S. 212, 91 S. Ct. 1778, (1971); *Martinez v. Texas State Bd. of Medical Examiners*, 476 S.W.2d 400 (Tex. Civ. App.— San Antonio 1972), writ refused n.r.e., (May 17, 1972). It is ironic to note that in this case, Cook sought and obtained a recusal of Judge Kim on the basis of *appearance* of impartiality.

[19] *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972); *County of Dallas v. Wiland*, 216 S.W.3d 344 (Tex. 2007) (citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978)).

[20] *County of Dallas v. Wiland*, 216 S.W.3d 344, 356 (Tex. 2007) (citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978)).

[21] *Id.* at 356-57 (Tex. 2007) (citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978)).

prepare for a hearing, (3) failing to give adequate notice of the reasons why removal of life-sustaining treatment is to occur, (4) failing to allow for a decision to be reached through an impartial tribunal, (5) failing to require objective standards, and (6) failing to provide a record or right of review.

(1) Plaintiffs were not given an opportunity to be heard.

The opportunity to be heard constitutes a fundamental requirement of due process and must be provided at a meaningful time and in a meaningful manner.[22] While due process allows for variances in the form of hearing "appropriate to the nature of the case,"[23] depending on significance of the interests involved and nature of the subsequent proceedings, "the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals."[24] Part of the opportunity to

[22] *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); *Univ. of Texas Med. Sch. at Houston v. Than,* 901 S.W.2d 926, 930 (Tex. 1995); *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976). At the core of affording sufficient due process lies the opportunity to be heard in front of an impartial tribunal. *Johnson v. Mississippi*, 403 U.S. 212 (1971). The constitutional right to be heard serves as a basic tenant of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his [rights or] possessions. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (noting the high value embedded in our constitutional and political history in permitting a person the right to enjoy what is his, free of governmental interference). In discussing the deprivation of property, the United States Supreme Court noted that the purpose of this requirement is not only to ensure abstract fair play to the individual, but more particularly, is to protect a person's use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. *Id.*

[23] *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950).

[24] *Boddie v. Connecticut*, 401 U.S. 371, 378- 79 (1971).

be heard is the ability to be represented at the hearing.[25] Again, Dr. Foster testified that Trinity was not entitled to be represented by an attorney or patient advocate. Such would have to be "discussed" as it was not their "practice" to do so. Trinity was left without an advocate to defend her daughter's life.

The Texas Supreme Court has held that the "opportunity [to be heard] may not be attenuated to mere formal observance."[26] Here, while §166.046(b)(4) entitles a patient or surrogate decision-maker to attend the committee meeting and receive the patient's medical records, diagnostic results, and a written explanation of the committee's decision, that by no means equates to due process, and the constitutional right to be heard is glaringly absent in the statute.[27]

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[25] While U.S. Circuit Courts were split on whether a prohibition against representation of a plaintiff by and through counsel was a violation of plaintiff's right to due process when subject to permanent suspension, the Court in *Houston v. Sabeti* referred to and assessed five factors first laid out in *Wasson v. Trowbridge*, most notably were: the education level of the student, his/her ability to understand and develop the facts, whether the other side is represented, and fairness of the hearing. *Univ. of Houston v. Sabeti*, 676 S.W.2d 685, 687 (Tex. App. – Houston [1st Dist.] 1984, no writ). The *Sabeti* court held the student was met with due process upon determining that the *Wasson* factors were not present, for: 1) the proceeding was not criminal; 2) the government did not proceed through counsel; 3) the student was mature and educated; 4) the student's knowledge of the events enabled him to develop the facts adequately; and, 5) the other aspects of the hearing, taken as a whole, were fair. *Id*; *see Wasson v. Trowbridge*, 382 F.2d 807, 812 (2nd Cir. 1967).

[26] "Due process of law ordinarily includes: (1) hearing before condemnation; (2) accordance of reasonable opportunity to prepare for the hearing. Mandate of reasonableness of opportunity may not be attenuated to mere formal observance by judicial action." *Ex parte Davis,* 344 S.W.2d 153, 157 (Tex. 1961) (citing *Ex parte Hejda*, 13 S.W.2d 57, 58 (Tex. Comm'n App. 1929).

[27] The statute does not entitle the patient or surrogate decision-maker to offer evidence or utilize counsel. *Tex. Health & Safety Code Ann.* § 166.046(b)(4) (West 2017).

(2) Plaintiffs were not given adequate notice of the proceeding.

The unnecessary exclusion of *the* critical party from meaningful participation in a determination of this right to direct the course of medical treatment contravenes the basic tenets of our judicial system and affronts the principles of individual integrity that sustain it.[28] As such, notice of the claims is a critical component of due process.[29] The statute does not require a conscious patient be guaranteed notice of the hearing that will determine whether the patient will be removed from life-sustaining treatment. The statutory language provides certain entitlements to "the patient or the person responsible for the health care decisions of the individual who has made the decision regarding the directive or treatment decision."[30] In this instance, his mother was handed the letter which stipulated the hearing date a few days in advance thereof, but as discussed above, this is hardly adequate notice. Inadequate notice constitutes no notice.

(3) Plaintiffs were not given ability to prepare for the hearing.

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[28] *Edward W. v. Lamkins*, (2002) 99 Cal. App. 4th 516, 529 (holding that public guardian's routine of seeking notice waivers violated conservatee's due process rights); *Thor v. Superior Court* (1993) 5 Cal. 4th 725, 723, fn. 2.

[29] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank Tr. Co.* 339 U.S. 306, 314 (1950); *see Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (noting that notice is required to satisfy the traditional notions of fair play and substantial justice implicit in due process).

[30] Tex. Health & Safety Code Ann. § 166.046(b) (West 2017).

A disciplinary proceeding by which a medical student is dismissed for cheating demands a level of due process that consists of oral and written notice of the charges, written notice of evidence to be used against the student in the hearing, including a witness list and summaries of their respective testimonies, the right to counsel or other representation, a formal hearing with the opportunity to present evidence and cross-examine witnesses, and a right of appeal.[31]

It is ironic that §166.046 does not afford individuals on life-sustaining treatment any of these same procedural safeguards as are given to medical students.[32] Here, the interest at risk is higher, yet under §166.046, ethics meetings are held without providing the patient or surrogate with notice of evidence to be used, a witness list accompanied by summaries, notice of panel members with accompanying qualifications, right to counsel or the opportunity to present evidence and cross-examine witnesses.[33]

With the absence of uniform statutory guidance, the ability of a patient or surrogate decision-maker to address an ethics committee depends upon the internal policies of individual hospitals, the individual in charge of that hospital's ethics committee, and the good graces (if any) of the committee members. Effectively, a

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[31] *Univ.of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 931 (Tex. 1995).

[32] Even with the heightened procedural due process observed in *Than*, the Court held that due course of law was infringed when a student with a liberty interest is denied an opportunity to respond to a new piece of evidence against him obtained in an ex parte visit and given that the countervailing burden on the state is slight. 901 S.W. 2d at 932.

[33] Medical students get, those rights while patients do not.

patient's ability to advocate before the body determining whether to continue his life may well depend on which hospital he finds himself. This lack of uniformity creates different due process availability to similarly-situated patients, and therefore, renders the statute facially unconstitutional. As Cook applied an unconstitutional statute, it deprived Tinslee and Trinity of their civil rights under color of state law even before it determined that it would withdraw Tinslee's life-sustaining care against her mother's expressed wishes. This is the ultimate termination of parental rights with the most permanent and dire of consequences – again without even a modicum of due process. This is, again, the action of the state which Cook is able to take only under color of state law.

(4) The hospital ethics committee is not an impartial tribunal.[34]

The U.S. Supreme Court has stressed the importance of a "neutral factfinder" in the context of medical treatment decisions and the right to a review process.[35] Under §166.046, a fair and impartial tribunal did not and could not hear Tinslee's case. The "ethics committee" members who are employed by the treating hospital

[34] *Johnson v. Mississippi*, 403 U.S. 212 (1971); *Martinez v. Texas State Bd. of Medical Examiners*, 476 S.W.2d 400 (Tex. Civ. App.—San Antonio 1972), writ refused n.r.e., (May 17, 1972).
[35] *Parham v. J.R.*, 442 U.S. 584, 591 (1979) (citing examples of hospital procedures where several hospitals' review boards are made up of non-staff community medical professionals and review processes afforded to patients).

cannot be fair and impartial. Their decision may have an adverse financial impact on the hospital or put a colleague's judgment in public question. Additionally, there is no safeguard against *ex parte* communications or the *ex parte* presentation of evidence which the patient or his surrogate could rebut. In this case, the evidence was uncontroverted – 19 of the 22 decision-makers – or 86% of them – are Cook employees. The conflict of interest and lack of partiality is indisputable.

Aside from hospital employees, the hospital itself has an inherent conflict of interest when acting as arbiter – treating any patient requires a financial burden upon the entity. 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.[36] When a hospital "ethics committee" meets under §166.046 for a patient within its own walls, objectivity and impartiality essential to due process are nonexistent. Section 166.046 provides no mechanism by which a patient's desire to live is considered by an impartial tribunal. Accordingly, a lack of an impartial committee by Cook was another violation of Plaintiffs' right to due process.[37]

[36] "There is a great potential for serious conflict of interest for the State when it is paying the medical bill for the treatment of its ward." *Woods v. Com.*, 142 S.W.3d 24, 64 (Ky. 2004).
[37] Again, Cook sought and obtained a judge who had the mere *appearance* of impartiality while depriving Plaintiffs of that same right.

(5) Tinslee was sentenced to a premature death.

The preservation of life in Texas is a long-valued right.[38] Courts recognize "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."[39] Here as such, the State of Texas has delegated life taking authority to a hospital's ethics committee. By the enactment of §166.046, the State of Texas has created a scheme whereby patients in Texas hospitals may have their life pre-maturely extinguished without any standard, being found guilty of nothing except that of being ill. Neither, the State of Texas nor its surrogate has the authority to sentence ill people to premature death.

In *Cruzan*, the United States Supreme 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.[40] The Supreme Court went on to note that the state could properly require a "clear and convincing evidence" standard to prove

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[38] "(a) A person commits an offense if, with intent to promote or assist the commission of suicide by another, he aids or attempts to aid the other to commit or attempt to commit suicide." Tex. Pen. Code Ann. §22.08 (West 2017); Additionally, courts across the nation have upheld similar statutes. *See Donorovich-Odonnell v. Harris,* 241 Cal. App. 4th 1118 (2015) (upholding a statute criminalizing the mere act of prescribing drugs as it "is active and intentional participation in the events leading to the suicide).

[39] *Cruzan v. Director*, *Missouri Dep't of Health*, 497 U.S. 261, 269 (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.

[40] *Cruzan,* 497 U.S. at 286.

the patient's wishes.[41] Where, as the Supreme Court in *Cruzan* held, the evidentiary standard could not be met, "it was best to err in favor or preserving life."[42]

Likewise, in *Wendland, supra,* the California Supreme Court held that Wendland's conservator would be allowed to withhold artificial nutrition and hydration only if she could prove, by clear and convincing evidence, either that the conservatee wished to refuse life-sustaining treatment or that to withhold such treatment would have been in his best interests.[43] The court "finding itself in uncharted territory" explained that "[w]hen the situation arises where it is proposed to terminate the life of a conscious but severely cognitively impaired person, it seems more rational…to ask 'why?' of the party proposing the act rather than 'why not?' of the party challenging it," and so placed the burden both of producing evidence and of persuasion on the conservator.[44]

Similarly, the Oklahoma Supreme Court asserted that the statute at the heart of a case involving a baby with abnormalities, a deteriorating and grim prognosis, "[did] not comport with the requirements of substantive due process because it permit[ted] a court to authorize a DNR order for a child in state custody without addressing what burden of proof applies and what findings the court must make."[45]

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[41] *Id*. at 280.
[42] *Cruzan*, 497 U.S. at 273. (Other citations omitted).
[43] *Wendlend*, 26 Cal.4th at 527.
[44] *Id.*
[45] *Baby F. v. Oklahoma Cty. Dist. Court*, 348 P.3d 1080, 1084 (Okla. 2015).

Relying on *Cruzan*, the court concluded that "the trial court, in all future matters, shall not authorize the withdrawal of life-sustaining treatment or the denial of the administration of cardiopulmonary resuscitation on behalf of a child in DHS custody without determining by clear and convincing evidence that doing so is in the best interest of the child."[46] The court also noted that "the standard of proof is a matter of due process and serves to 'allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decisions.'"[47]

In each case, supreme courts have understood that the withdrawal of life-sustaining care presents the risk of deprivation of a protected interest. The courts go further to demand the facts justifying such a decision be shown by clear and convincing evidence; the alternative being the statutes are unconstitutional for failure to comport with substantive due process. Further, the courts uniformly place the burden on the party seeking to withdraw care. In this case, however, there is no evidentiary standard imposed on hospitals by §166.046, as the testimony from Dr. Foster made clear. An attending physician and hospital ethics committee are given complete autonomy and immunity by the state in rendering a decision that further medical treatment is "inappropriate" for a person with an irreversible or terminal condition. They can do this and take away a parent's rights to decide what is in the

[46] *Id.* at 1089.
[47] *Id.* at 1086 quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

best interest of their children – thereby effectively terminating parental rights without a hearing or due process under color of state law. This is an alarming delegation of power by the state law.

There is simply no precedent or constitutional justification for this authority to make a decision for someone of this magnitude without their consent or against their will. A final decision rendered behind closed doors, without an opportunity to challenge the evidence or even be represented, present contrary evidence, or appeal a committee decision, is legally insufficient from the due process intended to protect the first liberty mentioned in Article 1, Section 19 of the Texas Constitution and that of the Fourteenth Amendment. Accordingly, the act of using §166.046 by Cook deprived Plaintiffs' of their civil rights under color of state law.

b. The hospital acted under color of state law.

There is no absolute rule for what is and is not state action, but it is undisputed that Cook is the agency by which the state provides urgent and indigent care. This is why Cook did not dispute it was a state actor, but only suggested the specific doctor might not be. As Dr. Duncan testified he was employed by Cook, this is a distinction without a difference.

The U.S. Supreme Court has "suggested that 'something more' which would convert the private party into a state actor might vary with the circumstances of the

case."[48] Conduct or action under color of state law requires that a defendant exercise power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.[49] A State cannot avoid constitutional responsibilities by delegating public function to private parties.[50] "In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action… Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor."[51] Courts have made clear that state action is concluded when "the State create[d] the legal framework governing the conduct."[52] Here, the State enacted §166.046, the legal framework granting authority to the hospital which deprived Plaintiffs' of their constitutional rights. And Cook used it.

Pursuant to the the statute, Cook exercised statutory authority evocative of a government function in the following ways:

- Provided approximately 48 hours' formal notice[53], that Tinslee's life-sustaining could be removed;

[48] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).
[49] *See Georgia v. McCollum*, 505 U.S. 42, 51 (1992) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982)); see also *Mitchell v. Amarillo Hosp. Dist.*, 855 S.W.2d 857, 864 (Tex. App.—Amarillo 1993, cert. denied).
[50] *Georgia v. McCollum*, 505 U.S. 42, 53 (1992).
[51] *National Collegiate Athletic Ass'n v. Tarkanian,* 488 U.S. 179, 192 (1988).
[52] *Id.* at 192 (citing *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).
[53] *See* Tex. Health & Safety Code § 166.046(a)(2)(West 2017).

- Held a hearing regarding whether Tinslee's life-sustaining treatment should be removed[54];

- Came to a determination that Trinity's request to continue life-sustaining treatment of her daughter, Tinlsee, should not be honored, thereby interfering with the parent-child relationship (ultimately permanently terminating it; again, without due process of law with Cook acting as the state in so doing)[55];

- Came to a determination that Tinslee's life-sustaining treatment should be removed[56];

- Gave written notice that Tinslee's life-sustaining treatment could be removed on or about November 10, 2019, as it can do under the Act[57].

Section 166.046 gives hospitals the power to decide a patient is no longer worthy of life-sustaining treatment. This grant of authority indicates even a private hospital, when taking action under the statute, is performing a State function.[58] The ability to take formal action which will result in death is not available to the public.[59]

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[54] *Id.* at §166.046(a).
[55] *Id.*
[56] *Id.*
[57] *Id.* at §166.046(e). ("The physician and health care facility are not obligated to provide life-sustaining treatment after the 10th day after the written decisions required under Subsection (b) s provided to the patient or the person responsible for the health care decisions of the patient [.]").
[58] Cook is further fulfilling the state function of providing medical care from the state as part of Medicaid to the state's poorest citizens. In this instance, Cook is an arm of the State. Cook is also the only entity in Tarrant County that can even provide the care that Tinslee needs. It acts as a monopoly in such a circumstance which has been held to be a factor pointing to an otherwise private entity being a state actor. *See, e.g., Millspaugh v. Bulverde Spring Branch Emergency Servs.*, 559 S.W.3d 613, 617 (Tex. App.—San Antonio 2018, no pet.),
[59] Compare *Lindsey v. Detroit Entertainment*, LLC, 484 F.3d 824, 828–31 (6th Cir. 2007) (casino security personnel were not engaged in state action when they detained a patron and thus owner could not be held liable for an unlawful seizure under § 1983, because security personnel are not licensed under state law to have misdemeanor arrest authority; although private security guards who are endowed by law with plenary police power may qualify as state actors, plaintiffs could

In making the decision to withhold life-sustaining treatment, the statute allows a hospital's ethics committee to sit as both judge and jury of a physician's recommendation to take action which will result in premature death. This judicial function of the "ethics committee" is similarly evocative of state action.

Private entities have been held to be acting under color of State law for performing traditionally government functions[60] as follows:

- *Marsh v. State of Ala.*, 326 U.S. 501 (1946) (company owned town);
- *Smith v. Allwright*, 321 U.S. 649 (1944) (primary election);
- *Watchtower Bible and Tract Society of New York, Inc. v. Sagardia De Jesus*, 634 F.3d 3, 10 (1st Cir. 2011), cert. denied, 132 S. Ct. 549, 181 L. Ed. 2d 396 (2011) (public streets within "urbanizations," which are neighborhood homeowners' associations authorized by city to control vehicular and pedestrian access, remain public property despite their enclosure, and regulating access to and controlling the behavior on public property is a traditional, classic government function; thus, urbanizations were state actors for purposes of § 1983 action challenging closure of access to public streets);
- *Romanski v. Detroit Entertainment, L.L.C.*, 428 F.3d 629, 636-40 (6th Cir. 2005) (although private security guards who exercise some police-like powers may not always be viewed as state actors, where guards are endowed by state law with plenary police powers, they qualify as state actors under the public function test; casino's private security police

not point to any powers beyond those possessed by ordinary citizens that the state delegated to unlicensed security personnel, and thus they could not show that defendant engaged in any action attributable to the state); see also *Johnson v.* , 372 F.3d 894, 896-898, (7th Cir. 2004) *Children's Hosp. LaRabida* (delegation of a public function to a private entity triggers state action and a privately employed "special officer" who possesses full police power pursuant to city ordinance will be treated the same as a regular Chicago police officer.

[60] *See also Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) ("We have held that the question is whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'") (Other citations omitted; emphasis by Court.)

officers were licensed by the state and had the authority to make arrests and thus were afforded power traditionally reserved to the state alone such that guard's conduct on duty on the casino's premises would be considered state action);

- *Belbachir v. County of McHenry*, 726 F.3d 975, 978 (7th Cir. 2013) (although employees of private firm hired to provide medical services at jail were not public employees, they were performing a public function and thus were acting under color of state law);

- *Lee v. Katz*, 276 F.3d 550, 554-557 (9th Cir. 2002) (under *Brentwood*, it suffices that a nominally private party satisfy a single state action test and here private lessee of public outdoor area owned by city performed a traditional sovereign function when it sought to regulate free speech activity on city-owned land; although not everyone who leases or obtains a permit to use a state-owned public forum will necessarily become a state actor, here the city retained little, if any, power over the private entity and thus its policing of free speech in the public forum was a traditional and exclusive function of government);

- *Duke v. Massey*, 87 F.3d 1226, 1231 (11th Cir. 1996) (decision of presidential candidate selection committee for state Republican Party to exclude candidate from primary ballot pursuant to authority granted under state law constitutes state action for purposes of candidate's federal civil rights action despite argument that committee members made decision in their capacity as representatives of Republican Party); and

- *Duke v. Smith*, 13 F.3d 388, 393 (11th Cir. 1994), writ denied, 513 U.S. 867 (1994) (because bipartisan state-created committees are inextricably intertwined with the process of placing candidates' names on the ballot and it is the state-created procedures and not the political parties that make the final determination as to who will appear on the ballot, the power exercised is directly attributable to the state).

Section 166.046 clearly permits Texas hospitals, via its "ethics committees," to take action (such as to hear and determine whether a recommendation to withhold life-sustaining treatment against a patient's wishes is appropriate, and then exercise

removal of life-sustaining care 10 days after providing written notice) normally only held in the hands of State officials such as judge, peace officers, and executioners who can take a person's life against that person's wishes with immunity.[61] Further, §166.046 can be used to interfere with parental rights – indeed, going so far as to terminate them – without due process of law.

As Cook has admitted to using §166.046, the elements to a 42 U.S.C. §1983 claim are met. There is no genuine issue of material fact that §166.046, even followed perfectly as Cook did, deprives a patient and/or his surrogate of substantive and procedural due process rights as a matter of law. It is designed to be without procedural due process when taking a right such as the right of self-determination or the right to life and the right of a parent to decide what is in the best interest of her child.[62] It violates substantive due process because the government has deprived patients of their constitutional rights by an arbitrary use of power. Here, Cook is a state actor because it utilizes this state authority to determine whether one lives or dies and whether a parent may exercise their parental rights – rights and authority not given to any other citizens – and does so with total and complete statutory immunity from civil or criminal liability.

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[61] *See, e.g., Cornish v. Correctional Services Corp.*, 402 F.3d 545, 550-51 (5th Cir. 2005) (private corporation delegated authority to operate juvenile correctional facility fell within public function test as far as its provision of juvenile correctional services to the county).

[62] "An individual's right to control his medical care is not lessened when the treatment at issue involves life-sustaining medical procedures." *In re. Gardner*, 534 A.2d 947, 951 (Me. 1987) (Other citation omitted).

B. Section 166.046 Is Not a Mere Immunity Statute

Section 166.046 is the very thing that provide Cook with this incredible authority – with complete immunity – to deprive an individual of their right to life by withdrawal of their life-sustaining treatment without due process of law and to interfere with parental rights. As noted above, there is no right of a doctor – and certainly not a hospital – to deny care to a patient already a patient there who requires life-sustaining care – emergency services, even – without which they will die. Cook is acting under §166.046, not just to enjoy complete immunity – but to be able to act as it is at all.

Moreover, Cook chose to invoke §166.046. It cannot now run from the very procedure it invoked and try to switch courses now.

C. Cook Interfered with Parental Rights under §166.046

There are specific proceedings that must be complied with in order to obtain a guardianship under Texas. *See, generally,* Title 3 of the Estates Code. Moreover, only the state can act to terminate parental rights – under ordinary circumstances – but Cook acts as the State here again by taking complete control over Tinslee and making decisions that affect her very ability to live from Trinity. *See, e.g.,* Tex. Fam. Code §1661.001, *et seq*. In essence, the proceedings required under the Family Code to involuntary termination parental rights were not complied with either, despite the fact that the result of Cook's decision here is the ultimate termination of the parent-

child relationship: Tinlsee's death. In no other context is a private citizen or entity given the rights to interfere so completely with parental rights than the utilization of §166.046. This is yet another reason Cook is a state actor.

D. The Attorney General Did Not Defend this Statute because It Cannot Be Defended

Plaintiffs adopt the position and briefing of the Office of the Attorney General of Texas. It cannot be overstated how significant it is that the governmental agency charged with defending the laws of this State cannot do so in this case.

IV.

CONCLUSION AND PRAYER

Based on the foregoing, the Attorney General's briefing and argumentation, Plaintiffs' prior briefing, the testimony and evidence in the record from the hearing on December 12, 2019, and the arguments of counsel at said hearing, Plaintiffs have met their burden to obtain a temporary injunction prohibiting Cook from utilizing this statute against Tinslee or anyone else pending trial of this case. Therefore, Plaintiffs respectfully ask that this Court:

> (a) convert the temporary restraining order into a temporary injunction enjoining Defendant Cook Children's Medical Center from the activities listed above and setting a trial date;

(b) 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;

(c) award nominal damages and attorneys' fees for violation of Plaintiffs' due process rights; and

(d) grant Plaintiffs such other and further relief, both general and special, at law or in equity, to which they may show themselves to be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that in accordance with the Texas Rules of Civil Procedure a true and correct copy of the foregoing has been served on Defendant's counsel via their emails as noted below and through the Court's e-filing system on December 20, 2019.

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