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02-20-00002-CV
SECOND COURT OF APPEALS
FORT WORTH, TEXAS
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DEBRA SPISAK
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CAUSE NO. 02-20-00002-CV

**IN THE SECOND APPELLATE DISTRICT OF TEXAS
AT FORT WORTH**

T.L., A MINOR, AND MOTHER, T.L., ON HER BEHALF, Appellants,

vs.

COOK CHILDREN'S MEDICAL CENTER, *Appellees*.

**On Appeal from the 48th Judicial District Court
Tarrant County, Texas
Trial Court No. 048-112330-19**

BRIEF OF APPELLANTS

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ORAL ARGUMENT REQUESTED

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STATEMENT OF CASE

This is a civil rights case. Mother T.L. and Baby T.L. ("Mother" and "Baby", respectively) filed their Original Verified Petition and Application for Temporary Restraining Order and Injunction Relief on November 10, 2019, against Cook Children's Hospital (Cook). (CR 6-24.) Cook sought to remove life-sustaining treatment against the Mother's (and Baby's) will pursuant to its state-granted authority and the procedure set forth in Tex. Health & Safety Code §166.046 ("§166.046"). Accordingly, Mother and Baby asserted that §166.046 is unconstitutional both facially and as applied to them as it violates their substantive right to life, the parent-child relationship, and procedural due process in allowing Cook to decide to remove life-staining treatment.

On November 10, 2019, the trial court entered an Order Granting Plaintiffs' Temporary Restraining Order (CR 25-27.) The next day, the trial court amended its order to correct a mistake in the original order between the names of Mother and Baby. (CR 28-30.) The State of Texas appeared and filed its amicus brief on November 21, 2019 denouncing §166.046 as constitutionally infirm.

Mother and Baby filed their First Amended Verified Petition and Application for Injunctive Relief on December 11, 2019.

Eventually, Justice Sandee Marion was appointed to hear this case and a Temporary Injunction hearing was set for December 12, 2019. Evidence and

argument were considered by the trial court at the Temporary Injunction hearing. At the conclusion of the hearing, the trial court stated that the matter would be taken under advisement, a decision would be made by January 2, 2020, and ordered Cook to keep Baby on life-sustaining treatment until that time. (RR 350.) The parties then agreed that life-sustaining treatment would be continued for seven (7) days after the trial court's ruling on the requested temporary injunction. (RR 351.)

Post hearing briefs were filed by both parties (CR 235-268; 280-303.)

On January 2, 2020, the trial court issued its Order denying a temporary injunction. (CR 304 and 307.) A few hours later, Mother and Baby filed their Notice of Appeal (CR 313-316.) The Record and hearing Transcript were filed the next day with this Court.

STATEMENT OF ORAL ARGUMENT

Appellants request oral argument. This case presents several questions of first impression and oral argument will benefit the Court in reaching its decision. The constitutional issues regarding the §166.046 involve issues of procedural due process in the manner in which the statute shifts the decision-making right from Mother to the hospital, and substantive due process issues in whether the shift in decision-making is itself deprives the Mother of protected substantive rights, and the Baby of her right to life.

ISSUES PRESENTED

1. Did the trial court misapply the law to the established facts of this case in denying Mother and Baby's motion for Temporary Injunction because it failed to hold the application of §166.046 denies Mother and Baby of substantive rights and procedural due process?

2. Did the trial court misapply the law to the established facts of this case because it failed to hold that §166.046 is facially violative of substantive right and procedural due process?

3. Did the trial court err in failing to hold that Mother and Baby had met the necessary elements to establish the need for a temporary injunction for claims under the Uniform Declaratory Judgment Act or 42 U.S.C. §1983?

STATEMENT OF FACTS

"Baby" is an 11-month old baby girl currently receiving medical treatment and assistance breathing *via* a ventilator at Cook. (CR 21.) "Mother" is the mother of Baby and her surrogate medical decision-maker. (RR: 17.) Baby, though medicated is often awake and conscious. (RR: 19-24.) She responds to touch and her family's presence and enjoys this interaction. She has her favorite nurses and likes watching cartoons. (RR at 19.) Baby likes Mother painting her nails, but objects to having her hair brushed. (RR at 19.) Baby is not in a coma. (RR at 19-24.) It is believed that Baby has congenital heart disease and chronic lung disease, which has been said to have caused pulmonary hypertension.[1] (RR at 17.) Even though Baby 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. (CR132.) There is no allegation that Baby only has a certain amount of time to live even with the assistance of life-sustaining treatment.[2] (Defendants' Exhibit 4). Rather, a note in Baby's medical records noted "speech therapy" would be

[1] The facts of this case are fluid. Recent consultation with doctors outside of Cook have called into question the diagnosis of pulmonary hypertension. It is not part of the record, nor is Baby's particular diagnoses relevant to the ultimate issues in this case. As argued by Appellants, §166.046 is facially unconstitutional. Every patient regardless of diagnosis is without due process when this statute is invoked against them.

[2] This was the case until recent press releases and conferences held by Appellee (without consent of Appellants). Again, it is not part of the record, nor is Baby's particular diagnoses relevant to the ultimate issues in this case.

appropriate due to feeding issues, signaling a belief that this 11-month old baby would live long enough to begin speaking. (CR: 21.)

On Thursday, October 31, 2019 at11:45 p.m., Mother was given notice that the hospital intended to remove Baby's life-sustaining treatment pursuant to §166.046. (Exhibit 4; RR at 51.)

Ventilator assistance is considered life-sustaining treatment[3] under §166.046. As such, Baby's life was set to expire on November 10, 2019, meaning her ventilator was to have been removed by hospital personnel against the wishes of Mother. (Defendant's Exhibit 4; RR at 51, 54.) The premature removal of Baby's life-sustaining treatment would have caused her death. (RR at 88.)

Mother, on behalf of Baby, obtained a temporary restraining order against Cook on November 10, 2019. (CR 25.) As a result of that temporary restraining order and extensions thereof either by agreement or court order, Baby has continued to live and life sustaining treatment has been provided to her by Cook.

[3] "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.

SUMMARY OF THE ARGUMENT

There are no relevant, undisputed facts. Baby is chronically ill and needs life-sustaining treatment. Cook provides Baby with life-sustaining treatment and has sought to withdraw it pursuant to §166.046. If and when life-sustaining treatment is withdrawn, Baby will die within *minutes*.

Accordingly, the trial court erred in failing to grant the temporary injunction which would maintain the status quo by keeping Baby alive until her and Mother's rights could be adjudicated in this case. When Cook applied §166.046 to Mother and Baby, it violated their substantive and procedural due process rights, giving rise to a cause of action under 42 U.S.C. 1983 and the right to seek declaratory relief under Texas Uniform Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code Chapter 37. The trial court erred in not granting a temporary injunction protecting Mother and Baby's constitutional rights. Additionally, the trial court failed to find §166.046 is facially unconstitutional and, therefore, cannot be used by Cook to terminate Baby's life-sustaining care. The failure of the trial court to make these findings destroys the status quo, severs the parent-child relationship, ends Baby's life, and precludes Mother and Baby the right to final adjudication of their case.

ARGUMENTS & AUTHORITIES

I. THIS COURT SHOULD APPLY A *DE NOVO* STANDARD OF REVIEW.

This court should determine this case *de novo* because there are no disputed relevant facts. There remains only questions of law. Alternatively, this Court should hold that the trial court erred by misapplying the law to establish facts of this case.

A. There Are No Disputed Material Facts. The Trial Court Erred in Misapplying the Law to Established Facts, Thereby Giving This Court *De Novo* Review.

Whether to grant or deny a temporary injunction is "usually within the trial court's sound discretion." *Walling v. Metcalfe,* 863 S.W.2d 56, 58; *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984). On appeal:

> The standard of review for the grant or denial of a temporary injunction is abuse of discretion. *Harbor Perfusion, Inc. v. Floyd*, 45 S.W.3d 713, 716 (Tex. App.—Corpus Christi 2001, no pet.) (citing *Walling*, 863 S.W.2d at 58; *Tenet Health Ltd. v. Zamora*, 13 S.W.3d 464, 468 (Tex. App.—Corpus Christi 2000, pet. dism'd, w.o.j.)). A trial court abuses its discretion when it acts arbitrarily and unreasonably, without reference to guiding rules or principles, or misapplies the law to the established facts of the case. *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241–42 (Tex. 1985). There is no abuse of discretion where the court bases its decision on conflicting evidence. *General Tire, Inc. v. Kepple,* 970 S.W.2d 520, 526 (Tex. 1998); *Zamora,* 13 S.W.3d at 468. **We do not give any particular deference to legal conclusions of the trial court <u>and</u> apply a *de novo* standard of review when the issue turns on a pure question of law.** *Zamora,* 13 S.W.3d at 468; *see State v. Heal,* 917 S.W.2d 6, 9 (Tex. 1996).

Legacy Home Health Agency, Inc. v. Apex Primary Care, Inc., 2013 WL 5305238, at *2 (Tex. App.—Corpus Christi 2013, rev. denied) (emphasis added); *see also, Pinnacle Premier Properties, Inc. v. Breton*, 447 S.W.3d 558, 562 (Tex. App.—

Houston [14th Dist.] 2014, no pet.).

In addition, "a trial court has no 'discretion' in determining what the law is." *see also Good Shepherd Hospital, Inc. v. Select Specialty Hospital – Longview, Inc.*, 563 S.W.3d 923, 928 (Tex. App.—Texarkana 2018, rule 57.3(f) motion granted July 16, 2019) citing *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). Further, "a clear failure by the trial court to analyze or apply the law correctly constitutes an abuse of discretion." *Baxter & Associates, L.L.C. v. D & D Elevators, Inc.,* 2017 WL 604043, at *5 (also holding that a *de novo* review is used for any questions of law).

The trial court here did not give a reason for the denial of Appellants' temporary injunction. But there is a reporter's record as part of the appellate record in this case. Thus, the record and analysis for Baby's case is as follows:

> When findings of fact and conclusions of law are not timely requested or filed, we imply all necessary findings in support of the trial court's judgment. *See, e.g.*, *Dallas Hous. Auth. v. Nelson*, No. 05–13–00818–CV, 2015 WL 1261953, at *2 (Tex. App.–Dallas Mar. 19, 2015, pet. denied) (mem. op.) (citing *Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989) (per curiam)). However, **when a reporter's record is included in the record on appeal, the implied findings may be challenged for legal and factual sufficiency**. *See id.* We review implied findings by the same standards we use in reviewing the sufficiency of the evidence to support a jury's answers or a trial court's fact findings. *Id.* In conducting a legal sufficiency review, **we must determine whether the evidence would enable the factfinder to reach the determination under review**. *Id.* (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)); *see also Fleischer v. Coffey*, 270 S.W.3d 334, 337 (Tex. App.–Dallas 2008, no pet.) (in reviewing legal sufficiency, no-evidence challenge fails if there is more than scintilla of evidence to support finding).

Baxter & Associates, L.L.C. v. D & D Elevators, Inc., 2017 WL 604043, at *5 (Tex. App.—Dallas 2017, no pet) (emphasis added) (an appeal of a temporary injunction); *see also, Pinnacle,* 447 S.W.3d at 562 citing *LasikPlus of Tex., P.C. v. Mattioli*, 418 S.W.3d 210, 216 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

In this case, there are no disputed, relevant facts but only (implied) conclusions of law that this Court will have to review *de novo*, in particular, the constitutional question that makes up the first and second required elements for temporary injunctions. The third element, probable, imminent, and irreparable injury, is established as a matter of law as it was undisputed in the record evidence. To the extent there were any implied findings to the contrary, they would constitute "[a]n erroneous application of the law to the undisputed facts [which] will constitute an abuse of discretion." *Telephone Equipment Network, Inc. v. TA/Westchase Place, Ltd.*, 80 S.W.3d 601, 607 (Tex. App.—Houston [1st Dist.] 2002, no pet.)

Taking all of the foregoing into account, the case *sub judice*, is similar to *Pinnacle* where the court discussed the interplay of the abuse of discretion and *de novo* standards in this context and held:

> Appellees argue that Pinnacle's "failure to brief an abuse of discretion review" resulted in a failure to carry its burden to show an abuse of discretion. We disagree. As discussed, **we review questions of law *de novo*** and not for an abuse of discretion. In this case, **the relevant facts are not disputed, but we are presented with questions of law regarding the effect** of the tenant-at-sufferance clause in the deed of trust, discussed below, and whether appellees, under the undisputed facts, had an adequate remedy at law through their wrongful foreclosure claim. *See Glapion v. AH4R I TX, LLC,* No. 14–13–00705–CV, 2014 WL 2158161, at *1 (Tex. App.—Houston [14th Dist.] May 22, 2014, no pet.) (mem. op.) (acknowledging whether justice court could

> exercise jurisdiction over question regarding possession of property is a question of law subject to de novo review); *see also 8100 N. Freeway, Ltd. v. City of Houston,* 363 S.W.3d 849, 854 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("A trial court abuses its discretion when it ... misapplies the law to the established facts of the case.").

Pinnacle, 447 S.W.3d at 562-63 (emphasis added).

Accordingly, as there are no disputed, relevant facts, this Court should review this case *de novo.*

B. The Trial Court Erred in Failing to Maintain the Status Quo.

As will be demonstrated herein, Appellants were able to establish each of the elements required for a grant of the temporary injunction which the trial court erroneously denied. Moreover, the status quo in this case – Baby's life and Mother's parental rights – can only be maintained through a grant of the temporary injunction. This is an unfortunate, stark and undisputed fact. Should Cook be allowed to withdraw her life-sustaining care against her mother's will – as it desires to – it would render a final judgment in this case. A temporary injunction is absolutely necessary to prevent "any act of a party which would tend to render the final judgment in the case ineffectual." *Baucum v. Texam Oil Corp*., 423 S.W. 2d 434, 441 (Tex. Civ. App. – El Paso 1967, writ ref'd n.r.e.).

Texas Supreme Court held in *Butnaru v. Ford Motor Co.* "[a] temporary injunction's purpose is to preserve the status quo of the litigation's subject matter pending a trial on the merits." 84 S.W.3d 198, 204 (Tex. 2002) citing *Walling v.*

Metcalfe, 863 S.W.2d 56, 57 (Tex. 1993); *Electronic Data Sys. Corp. v. Powell*, 508 S.W.2d 137, 133 (Tex. Ap p.—Dallas 1974, no writ). Expanding upon what is the status quo in the context of a temporary injunction, it has been explained:

> Generally, the status quo is "the last, actual, peaceable, non-contested status that preceded the pending controversy." *State v. Sw. Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex. 1975) (citing *Janus Films, Inc. v. City of Fort Worth*, 163 Tex. 616, 358 S.W.2d 589 (1962) (per curiam)). **A temporary injunction maintains the status quo by preventing "any act of a party which would tend to render the final judgment in the case ineffectual."** *Baucum v. Texam Oil Corp.*, 423 S.W.2d 434, 441 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.) (quoting *Moffitt v. Lloyd*, 98 S.W.2d 860 (Tex. Civ. App.—Waco 1936, no writ)); *see City of Dallas v. Wright*, 120 Tex. 190, 36 S.W.2d 973, 976–77 (1931).

Hartwell v. Lone Star, PCA, 528 S.W.3d 750, 759 (Tex. App.—Texarkana 2017, pet. dism'd) (emphasis added).

"A temporary injunction is an extraordinary remedy granted to preserve the status quo of the litigation's subject matter pending a trial on the merits." *Smith v. Nerium Int'l, LLC*, 2019 WL 3543583, at *2 (Tex. App.—Dallas 2019, no pet.) citing *Butnaru*, 84 S.W.3d at 204. Plaintiffs "must plead and prove the following elements: (i) a cause of action against the defendant; (ii) a probable right to the relief sought, and (iii) a probable, imminent, and irreparable injury in the interim." *Id. See also, 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). "The 'probable harm' element has three components…the harm is imminent, that the injury would be irreparable, and that the plaintiff has no other adequate legal remedy." *Tenet Health,*

infra, 13 S.W.3d at 468 (other citation omitted). Importantly, "[a]n 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." *Butnaru*, 84 S.W.3d at 204 citing *Canteen Corp. v. Republic of Tex. Props., Inc.*, 773 S.W.2d 398, 401 (Tex. App.—Dallas 1989, no writ). The permanent termination of parental rights is the harm to Mother. Death is the harm to Baby. No adequate remedy at law exists to either.

C. Section 166.046 is Subject to Strict Scrutiny.

State statues are forbidden to infringe upon fundamental personal rights, like life or the parent-child relationship, unless the law is narrowly tailored to serve a compelling state interest. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *In re Interest of J.W.T.*, 872 S.W. 2d 189, 211 (Tex. 1994). When there is such an infringement, the law must be narrowly tailored to meet a compelling state interest. *Troxel v. Granville*, 530 U.S. 57, 80 (2000).

Even then, before a state may completely and permanently sever the rights of a parent to care for their child, due process under the 14th Amendment requires the state prove specific allegations of "harmful neglect" by "clear and convincing" evidence. *Santosky II v. Kramer*, 455 U.S. 747-48 (1981), meaning the state may only act to protect the child's life.

So, the first determination made by this Court is what is the compelling state interest in causing, against the will of the parents, the death of a child who's only offense against the state was to be born ill. There is currently no legal authority for this "compelling state interest" that Cook suggests as it is morally and constitutionally offensive to even consider. And, neither the 14th Amendment nor the Texas Family Code supports the right of the state to interfere in the parent-child relationship for the purposed goal of bringing death to a child. It is barbaric to suggest the death of a sick child is a compelling state interest.

Nor is §166.046 narrowly tailored to obtain that "compelling state interest." The statute is triggered only upon a disagreement between the parent-decision maker and the doctor/hospital. When a disagreement occurs between a parent and the doctor, §166.046 severs the right of a parent to decide what is best for the child and shifts the decision to a hospital's ethics committee, with only the requirement of a 48 hours notice letter. Nothing in §166.046 protects the patient, the parents, or the parent-child relationship. Nor does due process exist to protect the parent/child relationship. Section 166.046 is very broad in its ease of application – the antithesis of a narrowly tailored remedy.

In failing to meet the strict scrutiny test, §166.046 is void and may not be utilized by Cook. *City of San Antonio v, Summerglen Prop. Owner's Assn Inc.*, 185

S.W. 3d 74, 88 (Tex. 2005). It was error for the trial court not to void Cook's application of §166.046 and grant the requested restraining order.

II. APPELLANTS MET EACH ELEMENT REQUIRED FOR A TEMPORARY INJUNCTION TO BE GRANTED

Appellants met each element necessary for the trial court to grant a temporary injunction preventing Cook from utilizing §166.046 as applied against either Mother or Baby, or against any other patients based on the facially unconstitutional nature of the statute.

A. Mother and Baby Have Pled Causes of Action Against Cook

Mother and Baby have viable causes of action against Cook for the violation of their constitutional rights. Specifically, Baby's right to life, Mother's right of parental decision making, and Baby's and Mother's rights to due process. Appellants have pleaded these causes of action under the Texas Declaratory Judgment Act, Chapter 37 of the Texas Civil Practice & Remedies Code and 42 U.S.C. §1983. Cook brought about deprivation of these rights by using §166.046, a facially unconstitutional statute and unconstitutional as it was applied in this case.

1. The Trial Court Erred in Failing to Hold §166.046 is Facially Unconstitutional Pursuant to the Uniform Declaratory Judgment Act.

Mother and Baby pled causes of action under the Texas Uniform Declaratory Judgments Act and asked the trial court to hold that §166.046 is both facially, and as applied, unconstitutional in that it 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…" Tex. Health & Safety Code §166.046(a). If a conflict exists, the statute then gives a patient these minimal and insufficient rights:

> (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] 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.).

(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).

Tex. Health & Safety Code Ann. § 166.046.

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.[5] 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 "preponderance" or "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

[5] The Court will note that Cook asserted that Mother failed to provide the ethics committee with controverting medical evidence, even if Mother had brought a lawyer or controverting evidence, the Ethics Committee's rules do not provide for it. (RR 77-78.)

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 Baby and her mother as well through the testimony of Cook employees, Dr. Foster, and Dr. Duncan. (RR 77-78, 202.)

The result of the application of §166.046 is that Mother's right to decide the medical treatment of her baby shifted from her to Cook and that Baby's life is terminated. (RR 201-202.) The lack of procedural due process results in the deprevation of substantive rights, *i.e.*, the loss of life of Baby and the elimination of Mother's right to decide. (RR 88.)

By statutorily immunizing the hospital, the doctor and the Ethics Committee, Tex. Health & Safety Code §166.045(d), and providing Cook the opportunity to deprive an individual of necessary medical care without due process and substantive rights, the statute guarantees a constitutional violation. A substantive due process violation occurs when the government deprives individuals of constitutionally protected rights by an arbitrary use of its power. *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)). Here, there are simply no standards and no specific procedures (procedural due process) to protect against a deprivation of life (substantive 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. (RR 46-47.) 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 which cannot be corrected.

a. Appellants do not have 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.[6] *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). While due process allows for variances in the form of a hearing "appropriate to the nature of the case,"[7] 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

[6] 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 also, 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.*

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

that operate to jeopardize it for particular individuals."[8] Part of the opportunity to be heard is the ability to be represented at the hearing.[9] Again, Dr. Foster testified that Mother or Baby were not entitled to be represented by an attorney or patient advocate. (RR at 77-78.) Such would have to be "discussed" as it was not their "practice" to do so. (RR at 77-78.) Consequently, Mother, individually, and on behalf of Baby, 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."[10] 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

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

[9] 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 also, Wasson v. Trowbridge*, 382 F.2d 807, 812 (2nd Cir. 1967).

[10] "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).

committee's decision, that by no means equates to a right to be heard. Accordingly, the due process right to be heard is glaringly absent in the statute.[11]

b. Appellants do not have 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. *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. As such, notice of the claims is a critical component of due process.[12] 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." Tex. Health & Safety Code Ann. § 166.046(b). In this instance, his Mother was handed the letter which stipulated the

[11] 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).

[12] "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 also, 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).

hearing date a few days in advance thereof (Defendant's exhibit 1), but as discussed above, this is hardly adequate notice. Inadequate notice constitutes no notice.

c. Appellants do not have ability to prepare for the hearing.

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

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.[13] 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.[14]

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[13] 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.

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

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 patient's ability to advocate before the body determining whether to continue his life may well depend on which hospital he finds himself in. 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 Baby and Mother of their civil rights under color of state law even before it determined that it would withdraw Baby'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.

d. The hospital ethics committee is not an impartial tribunal.

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. *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 in the context of affirming a parent's right to made medical decisions for their child); *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).

Under §166.046, a fair and impartial tribunal did not and could not hear Baby's case. The "ethics committee" members who are employed by the treating hospital 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 employees of Cook. (RR at 40.) 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.[15] 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

[15] "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. Commonwealth of Kentucky*, 142 S.W.3d 24, 64 (Ky. 2004).

patient's desire to live is considered by an impartial tribunal. Accordingly, a lack of an impartial committee by Cook was another violation of mother and baby's rights to due process.[16]

e. Baby was sentenced to a premature death.

The preservation of life in Texas is a long-valued right.[17] 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."[18] *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)). Here 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 more than being ill. Neither, the State of Texas nor its surrogate has the authority to sentence ill people to premature death.

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[16] Again, Appellee sought and obtained in this case the recusal of a judge who had the mere *appearance* of impartiality while depriving Appellants of that same right of impartiality.

[17] "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(a). 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).

[18] *Cruzan* further held: "It cannot be disputed that the Due Process Clause protects an interest in life." *Cruzan,* 497 U.S. at 281.

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. *Cruzan,* 497 U.S. at 286. The Supreme Court went on to note that the state could properly require a "clear and convincing evidence" standard to prove the patient's wishes. *Id*. at 280. 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." *Id.* at 273 (other citations omitted).

Likewise, in *In the Conservatorship of Wendland,* 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. 26 Cal. 4th 519, 527 (2002). 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. *Id.*

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." *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." *Id.* at 1089. 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.'" *Id.* at 1086 quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

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. (RR at 46-47.) 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 take away both a life and a parent's rights to decide what is in the best interest of their children in one short meeting followed by a letter. This is an alarming delegation of power by the state.

f. Mother's parental rights were terminated.

Federal law, *via* the Fourteenth Amendment, presumes that the decisions of a fit parent, including medical decisions, are in the best interest of the child. *See Troxel v. Granville*, 530 U.S. 57, 68-69 (2000). ("So long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decision concerning the rearing of that parents' children.").

Texas recognizes this fundamental right and has enact a detailed, complex and parental-protective laws in the Texas Family Code. *See* Tex. Fam. Code Chapters 61, 151.

Instead of protecting the parent-child relationship as the Fourteenth Amendment and the Texas Family Safety Code requires, §166.046 allows that relationship to be permanently severed with the writing of a short letter.

g. There is no right of review or appeal under §166.046.

Finally, under the statute 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. *Parham v. J.R.*, 442 U.S. 584, 591 (1979). The statute does not require a record, or evidentiary or medical standard or a written decision. Without a record and standards by which to measure the decision, there is absolutely no way to review or appeal this life/death decision. All alleged due process safeguards by Cook here are illusory.

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 mere act of using §166.046 by Cook deprived Appellants of their fundamental civil rights. Due to the statute's failure to provide substantive or procedural due process, the Court should reverse and render a temporary injunction pursuant to Civ. Prac. & Rem. Code Ch. 37, holding that the §166.046 is facially unconstitutional and was unconstitutionally applied to both Baby and Mother.

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.

Federal law in 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." . *v. Toldeo*, 446 U.S. 635, 638 (1980). 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. See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Schreiber v. City of Garland*, 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)).

"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 Mother and Baby of procedural 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

an impartial tribunal.[19] *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.). To constitute a competent trial, the trial (hearing) must be conducted before an unbiased judge.[20] *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). 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. *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)).

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. *County of Dallas v. Wiland*, 216 S.W.3d 344, 356 (Tex. 2007) (citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978)). Denial of the right to procedural due process requires an order reversing the denial case and the award of nominal

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[19] 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.

[20] It is ironic to note that in this case, Appellee sought and obtained a recusal of Judge Kim on the basis of *appearance* of impartiality.

damages even without proof of actual injury. *Id.* at 356-57 (Tex. 2007) (citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978)). 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 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.

b. Cook deprived Mother and Baby of substantive rights.

Mother has the right to decide what is in Baby's best interest. Section 166.046 permanently terminates that right without a court order or intervention. In Texas, parental rights may not be terminated without court intervention, meeting statutorily required evidence and an order from a district court judge. Texas Family Code Chapter 151 *et seq*. This is because the U.S. and Constitutions guarantee parental rights. U.S. Const. Amend. XIV51; *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997). The application of §166.046 disregards the rights of parents and shift the most important decision of all – life – to a committee. This is a constitutionally unjustifiable outcome and depravation of substantive rights of parents.

Baby's life is also a constitutionally protected, substantive right. U.S. Const. Amend XIV51. The real threat by Cook of taking Baby's life which is inextricably intertwined with her continued life-sustaining treatment gives rise to a federally protected right which may be protected under 42 U.S.C. §1983. Baby's right to life cannot be separated from her life-sustaining care.

c. Cook 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 in cases such as this one. This is why Cook did not initially 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. (RR 201-202.)

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." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). 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. *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). A State cannot avoid constitutional responsibilities by delegating public function to private

parties. *Georgia v. McCollum*, 505 U.S. 42, 53 (1992). "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." *National Collegiate Athletic Ass'n v. Tarkanian,* 488 U.S. 179, 192 (1988). Courts have made clear that state action is concluded when "the State create[d] the legal framework governing the conduct." *Id.* at 192 (citing *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). Here, the State enacted §166.046, the legal framework granting authority to the hospital which deprived Appellants of their constitutional rights. And Cook used it.

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

- Provided approximately 48 hours' formal notice[21], that Baby's life-sustaining could be removed;
- Held a hearing regarding whether Baby's life-sustaining treatment should be removed[22];
- Came to a determination that Mother's request to continue life-sustaining treatment of her daughter, Baby, should not be honored, thereby interfering with the parent-child relationship (ultimately permanently terminating it;

[21] *See* Tex. Health & Safety Code § 166.046(a)(2).
[22] *Id.* at §166.046(a).

again, without due process of law with Cook acting as the state in so doing)[23];

- Came to a determination that Baby's life-sustaining treatment should be removed[24];

- Gave written notice that Baby's life-sustaining treatment could be removed on or about November 10, 2019, as it can do under the Act[25].

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.[26] The ability to take formal action which will result in death is not available to the public.[27] 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

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[23] *Id.*
[24] *Id.*
[25] *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 [.]").
[26] Appellee 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 Baby 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.),
[27] *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 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).

recommendation to take action which will result in premature death. This judicial function of the ethics committee is only evocative of state action.

Private entities have been held to be acting under color of State law for performing traditionally government functions[28] 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 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);

[28] *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.).

- *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.[29] Further, §166.046 can be used to interfere with parental rights – indeed, going so far as to terminate them – without due process of law.[30]

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.[31] 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

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[29] *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).

[30]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 Baby and making decisions that affect her very ability to live from Mother. *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: Baby'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.

[31] "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).

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. Tex. Health & Safety Code §166.045(d).

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[.]" 42 U.S.C. §1983. Based on the foregoing law, and undisputed facts, a §1983 cause of action 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 Appellee utilized Texas Health & Safety Code §166.046 as authority to remove life-sustaining care against a patient or her surrogate's will as well as to protect their decision to do so, they are taking state action and are subject to Constitutional regulation. *See Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

Mother and Baby are entitled to injunctive relief from an ongoing violation of 42 U.S.C. §1983.

B. Appellants Have a Probable Right to the Relief Sought

At this juncture, Appellants do not have "to show that [they] will prevail at trial, nor does [this element] require the trial court to evaluate the probability that [Plaintiffs] will prevail at trial." *Nerium Int'l,* 2019 WL 3543583, at *3 citing *Austin v. Mitchell*, 2018 WL 2949443, at *3 (Tex. App.—Dallas 2018, no pet.); *Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 897 (Tex. App.—Houston [1st Dist.] 2011, no pet.) What is required is for "the applicant to present enough evidence to raise a bona fide issue as to the right to its ultimate relief." *Id.* citing *Austin*, 2018 WL 2949443, at *3.

Appellants have a probable right to the relief sought based on the same evidence showing the violations of Baby's and Mother's constitutional rights – including most especially the right to life and that it not be taken without at least due process of law. There is simply not even a modicum of due process in this statute as written. That was well-established in the record in this case. (RR at 39-53.) Even where Cook followed the statute perfectly, there is still no due process for Mother and Baby and their constitutional rights have still been violated as a matter of law simply by virtue of how the statute is written. At the end of the day, their substantive and due process rights have been violated simply by the statute having been invoked against them.

C. A Probable, Imminent, and Irreparable Injury Will Occur Without a Temporary Injunction Being Granted

It has been said that "[t]he irreparable injury requirement is sometimes described in terms of the injured party having an inadequate legal remedy." *Nerium Int'l*, 2019 WL 3543583, at *3 citing *Butnaru*, 84 S.W.3d at 204 (other citation omitted) ("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."). *Nerium* also held, "[a]n adequate remedy at law is one that is as complete, practical, and efficient to the prompt administration of justice as equitable relief." *Id.* at *15 citing *Dass, Inc. v. Smith*, 206 S.W.3d 197, 202 (Tex. App.—Dallas 2006, no pet.)

It is undisputed that if §166.046 is allowed to be used by Cook, as it wishes to do, the withdrawal of Baby's life-sustaining care will kill her. That was established in the record, is undisputed, and is now established as a matter of law. (RR 88.)

The same result – death – is more than likely true for any patient against whom §166.046 would be invoked by Cook. That is the natural and intended consequence of invoking §166.046, to remove life-sustaining care. Baby will face immediate and irreparable injury: her death.

Moreover, neither Baby nor Mother could possibly be compensated in damages for this loss. But more than that, even if Baby's life (or death) were for sale,

Cook is completely immune from any civil or criminal liability once it invokes §166.046 and a life is taken by that means. Section 166.045(d) states very clearly: "A physician, health professional acting under the direction of a physician, or health care facility is not civilly or criminally liable or subject to review or disciplinary action by the person's appropriate licensing board if the person has complied with the procedures outlined in Section 166.046."

By virtue of undisputed facts and the plain language of the statute, the third element required for a temporary injunction is established.

III. SECTION 166.046 IS NOT A MERE IMMUNITY STATUTE

Section 166.046 is the very thing that provided 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 all within a mere 10 days. As noted above, there is no right of a doctor – and certainly not a hospital – to deny care to an existing patient who requires life-sustaining care without which they will die. Cook is acting under §166.046, not just to enjoy complete civil and criminal immunity – but to be able to withdraw life-sustaining care. Moreover, Cook chose to invoke §166.046. It cannot now run from the very procedure it invoked and try to switch courses now.

IV. THE ATTORNEY GENERAL DID NOT DEFEND THIS STATUS BECAUSE IT CANNOT BE CONSTITUTIONALLY DEFENDED.

Mother and Baby adopt the position and briefing of the Office of the Attorney General of Texas. It cannot be overstated how significant it is that the State of Texas will not defend the constitutionality of this statute.

CONCLUSION AND PRAYER

As the trial court misapplied the flaw to the undisputed material facts of this case and reached a legally incorrect result, this Court should consider this case *de novo*, reverse the trial court's denial of the temporary injunction, and render that §166.046 violates Mother and Baby's rights under the Fourteenth Amendment of the United States Constitution and the Texas Constitution, order Cook to maintain life-sustaining treatment until the final determination of this case, hold that Mother & Baby have a viable cause of action pursuant to 42 U.S.C. §1983 and are entitled to a declaratory judgment pursuant to Tex. Civ. Prac. & Rem. Code Chapter 37, return the case to the trial court for a trial on the merits, and for such other relief, both general and special, at law or in equity, to which Mother and Baby may show themselves justly entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Texas Rule of Appellate Procedure 9.4(c)(3), the undersigned attorney hereby certifies that the foregoing brief contains 11,229 words, excluding those portions permitted by Rule 9.4(c)(1). The undersigned further certifies that Appellants' Brief has been prepared using a typeface of no smaller than 14-point, except for footnotes, which are 12-point.

/s/ Joseph M. Nixon
Joseph M. Nixon

CERTIFICATE OF SERVICE

I hereby certify that in accordance with the Texas Rules of Appellate Procedure a true and correct copy of the foregoing has been served on Appellee's counsel through the Court's e-filing system on January 16, 2020.

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APPENDIX

Tab A	Order Denying temporary injunction.
Tab B	Texas Health & Safety Code §166.046.
Tab C	Texas Health & Safety Code §166.045.
Tab D	Cook Children's Medical Center's letter to Mother T.L. of October 25, 2019 invoking the hearing Texas Health & Safety Code §166.046, exhibit 1.
Tab E	Cook Children's Medical Center's letter to Mother T.L. of October 31, 2019 giving 10-day notice of withdrawing treatment, hearing exhibit 4.

TAB A

Cause No. 048-112330-19

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

ORDER

On December 12, 2019, the Court heard the Plaintiffs' Application for Temporary Injunction in the above styled cause number. After hearing the evidence and arguments of counsel, and after considering the briefs filed in this matter, the Court is of the opinion that the application should be denied.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiffs' Application for Temporary Injunction is DENIED. During the hearing, defendant announced in open court that it would take no action to withdraw life sustaining treatment from Tinslee Lewis for a period of seven days from the date of this court's order to allow plaintiffs to file a notice of appeal and a motion for emergency relief with the appropriate court of appeals, and it is so ORDERED.

Signed this the 2nd of January, 2020.

Sandee Bryan Marion

Chief Justice Sandee Bryan Marion
Sitting by Assignment

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TARRANT COUNTY
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THOMAS A. WILDER
DISTRICT CLERK

TAB B

Sec. 166.046. PROCEDURE IF NOT EFFECTUATING A DIRECTIVE OR TREATMENT DECISION. (a) 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. The attending physician may not be a member of that committee. The patient shall be given life-sustaining treatment during the review.

(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).

(c) The written explanation required by Subsection (b)(4)(B) must be included in the patient's medical record.

(d) If the attending physician, the patient, or the person responsible for the health care decisions of the individual does not agree with the decision reached during the review process under Subsection (b), the physician shall make a reasonable effort to transfer the patient to a physician who is willing to comply with the directive. If the patient is a patient in a health care facility, the facility's personnel shall assist the physician in arranging the patient's transfer to:

(1) another physician;

(2) an alternative care setting within that facility; or

(3) another facility.

(e) If the patient or the person responsible for the health care decisions of the patient is requesting life-sustaining treatment that the attending physician has decided and the ethics or medical committee has affirmed is medically inappropriate treatment, the patient shall be given available life-sustaining treatment pending transfer under Subsection (d). This subsection does not authorize withholding or withdrawing pain management medication, medical procedures necessary to provide comfort, or any other health care provided to alleviate a patient's pain. The patient is responsible for any costs incurred in transferring the patient to another facility. The attending physician, any other physician responsible for the care of the patient, and the health care facility are not obligated to provide life-sustaining treatment after the 10th day after both the written decision and the patient's medical record required under Subsection (b) are provided to the patient or the person responsible for the health care decisions of the patient unless ordered to do so under Subsection (g), except that artificially administered nutrition and hydration must be provided unless, based on reasonable medical judgment, providing artificially administered nutrition and hydration would:

(1) hasten the patient's death;

(2) be medically contraindicated such that the provision of the treatment seriously exacerbates life-threatening medical problems not outweighed by the benefit of the provision of the treatment;

(3) result in substantial irremediable physical pain not outweighed by the benefit of the provision of the treatment;

(4) be medically ineffective in prolonging life; or

(5) be contrary to the patient's or surrogate's clearly documented desire not to receive artificially administered nutrition or hydration.

(e-1) If during a previous admission to a facility a patient's attending physician and the review process under Subsection (b) have

determined that life-sustaining treatment is inappropriate, and the patient is readmitted to the same facility within six months from the date of the decision reached during the review process conducted upon the previous admission, Subsections (b) through (e) need not be followed if the patient's attending physician and a consulting physician who is a member of the ethics or medical committee of the facility document on the patient's readmission that the patient's condition either has not improved or has deteriorated since the review process was conducted.

(f) Life-sustaining treatment under this section may not be entered in the patient's medical record as medically unnecessary treatment until the time period provided under Subsection (e) has expired.

(g) At the request of the patient or the person responsible for the health care decisions of the patient, the appropriate district or county court shall extend the time period provided under Subsection (e) only if the court finds, by a preponderance of the evidence, that there is a reasonable expectation that a physician or health care facility that will honor the patient's directive will be found if the time extension is granted.

(h) This section may not be construed to impose an obligation on a facility or a home and community support services agency licensed under Chapter 142 or similar organization that is beyond the scope of the services or resources of the facility or agency. This section does not apply to hospice services provided by a home and community support services agency licensed under Chapter 142.

Added by Acts 1999, 76th Leg., ch. 450, Sec. 1.03, eff. Sept. 1, 1999.
Amended by Acts 2003, 78th Leg., ch. 1228, Sec. 3, 4, eff. June 20, 2003.
Amended by:

Acts 2015, 84th Leg., R.S., Ch. 1 (S.B. 219), Sec. 3.0503, eff. April 2, 2015.

Acts 2015, 84th Leg., R.S., Ch. 435 (H.B. 3074), Sec. 5, eff. September 1, 2015.

Sec. 166.047. HONORING DIRECTIVE DOES NOT CONSTITUTE OFFENSE OF AIDING SUICIDE. A person does not commit an offense under Section 22.08, Penal Code, by withholding or withdrawing life-sustaining treatment from a qualified patient in accordance with this subchapter.

Acts 1989, 71st Leg., ch. 678, Sec. 1, eff. Sept. 1, 1989. Renumbered from Sec. 672.017 and amended by Acts 1999, 76th Leg., ch. 450, Sec. 1.03, eff. Sept. 1, 1999.

TAB C

Sec. 166.045. LIABILITY FOR FAILURE TO EFFECTUATE DIRECTIVE. (a) A physician, health care facility, or health care professional who has no knowledge of a directive is not civilly or criminally liable for failing to act in accordance with the directive.

(b) A physician, or a health professional acting under the direction of a physician, is subject to review and disciplinary action by the appropriate licensing board for failing to effectuate a qualified patient's directive in violation of this subchapter or other laws of this state. This subsection does not limit remedies available under other laws of this state.

(c) If an attending physician refuses to comply with a directive or treatment decision and does not wish to follow the procedure established under Section 166.046, life-sustaining treatment shall be provided to the patient, but only until a reasonable opportunity has been afforded for the transfer of the patient to another physician or health care facility willing to comply with the directive or treatment decision.

(d) A physician, health professional acting under the direction of a physician, or health care facility is not civilly or criminally liable or subject to review or disciplinary action by the person's appropriate licensing board if the person has complied with the procedures outlined in Section 166.046.

Acts 1989, 71st Leg., ch. 678, Sec. 1, eff. Sept. 1, 1989. Renumbered from Sec. 672.016 and amended by Acts 1999, 76th Leg., ch. 450, Sec. 1.03, eff. Sept. 1, 1999.

TAB D

CookChildren's
Medical Center

October 25, 2019

Via Hand Delivery

[redacted]

I am writing to ask that you attend a meeting with members of Cook Children's ethics committee regarding [redacted] future medical care, and to explain why an ethics committee review has been requested. This meeting is part of a formal review process available under a state law called the Texas Advance Directives Act. That law allows a physician to request a formal review by the hospital's ethics committee when the physician feels that continuing to honor a family's request to provide life-sustaining treatment to a patient with a terminal or irreversible condition is medically inappropriate. As you know, [redacted] gravely ill, and in the professional opinion of the physicians caring for her, escalating care and continuing to provide life-sustaining treatment is medically futile and not in [redacted] best interest.

Enclosed is a copy of a notice we are required by law to provide you, and which includes a detailed explanation of the review process and your rights related to that process. Also enclosed is a list maintained by the Texas Department of State Health Services that identifies 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. **The meeting is scheduled for Wednesday, *October 30, 2019*, at 12:00 p.m., and will be held in Room 1163 of the Medical Center's South Tower.**

It is very important that you attend the meeting next Wednesday so that the ethics committee can hear from you directly before making a determination regarding the appropriateness of continuing to sustain [redacted] life through artificial means. The chaplain will meet you in [redacted] room at 11:30 a.m., and will escort you to the meeting. You are welcome to invite any involved family members to support you at the meeting. In the meantime, please do not hesitate to call me with any questions you might have.

Sincerely,

Pam Foster

Pam Foster, DMin, BCC
Chairman, Ethics Committee
Cook Children's Medical Center

DEFENDANT'S EXHIBIT 1

801 Seventh Avenue
Fort Worth, TX 76104-2796
682-885-4000
www.cookchildrens.org

TAB E

CookChildren's
Medical Center

October 31, 2019

Via Hand Delivery

[redacted]

Dear [redacted]

I am writing to notify you of the recommendation of Cook Children's ethics committee relating to the continuation of life-sustaining treatment for your daughter, [redacted] After receiving the required notice from Cook Children's on October 25th, you, along with your mother and father, participated in the October 30th meeting of the ethics committee. [redacted] attending physician, Dr. Jay Duncan, was also in attendance.

As previously discussed, [redacted] has been diagnosed with severe congenital heart disease, lung disease, and pulmonary hypertension. [redacted] attending physicians have determined her condition is irreversible, meaning it may be treated but will never be cured or eliminated, and, without life-sustaining treatment provided in accordance with the prevailing standard of medical care, her condition is fatal. [redacted] physicians feel that she is suffering. Dr. Duncan provided an overview of [redacted] medical history and current condition to the committee, and explained that all of her physicians (including her pulmonologist, the cardiac surgeons, cardiac intensivists, and cardiologists) agree that continuing to provide life-sustaining treatment to [redacted] is futile. The committee members also heard you express your sincere belief that Tinslee is not suffering, and that her condition will improve.

The committee discussed the information that was presented and reviewed the benefits versus the burdens of continued treatment. After weighing all of the information presented, the committee concluded that the goal of restoring [redacted] health is unattainable, that no other medical benefits can be accomplished by continuing treatment that artificially sustains her life, and that it is in [redacted] best interest to allow her to die naturally. As a result, you have been informed that the committee concurs with the physicians' opinion that further treatment would be inappropriate, should not be continued, and that [redacted] should be allowed to die naturally. Despite this, it is my understanding that you do not agree with this decision and desire further treatment to be given to your daughter. We will continue to provide life-sustaining treatment to [redacted] for up to ten (10) days from the date you receive this letter, pending transfer to another facility. As you know, we have already made several unsuccessful attempts to locate a facility willing to accept [redacted] as a patient. We will continue to make reasonable efforts to find a facility that is acceptable to you that is willing to accept [redacted] as a patient and comply with your treatment directives. Please note that under state law, Cook Children's is not obligated to provide life-sustaining

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treatment after the tenth day following your receipt of this letter. However, we will continue to provide artificial nutrition and hydration for as long as is medically appropriate.

Along with this letter, and as you requested, you are receiving paper copies of [redacted] medical records for the last thirty (30) days, including all diagnostic reports. I understand you also recently requested an abstract of Tinslee's records for the entire admission, and that those records were provided to you on CD earlier this week.

We appreciate the difficulty of making decisions concerning the withdrawal of artificial life support. If you have any questions or if I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

Pam Foster, DMin, BCC
Chairman, Ethics Committee
Cook Children's Medical Center