

Judge lets one-of-a-kind ‘futile care’ law stand

Suit tested statute allowing doctors to suspend life-sustaining treatment

Todd Ackerman

Sep. 22, 2017 Updated: Sep. 23, 2017 1:23 p.m.



Evelyn Kelly of Pasadena, with pictures of her son, Chris Dunn, who died of cancer in December 2015 after being diagnosed in October.

Photo: Yi-Chin Lee, Staff

In a victory for Texas’ medical community, a Harris County state district judge Friday rejected a lawsuit challenging the constitutionality of a state law that allows doctors to withdraw life-sustaining treatment against the wishes of the patient or guardian.

Judge Bill Burke said it would be “a case of throwing the baby out with the bath water” to repeal the controversial 1999 law, enacted in response to doctors’ push to eliminate care they believe prolongs suffering in terminal patients. The law, which is unique to Texas, has drawn criticism from some families who say it gives doctors too much power.

“It would be a big mistake to throw out a statute in place for nearly 20 years that seems to be working pretty well,” Burke said in rejecting the request for summary judgment declaring the law unconstitutional. “If you think the law doesn’t provide sufficient protection for patients, go to the Legislature to remedy it.”

Burke, a Republican, also questioned the involvement of Attorney General Ken Paxton, who filed a brief supporting the plaintiffs. Burke told Austin Nimocks, a Paxton associate at the hearing, that “I find your presence very unsettling” and suggested the attorney general should be defending state law, not advocating against it. He said it smacked of politics.

RELATED: Lawsuit challenging futile-care law goes before judge

“I suspect you’re looking for a shoehorn into the abortion debate,” Burke said. “I’m not going to go there.”

Nimocks acknowledged that the attorney general’s position is unusual but said the office’s “oath is to the Constitution first and foremost.” He said there are occasions when laws are unconstitutional.

Burke added that the suit was moot because it concerns a patient no longer alive.

Treatment continued

The lawsuit was brought by Evelyn Kelly, a Pasadena woman whose 46-year-old, cancer-stricken son died, without any interruption in treatment in December 2015, a month after Houston Methodist Hospital invoked the so-called futile-care law. Methodist agreed to continue providing Chris Dunn treatment after her lawyers sought a temporary restraining order in November 2015.

Kelly said she was “disappointed and shocked” by the ruling.

“I’m not sure what the judge’s problem was,” Kelly said. “He’d obviously made up his mind before arguments began how he was going to rule.”

Joe Nixon, the lawyer representing Kelly, said immediately after the hearing Friday that it had not been decided whether to appeal the ruling. But Kelly said Friday night she plans to appeal.

Methodist lawyers and a spokeswoman declined comment.

Nixon called his motion “a big ask” and said “trial judges don’t like striking down judgments.”

The suit, which did not fault the care provided by Methodist, alleged the law does not provide due process to patients or their guardians.

Nixon cited as examples that the law provides no definition of futile care; no criteria for the makeup of the ethics committee; no right for the patient to have an advocate at the committee hearing; no record of the hearing or right of review; and no avenue for court appeal.

Burke said he would only address the facts of this case, not “abstract” constitutional questions.

He said it was clear Methodist didn’t violate Dunn’s due process because the hospital provided everything the law requires.

The law gives doctors the authority to remove life support in cases doctors deem futile as long as a hospital ethics committee agrees with the recommendation and loved ones are given 10 days to find a facility to which to transfer the patient.

No other state gives such power to doctors and hospitals, a fact that has drawn national attention. Art Caplan, a bioethicist at New York University Medical Center, said that “if you were to predict which state would defer to doctors and establish a futility process, Texas would be way down the list.”

Signed by then-Gov. George W. Bush, the law was a compromise between the medical community and Texas Right to Life and some disability-rights groups. Texas Right to Life came to regret the decision.

Right to Life’s statement

In a statement Friday, Texas Right to Life assailed the ruling.

“This statute denied Chris his due process, but today the court left this mother voiceless and helpless by deeming her child’s right to life moot by this ruling,” the statement said. “Once again, Evelyn’s son was victimized by this unconscionable law.”

Texas Right to Life has represented more than 300 families unhappy about hospitals’ decisions to invoke the law, its staffers say. As a result of a 2003 amendment to the law, the group is listed as a resource on the notification letter families receive when the law is invoked. It assisted Kelly’s legal pursuit of the case.

Dunn was taken to Methodist in October 2015, after doctors found a mass on his pancreas. In ensuing weeks, it grew so large it began pinching his small intestine and kidney and caused organs to begin failing. Methodist doctors placed him on a breathing tube, but told Kelly they had done all they could and invoked the law.

The ruling was applauded by the Texas Medical Association, which was part of a broad coalition of groups who together filed a motion in support of the law. The groups included Texas Alliance For Life, the Texas Catholic Conference of Bishops, the Coalition of Texans With Disabilities and the Texas Alliance for Patient Access.

“This is a good decision,” said Dr. Carlos J. Cardenas, president of the medical association, which represents more than 50,000 doctors and medical students in Texas. “It upholds a law that reinforces physicians’ professional and ethical responsibility always to put our patients’ best interests first.”

Nixon told Burke that he and Methodist lawyers would draft a ruling for him to sign in the coming days.

Todd Ackerman is a veteran reporter who has covered medicine for the Houston Chronicle since 2001. A graduate of the University of California at Los Angeles, he previously worked for the Raleigh News & Observer, the National Catholic Register, the Los Angeles Downtown News and the San Clemente Sun-Post.