I. STATUTORY REQUIREMENTS: Medical Liability and Insurance Improvement Act of Texas

A. General Provisions

Tex. Rev. Civ. Stat. Ann art. 4590i, Subchapter F., is detailed on the intricacies of informed consent. Section 6.02 of that article provides:

"In a suit against a physician or health care provider involving a health liability claim that is based on the failure of the physician or health care provider to disclose or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or health care provider, the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent (emphasis added)."

In determining whether consent is given, the inquiry is whether a reasonable person (not a particular plaintiff) would have refused the procedure if he had been fully informed of all inherent risks which would influence his decision. McKinley v. Stripling, 763 S.W.2d 407, 409 (Tex. 1989). This is the only way a plaintiff may establish that the failure to obtain informed consent was a proximate cause of his injuries. Id.

B. Who determines which risks and hazards related to medical care must be disclosed for purposes of consent?

Pursuant to section 6.03 of 4590i, the Texas Medical Disclosure Panel was created to determine which risks and hazards must be disclosed. The Panel is administratively linked to the Texas Department of Health, who provides assistance to the Panel. The Panel is composed of nine members, with three lawyer members and six medical practitioner members.

C. How does the panel decide which procedures require informed consent?

Pursuant to section 6.04, the panel identifies and makes an examination of all treatments and procedures in order to determine which procedures require disclosure of risks and hazards. The panel shall prepare lists accordingly, which set forth the degree of disclosure required and the form in which the disclosure must be made. Written explanations of the degree and form of disclosure are published in the Texas Register.

D. What if a procedure appears on the list requiring consent?

Under section 6.05, before a patient or person authorized to consent for a patient gives consent to any procedure that appears on the list, the physician or health care provider shall disclose to the patient or authorized person the risks and hazards involved in the particular procedure.
E. What satisfies the disclosure requirements?

Section 6.06 provides:

"Consent to medical care that appears on the panel's list requiring disclosure shall be considered effective under this subchapter if it is given in writing, signed by the patient or a person authorized to give the consent and by a competent witness, and if the written consent specifically states the risks and hazards that are involved in the medical care or surgical procedure in the form and to the degree required by the panel under Section 6.04 of this subchapter."

F. What if a health care provider or physician is sued for a failure to obtain consent pursuant to the statute?

Pursuant to section 6.07, (1) both disclosure made as provided by Section 6.05 and failure to disclose based on inclusion of any medical care or surgical procedure on the panel's list for which disclosure is not required shall be admissible in evidence and shall create a rebuttable presumption that the requirements of Sections 6.05 and 6.06 have been complied with and the presumption must be included in the charge to the jury; and (2) the failure to disclose any hazards required to be disclosed under Sections 6.05 and 6.06 shall also be admissible in evidence in evidence and shall create a rebuttable presumption of a negligent failure to conform to the duty of disclosure set forth in Sections 6.05 and 6.06, and the presumption shall be included in a charge to the jury. The failure to disclose cannot be found to be negligent, however, if there was an emergency or if it was not medically feasible to make a disclosure of the kind that would have otherwise been negligent. If the panel has made no determination as to the risks imposed by a certain procedure, the health care provider is under the duty otherwise imposed by law.

G. How has the Act been interpreted in Texas cases?

In Peterson v. Shields, 652 S.W.2d 929 (Tex. 1983), the Texas Supreme Court held that Section 6.02 of the Act replaces the common law locality rule with a "reasonable person" rule. The reasonable person rule focuses on the disclosures which would influence a reasonable person in deciding whether to consent to a procedure, rather than the disclosures that doctors in a certain community deem important. The court explained that if List A procedures (procedures requiring some disclosure) were properly disclosed, or List B procedures (procedures requiring no disclosure) were nondisclosed, a rebuttable presumption that the doctor was not negligent arises, while a failure to disclose risks found on List A creates a rebuttable presumption that the doctor was negligent. Pursuant to section 6.07(b) the court stated that if no determination has been made by the panel regarding a duty of disclosure, the physician is under the duty otherwise imposed by law. Importantly, the court held that the duty "otherwise imposed by law" is the duty to disclose "all risks or hazards which could influence a reasonable person in making a decision to consent to the procedure." Id. at 931.

Some commentators have opined that the result of the holding in Peterson is somewhat contradictory because in unlisted procedure cases, there is "virtually strict liability" for nondisclosure, while in List A cases, the Act retains the therapeutic privilege and emergency as legitimate reasons for nondisclosure. See Informed Consent in Texas: A proposal for reasonableness and predictability, Vol. 18:835, ST. MARY'S L.J. 866 (1987).

In Barclay v. Campbell, 704 S.W.2d 8 (Tex. 1986), the Court explained that to raise a fact issue at trial on informed consent if no presumption has been established by the Act, the plaintiff must show: (1) that the risk was inherent to the medical or surgical procedure undertaken, and (2) the risk was material, in that it could influence a reasonable person's decision to consent to the procedure. Finally, in McKinley v. Stripling, 763 S.W.2d 407, 410 (1989), the Court reiterated that a party urging lack of informed consent must show that the damages alleged by a patient were
proximately caused by a failure to obtain informed consent. Proximate cause is met if a reasonable person, not a particular plaintiff, would have refused the treatment or procedure had he been fully informed of all inherent risks which would influence his decision. Id.

II. Obtaining consent for adults with special needs

A. How is consent obtained for these individuals?

The Consent to Medical Treatment Act, s. 313.004 (Vernon Supp. 1995) of the Texas Health and Safety Code, sets forth a list of those who can provide consent on behalf of certain adult patients. (Adult means 18 years of age or a person who has had the disabilities of a minority removed by a court). Section 313.004 provides:

(a) if an adult patient in a hospital or nursing home is comatose, incapacitated, or otherwise mentally or physically incapable of communication, an adult surrogate from the following list, in order of priority, who has decision-making capacity, is available after a reasonably diligent inquiry, and is willing to consent to medical treatment on behalf of the patient may consent to medical treatment on behalf of the patient:

(Note that "treatment" means a health care treatment, service, or procedure designed to maintain or treat a patient's physical or mental condition, as well as preventative care.)

1. the patient's spouse;
2. an adult child of the patient who has the waiver and consent of all other qualified adult children of the patient to act as sole decision maker;
3. a majority of the patient's reasonably available adult children;
4. the patient's parents;
5. the individual clearly identified to act for the patient by the patient before the patient became incapacitated, the patient's nearest living relative, or a member of the clergy.
6. Any dispute as to the right of a party to act as a surrogate decision-maker may be resolved only by a court of record having jurisdiction under Chapter V, Texas Probate Code.

Under the statute, any medical treatment consented to under section (a) must be based on knowledge of what the patient would desire, if known. Furthermore, a surrogate decision maker may not consent to voluntary inpatient mental health services, electro-convulsive treatment, or the appointment of another surrogate decision maker.

B. What are the definitions of relevant terms under the "Consent to Medical Treatment Act"?

1. "adult" means a person 18 years of age or older or a person under 18 years of age who has had the disabilities of a minor removed.
2. "Attending physician" means the physician with primary responsibility for a patient's treatment and care.
3. "Decision-making capacity" means the ability to understand and appreciate the nature and consequences of a decision regarding medical treatment and the ability to reach an informed decision in the matter.
4. "Hospital" means a facility licensed under Chapter 241.
5. "Incapacitated" means lacking the ability, based on reasonable judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to any proposed treatment decision.
6. "Medical Treatment" means a health care treatment, service, or procedure designed to maintain or treat a patient's physical or mental condition, as well as preventative care.
7. "Nursing home" means a facility licensed under Chapter 242.
8. "Patient" means a person who is admitted to a hospital or residing in a nursing home.
9. "Physician" means:
   A. a physician licensed by the Texas State Board of Medical Examiners; or
(B) a physician with proper credentials who holds a commission in a branch of the armed services of the United States and who is serving on active duty in this state.

(10) "Surrogate decision-maker" means an individual with decision-making capacity who is identified as the person who has authority to consent to medical treatment on behalf of an incapacitated patient in need of medical treatment.

Under definition (5), if a patient can communicate but the patient does not have the mental capacity to consent, the patient is still considered incapacitated under the Act and the provisions of the Act would apply. Similarly, all persons who cannot "understand and appreciate the nature and consequences of a treatment decision" are also considered incapacitated under the Act.

Because the Consent to Medical Treatment Act was passed in 1993, there are no cases elaborating on these provisions. Therefore, the definitions themselves are the best guide available in determining how the Act will apply.

C. What are Prerequisites to consent?

Under section 313.005, if an adult patient that meets the above mentioned standards for incapacity, is in a hospital or nursing home, and is in need of medical treatment according to reasonable medical judgment, the attending physician shall describe the patient's state in the patient's medical record and the proposed medical treatment. The attending physician shall make a reasonably diligent effort to contact or cause to be contacted the persons eligible to serve as surrogate decision makers, with these efforts set forth in the patient's medical records. If a surrogate decision maker consents to medical treatment on behalf of the patient the attending physician shall record the date and time of the consent and sign the patient's medical record. The surrogate decision maker shall countersign the patient's medical record or execute an informed consent form.

A surrogate decision maker's consent to treatment that is not made in person shall be reduced to writing in the patient's medical record, signed by the hospital or nursing home staff member receiving the consent, and countersigned in the patient's medical record or an informed consent form by the surrogate decision maker as soon as possible.

D. Exemptions

These provisions do not apply to a health care decision made under a durable power of attorney for health care under Chapter 135, Civil Practice and Remedies Code, or under Chapter XII, Texas Probate Code. They further do not apply to consent for minors, consent for emergency care, hospital patient transfers, or a patient's legal guardian who has the authority to make a decision regarding the patient's medical treatment.

E. Can the patient avoid costs if consent is given by a surrogate decision maker?

No. Liability for the cost of the medical treatment made possible by the consent of a surrogate decision maker is the same as the liability if the patient had given consent. Furthermore, an attending physician, hospital, or nursing home or a person acting under the control of the physician, hospital or home is not subject to criminal or civil liability and has not engaged in unprofessional conduct if the treatment consented to is done in good faith under the consent and does not constitute a failure to exercise due care in the provision of the medical treatment.

F. What about legal guardians?

The Consent to Medical Treatment Act does not apply to a patient's legal guardian who has the authority to make a decision regarding the patient's medical treatment. Section 602 of the Texas Probate Code (Vernon Supp. 1995) provides as follows:
"A court may appoint a guardian with full authority over an incapacitated person or may grant a guardian limited authority over an incapacitated person as indicated by the incapacitated person's actual mental or physical limitations and only as necessary to promote and protect the well-being of the person. If the person is not a minor, the court may not use age as the sole factor in determining whether to appoint a guardian for the person. In creating a guardianship that gives a guardian limited power or authority over an incapacitated person, the court shall design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person."

Chapter 767 (Vernon Supp 1995) provides as follows:

"The guardian of the person is entitled to the charge and control of the person of the ward, and the duties of the guardian correspond with the rights of the guardian. A guardian of the person has:
(1) the right to have physical possession of the ward and to establish the ward's legal domicile;
(2) the duty of care, control, and protection of the ward;
(3) the duty to provide the ward with clothing, food, medical care, and shelter; and
(4) the power to consent to medical, psychiatric, and surgical treatment other than the inpatient psychiatric commitment of the ward."

According to the above statutes, the ability of a guardian can be limited or full authority to act for another person. But unless a guardian's authority is expressly limited, 767 gives the guardian the power to provide consent for the patient. Basically, the guardian of a mentally incompetent person has the same powers and duties as does the managing conservator of a minor. \textit{Little v. Little}, 576 S.W.2d 493, 495 (Tex. Civ. App. -- San Antonio 1979).

G. Other provisions affecting retarded individuals

Chapter 597 of the Health and Safety Code (Vernon Supp. 1995) applies to the ICF-MR (medical assistance program serving persons with mental retardation who receive care in intermediate care facilities). This Chapter requires that certified ICF-MR facilities must assess the capacity of each adult client that is without a legal guardian to make treatment decisions when there is evidence to suggest the individual is not capable of making a decision. The rules require the use of a uniform assessment process prescribed by board rules to determine a client's capacity to make treatment decisions. Under Subchapter C, s. 597.041, the statute provides as follows:

"(a) if the results of an assessment . . . indicate that an adult client who does not have a legal guardian or a client under 18 years of age who has no parent, legal guardian, or managing or possessory conservator lacks the capacity to make a major medical or dental treatment decision, an adult surrogate from the following list, in order of descending preference, who has decision-making capacity and who is willing to consent on behalf of the client may consent to major medical or dental treatment on behalf of the client:
(1) an actively involved spouse;
(2) an actively involved adult child who has the waiver and consent of all other actively involved adult children of the client to act as sole decision maker;
(3) an actively involved parent or stepparent;
(4) an actively involved adult sibling who has the waiver and consent of all other actively involved adult siblings of the client to act as the sole decision maker; and
(5) any other actively involved adult relative who has the waiver and consent of all other actively involved adult relatives of the client to act as the sole decision maker.
(b) Any person who consents on behalf of a client and who acts in good faith, reasonably, and without malice is not criminally or civilly liable for that action."
(c) Consent given by the surrogate decision-maker is valid and competent to the same extent as if the client had the capacity to consent and had consented.

(d) Any dispute as to the right of a party to act as a surrogate decision-maker may be resolved only by a court of record under Chapter V, Texas Probate Code.

For cases where there is no guardian or surrogate decision maker available, the Texas Dept. of Mental Health and Retardation shall establish and maintain a list of individuals qualified to serve on a surrogate consent committee. If a client under this section does not have a legal guardian or surrogate decision maker to make a treatment decision, the ICF-MR facility must file an application for a treatment decision with the Dept. of Mental Health and Retardation.

Section 597.044 provides:
   (a) If the results of the assessment conducted in accordance with Section 597.021 indicate that a client who does not have a legal guardian or surrogate decision-maker lacks the capacity to make a treatment decision about major medical or dental treatment, psychoactive medication, or a highly restrictive procedure, the ICF-MR facility must file an application for a treatment decision with the department.
   (b) An application must be in the form prescribed by the department, must be signed by the applicant, and must:
      (1) state that the applicant has reason to believe and does believe that the client has a need for major medical or dental treatment, psychoactive medication, or a highly restrictive procedure;
      (2) specify the condition proposed to be treated;
      (3) provide a description of the proposed treatment, including the risks and benefits to the client of the proposed treatment;
      (4) state the applicant's opinion on whether the proposed treatment promotes the client's best interest and the grounds for the opinion;
      (5) state the client's opinion about the proposed treatment, if known;
      (6) provide any other information necessary to determine the client's best interests regarding the treatment; and
      (7) state that the client does not have a guardian of the person and does not have a parent, spouse, child, or other person with demonstrated interest in the care and welfare of the client who is able and willing to become the client's guardian or surrogate decision-maker.

III. Obtaining Consent for Children

A. Who can consent for the child?

Under section 12.04 of the Family Code, the parent of a child has the privilege and right to consent to medical, psychiatric and surgical treatment.

B. What if the person otherwise provided by law (usually the parent) cannot be contacted and actual notice to the contrary (regarding consent) has not been given by that person?

   (a) Pursuant to section 35.01 of the Family Code, the following people can give consent in that situation:
      (1) a grandparent;
      (2) an adult brother or sister;
      (3) and adult uncle or aunt;
      (4) an educational institution in which the minor is enrolled that has received written authorization to consent from the person having the power to consent as otherwise provided by law;
      (5) any adult who has care and control of the minor and has written authorization to consent from the person having the power to consent as otherwise provided by law
      (6) any court having jurisdiction of the child; or
(7) any adult responsible for the care and control of a minor under the jurisdiction of a juvenile court or committed by a juvenile court to the care of an agency of the state or county, if the adult has reasonable grounds to believe the minor is in need of immediate medical treatment. The person giving consent, a physician or dentist licensed to practice medicine or dentistry in this state, or a hospital or medical facility shall not be liable for the examination and treatment of a minor under this subsection except for his or her own acts of negligence.

(b) The Texas Youth Commission may consent to the medical treatment of any minor committed to it under this code when the person having the power to consent has been contacted and actual notice to the contrary has not been given.

C. What constitutes a “treatment” under these sections?

Previous Texas case law defined “treatment” as limited to the steps taken to effect a cure of an injury or disease including examination and diagnosis as well as remedies. See Little, NCM v. Little, 576 S.W.2d 493 (Tex. Civ. App. -- San Antonio 1979, no writ). But in the recent Texas case of Powers v. Floyd, 1995 WL 271806 (Tex. App. -- Waco), the Waco Court of Appeals refused to give “treatment” such a restrictive meaning. The Court stated that “treatment” simply means to care for or deal with medically or surgically. Id. at 4. Therefore, treatment can involve simple procedures such as the removal of a birthmark. Id.

D. Can a minor ever provide consent on his or her own behalf?

Yes. Under section 35.03(a) of the Family code, a minor may consent to the furnishing of hospital, medical, surgical, and dental care by a licensed physician or dentist if the minor:

(1) is on active duty with the armed services of the U.S. army;
(2) is 16 years of age or older and resides separate and apart from his parents, managing conservator, or guardian, whether with or without the consent of the parents, managing conservator, or guardian and regardless of the duration of such residence, and is managing his own financial affairs, regardless of the source of the income;
(3) consents to the diagnosis and treatment of any infectious, contagious or communicable disease which is required by law or regulation adopted pursuant to law to be reported by the licensed physician or dentist to a local health officer or the Texas Dept. of Health and including all sexually transmitted diseases;
(4) is unmarried and pregnant, and consents to hospital, medical, or surgical treatment, other than abortion, related to her pregnancy;
(5) consents to examination and treatment for chemical addiction, chemical dependency, or any other condition directly related to chemical use.

Other provisions under this section:

(a) Consent by a minor to hospital, medical, surgical, or dental treatment under this section is not subject to disaffirmance because of minority.
(b) Consent of the parents, managing conservator, or guardian of a minor is not necessary in order to authorize hospital, medical, surgical, or dental care under this particular section.
(c) A licensed physician or dentist may, with or without the consent of a minor who is a patient, advise the parents, managing conservator, or guardian of the minor of the treatment given to or needed by the minor.
(d) A physician or dentist shall not be liable for the examination and treatment of minors under this section except for his own acts of negligence.
(e) A physician, dentist, hospital, or medical facility may rely on the written statement of the minor containing the grounds on which the minor has capacity to consent to his own medical treatment under this section.

Finally, a minor may consent on his or her own behalf for counseling or counseling in conjunction with treatment by a physician, psychologist, counselor, or social worker licensed or certified by Texas within the scope of the professional's license, if the treatment and/or counseling is for sexual abuse, physical abuse, suicide prevention, or chemical addiction,
dependency or abuse. The caretakers may, however, advise the parents or managing conservator of such treatment, without the consent of the minor. The caretaker may further rely on the written statement of the minor containing the grounds on which the minor has capacity to consent to his or her own treatment under this section. The parent or guardian is not obligated to compensate a caretaker for services rendered under this section without the prior consent of the parent or guardian.

E. Which parent provides consent if the parents are divorced?

Under section 14.02 of the Family code, the following rights and privileges of the conservators (parents) are set forth as follows:

(a) If both parents are appointed as conservators of the child, either by agreement between the parties or by court order, the court shall specify the rights, privileges, duties, and powers of a parent that are to be retained by both parents and the same rights, etc. that are to be exercised exclusively by one parent. Each parent retains the right to receive information from the other concerning the health of the child and, to the extent possible, to confer with the other parent before making a decision concerning the health or welfare of the child.

Unless the court determines by written findings that it would not be in the best interest of the child, a parent appointed as conservator retains the following rights, subject to court ordered limitations:

(1) a parent appointed as conservator (either temporary or sole) of a child has during the period that the parent has possession the right to support the child, including providing the child with medical and dental care not involving an invasive procedure and the power to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child.

(2) each parent appointed as a conservator of a child has at all times the right of access to medical and dental records, the right to consult with any physician or dentist, and the right to be designated on records as one to be notified in case of an emergency.

(3) A parent appointed as the sole managing conservator (meaning the child resides with that parent the majority of the time) of a child exclusively has the power to consent to medical, dental and surgical treatment involving invasive procedures and to other medical treatment, subject to the rights of the temporary conservator and subject to court ordered limitations.

(4) A managing conservator who is not the parent of the child has the power to consent to medical, psychiatric, psychological, dental, and surgical treatment, subject to the rights of the possessory conservator and subject to any court ordered limitations.

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