

SUBJECT: Revising Natural Death Act witnessing provisions

COMMITTEE: Public Health — committee substitute recommended

VOTE: 7 ayes — Berlanga, Hirschi, Coleman, Davila, Delisi, Glaze, Maxey
0 nays
2 absent — Janek, Rodriguez

WITNESSES: For — George Hernandez, Bexar County Hospital District
Against — None
On — Allen Horne, Texas Hospital Association

BACKGROUND : The Natural Death Act authorizes a competent adult to execute a directive to withhold or withdraw life-sustaining procedures in the event of a terminal condition. Under the act, an attending physician can make treatment decisions when a patient with a terminal condition has not executed or issued a directive and is incompetent or incapable of communication.

The act requires the witnessing of the execution of written and nonwritten directives and treatment decisions for people who are incompetent or incapable of communication. It specifically prohibits as witnesses blood relatives, spouses, attending physicians, other patients, persons with financial interests in the patient's estate and health care facility employees who provide direct patient care or who are directly involved in the facility's financial affairs.

DIGEST: CSHB 880 would amend the Natural Death Act to disallow as witnesses to a written or nonwritten directive persons designated by the individual involved to make treatment decisions and officers, directors, partners or business office employees of the health care facility or any parent organization of the health care facility. It would allow other patients to be witnesses. The bill would amend the exemplary witness statement for written directives contained in the act to reflect these changes.

Persons with claims against any part of the declarant's estate at the time a *nonwritten* directive was issued could not serve as witnesses.

CSHB 880 also would eliminate a provision requiring the presence of at least two witnesses in cases where an incompetent or noncommunicative person had not executed or issued a directive. Instead, it would require that the attending physician's treatment decision be documented in the patient's medical record and signed by the physician.

CSHB 880 would take effect on January 1, 1998, and would apply to directives executed on or after that date.

SUPPORTERS
SAY:

CSHB 880 would improve witness qualification provisions and the confidentiality of sensitive discussions between a patient's family and physician. It would continue to ensure that treatment decisions are made in the best interest of the patient and conform to the patient's wishes.

Impartiality is the most important quality a witness must have for directives to withhold or withdraw life-sustaining procedures. Good sources within a hospital are (1) other patients who have no tie to the patient issuing the directive and (2) employees of the facility who have no interest in financial decisions or provide direct patient care.

Allowing these individuals to serve as would help terminally ill patients and their families. The current law that excludes all patients from being witnesses makes it difficult to secure impartial witnesses at a critical time in the life of a terminally ill patient. Hospitals and other health care facilities have plenty of patients who are fully competent and capable of serving as good and impartial witnesses.

CSHB 880 would more narrowly and appropriately define which health care facility employees should be prohibited as witnesses by specifically prohibiting officers, directors, partners or business office employees of a health care facility or its parent organization. Current law, which generally prohibits anyone "directly involved in the financial affairs of the facility," could be broadly interpreted to prohibit almost all health care facility employees and create additional problems in finding impartial and available witnesses.

Unlike for directives, witnesses do not perform a vital function or role in treatment decisions for incompetent or noncommunicating terminally ill patients. Their purpose is to “witness” a discussion, something that is not a tangible, verifiable action such as a document signing. The family of a terminally ill patient may find it awkward to discuss with a physician sensitive and difficult issues in front of two witnessing strangers. This can even be construed as a breach of confidentiality. In such cases, a stranger is in no position to gauge whether the final decision would conform to the patient’s wishes. Requiring witnesses for such a discussion runs counter to all other legislative and health care goals to protect the privacy of patients and their families.

A terminally ill, incompetent or noncommunicating patient’s welfare and choice would remain protected even if the witness requirement were eliminated because the law would still mandate that the attending physician make the treatment decision with the patient’s legal guardian or relatives, if available. From fear of lawsuit if not out of compassion, most doctors are extremely hesitant to make a decision to withhold life support without explicit family approval.

Witnesses do not participate in decisionmaking, they only witness it. Even if extreme or unusual circumstances compelled a doctor to decide to withhold or withdraw life support without first consulting the family, the presence of two witnesses would not protect the patient or the family because there would be no discussion or action for the witnesses to witness.

**OPPONENTS
SAY:**

Removing the requirement that two witnesses be present in the formulation of a treatment decision concerning a terminally ill, incompetent or noncommunicating patient would mean doctors could decide to withhold or withdraw life support without any oversight by impartial observers.

NOTES:

The committee substitute would remove provisions in current law that prohibit a patient in a health care facility from being a witness, added provisions specifying the types of health facility employees who could not be witnesses, and made other nonsubstantive changes.

A related bill, SB 414 by Moncrief, also would amend witness and other provisions in the Natural Death Act and laws governing out-of-hospital do-

not-resuscitate orders and the delegation of health care decisions to an individual with durable power of attorney. SB 414 passed the Senate on April 2 and has been referred to the House Public Health Committee.