KEEPING SURROGATE DECISION MAKERS OUT OF THE COURT: A PROPOSED AMENDMENT TO TEXAS HEALTH AND SAFETY CODE SECTIONS 313.004 & 166.039

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Incapacitation can occur unexpectedly at any time to an individual, leaving them unable to make their own medical decisions or even the decision to withdraw life-sustaining treatment. When individuals lack an advance directive, medical power of attorney, or a guardianship over their person and become unexpectedly incapacitated, a surrogate decision-maker designated by the laws of their particular state is permitted to make these medical decisions. However, due to the wording of these statutes, two or more individuals may be the surrogate decision maker for an individual, and they become equal priority surrogate decision-makers with equal authority to make medical decisions for the patient. There is little uniformity in these laws across the United States, particularly when equal priority surrogate decision makers do not agree on course of treatment. Few states have a solution implemented by statute that avoids forcing a family or group of loved ones to go to the courts to have the matter resolved. Particularly in Texas, the only remedy provided by statute for disagreements amongst equal priority surrogate decision-makers is in the form of judicial recourse, or, going to the probate court to petition for a guardianship over the incapacitated person. This is not an ethical nor a practical solution for a patient who needs medical decisions made, as it does not consider the urgency of these medical decisions nor the ramifications on already struggling families, inconsistent with the concept of family harmony. This comment will explore other state's surrogate decision maker statutes in order to amend the Texas Health and Safety Code to provide an adequate remedy for this issue. Texas Health and Safety Code Sections 313.004 and 166.039 require amendment, as judicial recourse is not a sufficient solution for disagreeing equal priority surrogate decision makers.

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I. INTRODUCTION

Steve is a fifty-five year-old Texas resident who enjoys his quiet life out in the countryside.[1] Divorced, Steve spends his days tending to his ranch, occasionally hearing from his two adult children, Carolyn and Adam.[2] He also maintains contact with his two siblings, Laura and Michelle.[3] Steve's four family members also live in Texas and he tries to see his children and siblings whenever possible.[4] Steve, Laura, and Michelle's parents are both deceased.[5] One day, Steve ends his day by going out to his deer blind to relax.[6] As he is climbing up the ladder to enter the blind, he misses a step, and falls ten feet to the ground.[7] He is eventually rescued by EMTs where he is found unconscious and is taken to the hospital.[8] The doctor determines Steve has suffered a traumatic brain injury.[9]

[1] Author's own hypothetical.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

The doctor explains to Steve's family that due to intense brain swelling, he has become incapacitated, unable to communicate, and is therefore incapable of making his own medical decisions.[10] There are several options for Steve: he could undergo risky brain surgery, or the doctors can wait and see if the swelling gets better on its own.[11] The doctor further advises the group that Steve's condition could possibly deteriorate quickly, and there could soon be a need to make the decision to withhold treatment if his condition worsens.[12] Steve never imagined he would end up in this situation, therefore he never thought it necessary to draft any kind of advance directive or designate a medical power of attorney.[13] The family turns to the doctor to determine what their next steps will be.[14]

The doctor explains that Steve's children, Carolyn and Adam, have statutory priority in Texas to make this decision, despite the fact that Steve's siblings are present and ready to share their opinions, believing they know what is best for their brother.[15] Carolyn does not believe in the removal of life-sustaining treatment, while Adam does, and the group cannot seem to decide what Steve would have wanted if he found himself in this position.[16] As a result of the group's differing personal and religious opinions, it is soon obvious that Steve's children and siblings are not going to agree on how to proceed with his treatment.[17] Consulting the Texas statute regarding who is designated as the surrogate decision-maker for an incapacitated individual lacking an advance directive or medical power of attorney, the doctor and family are left with no good answer on how to properly handle this disagreement.[18] The group could take this issue to the probate court; however, the doctor advises them that the decision should be made sooner rather than later and the family would prefer not to put that type of strain on their relationship.[19]

This hypothetical situation portrays a scenario that may arise when individuals without a designated medical power of attorney become incapacitated and require a default healthcare surrogate to make medical decisions.[20] Surrogate decision-maker statutes are codified in a majority of states across the United States, and in Texas, the statutory language that provides a guideline for these decisions is laid out in two different sections of the Texas Health and Safety Code.[21] Section 313.004 provides the language for who may make medical decisions for incapacitated patients in hospitals, nursing homes, and those in county or municipal jail who require medical treatment – with the exception of withdrawing life-sustaining treatment.[22] Section 313.004 has been recently amended as of September 2023, where certain language was withdrawn, leaving it

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[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id*.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] TEX. HEALTH AND SAFETY CODE ANN. § 313.004; TEX. HEALTH AND SAFETY CODE ANN. § 166.039.
[22] TEX. HEALTH AND SAFETY CODE ANN. § 313.004.

with more room for disputes than before.[23] Section 166.039 offers similar language for when an incompetent patient requires a decision to withdraw or withhold life-sustaining treatment.[24] Both of these Texas statutes provide the hierarchical priority order of individuals designated to make an incapacitated patient's medical decisions in the absence of any type of advance directive.[25] However, the language of these statutes leaves room for disagreements on the medical care of loved ones and no adequate solution for these disputes.[26]

Family members and loved ones often disagree on the course of treatment when tasked with making medical decisions.[27] During these difficult times emotions can run high, and it can be difficult to make these choices due to differing religious and ethical beliefs.[28] Due to the language of surrogate decision-making statutes, two or more individuals may qualify at an equal priority level.[29] When these equal surrogate decision-makers are unable to come to a consensus on treatment, the only remedy for these disagreements in Texas is to attempt to obtain judicial recourse by applying for a temporary guardianship, which is both practically and ethically unfeasible.[30] This Comment will discuss why it is impractical for Texas statutes to provide judicial recourse as the only option for those who disagree on urgent medical decisions for an incapacitated patient.[31]

The problems with these statutes are important to discuss and crucial for Texans to know and address before reaching a state of incapacitation.[32] A life-altering injury that can lead to incapacitation can happen at any moment, leaving no time for an individual who never got around to designating a person to make their medical decisions to do so.[33] The language included in Sections 313.004 and 166.039 of the Texas Health and Safety Code has failed to account for disagreements amongst equal priority medical surrogate decision makers, leaving the door open for litigation that may disrupt familial harmony.[34] As such, the Texas Legislature should adopt a proposed amendment to be included in both sections that provides resolution mechanisms to address these critical situations.[35]

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[23] *Id.*
[24] TEX. HEALTH AND SAFETY CODE ANN. § 166.039.
[25] *Id.*; TEX. HEALTH AND SAFETY CODE ANN. § 313.004.
[26] *Id.*
[27] Timothy M. Smith, *When patients, families disagree on treatment: 6 ways forward*, AMA (Dec. 20, 2018), https://www.ama-assn.org/delivering-care/ethics/when-patients-families-disagree-treatment-6-ways-forward.
[28] *See id.*
[29] TEX. HEALTH AND SAFETY CODE ANN. § 313.004; TEX. HEALTH AND SAFETY CODE ANN. § 166.039(b).
[30] TEX. HEALTH AND SAFETY CODE ANN. § 313.004(b).
[31] *See infra* Part III.
[32] *See Stephanie* Gordy & Eran Klein, *Advance Directives in the Trauma Intensive Care Unit: Do they really matter?*, NATIONAL LIBRARY OF MEDICINE (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3249846/
[33] *See Advance Care Planning: Advance Directives for Health Care*, NATIONAL INSTITUTE ON AGING, https://www.nia.nih.gov/health/advance-care-planning/advance-care-planning-advance-directives-health-care (Oct. 31, 2022).
[34] *See* TEX. HEALTH AND SAFETY CODE ANN. § 313.004.
[35] Author's original thought.

Part II of this Comment will first explore the background of statutory surrogate decision-makers across the United States and the different ways these can be chosen, with a focus on the Texas statutes.[36] Part II will also provide information and statistics regarding how few people have designated any kind of advance directive or medical power of attorney, leaving over two-thirds of the United States with a statutory surrogate decision-maker to make their medical decisions in the event they become incapacitated.[37] Part II will also highlight the lack of consensus among states on the recourse for disagreements and explain how Texas is one such situated state.[38] Finally, Part II will provide the language of Texas Health and Safety Code Section 313.004 both before and after the September 2023 amendment, along with the language of Texas Health and Safety Code Section 166.039.[39]

Part III will provide an in-depth argument as to why the language of Texas Health and Safety Code Sections 313.004 and 166.039 is problematic by discussing the ramifications of potential disagreements among equal priority surrogate decision makers.[40] Part III will discuss how the only remedy in Texas for disagreeing surrogates is to petition the court for a guardianship, and the problems and impracticalities that arise from this limited recourse.[41] Part III will also consider other states surrogate decision maker statutes that provide more helpful language in the case of disagreements.[42] Part III will then argue in favor of a proposed amendment to the statutes that includes language offering a recourse for disagreements among equal priority surrogates.[43] Finally, Part III will analyze other proposed solutions and their potential shortcomings as opposed to the amendment proposed by this Comment.[44]

II. UNDERSTANDING ADVANCE DIRECTIVES AND SURROGATE DECISION-MAKERS

A. Urgent Medical Decisions

Every day, individuals across the United States face sudden medical crises and are left incapacitated, unable to make their own medical decisions.[45] Technical advances in the field of medicine have made it increasingly common for patients to be kept alive in unprecedented ways, resulting in patients and families being presented with an overwhelming array of medical treatments, often including options to both help prolong life or to withdraw treatment.[46] Nearly

[36] *See infra* Section II.A.
[37] *See infra* Section II.B.3.
[38] *See infra* Section II.B.
[39] *See infra* Sections II.D-E.
[40] *See infra Section III.A.*
[41] *Id.*
[42] *See infra Section III.B.*
[43] *See infra* Section III.C.
[44] *See infra* Section III.
[45] Duncan Moore, *Medical Surrogacy Mediation: Expanding Patient, Family, and Physician Rights and Reformulating The Virginia Health Care Decisions Act*, 10 VA. J. SOC. POL'Y & L. 410, 410 (2002-2003).
[46] *Id.*

half of all patients that die in hospitals in the United States spend their last three days of life in an ICU; many of these deaths are a result of the choice to withdraw life-sustaining measures.[47]

The concept of individual autonomy to decide one's own medical decisions is a longstanding one.[48] Since 1976, the court has held that patients have the right to refuse medical treatment, even if this ultimately leads to death.[49] This right was first decided by the court in *In re Quinlan*, where the Court ruled that a person is able to make the decision to forgo life-sustaining treatment.[50] This notion of medical autonomy has been upheld time and time again in American courts; however, in many individuals' lives there comes a time when this is no longer possible.[51] This right was extended to whomever the patient has identified, or has been identified for them as a result of incapacitation, as their medical decision-maker upon incapacitation.[52]

A patient is deemed incapacitated in Texas when they are "lacking the ability, based on reasonable medical judgment to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits, harms, and reasonable alternatives to any proposed treatment decision."[53] Therefore, these patients are unable to make medical decisions for themselves due to their inability to understand what it is exactly they are deciding and the consequences of these decisions.[54] It is estimated that decisional incapacity for patients is near forty percent for adult medical inpatients and residential hospice patients, and ninety percent among adults in some intensive care units.[55] The number of adults that are incapable of making their own medical treatment decisions is only increasing with the rapid escalation of Americans diagnosed with Alzheimer's disease and with traumatic brain injuries.[56] Those working in hospitals encounter these patients with rising frequency who are unable to communicate whether they want surgery, don't want surgery, want life-sustaining treatment, or wish to forgo life-sustaining treatment.[57]

Consequently, there must be someone designated to make these medical decisions when an incapacitated individual, unable to communicate their wishes, cannot.[58] There is a general ethical agreement that in these situations, other persons may step in and decide these life or death medical

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[47] Gordy & Klein, *supra* note 32.
[48] Ben A. Rich, *The ethics of surrogate decision making*, NATIONAL LIBRARY OF MEDICINE (Mar. 2002), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1071685/#ref5.
[49] *In re Quinlan*, 70 N.J. 10 (1976).
[50] *Id*.
[51] *Id.*
[52] *Gordy and Klein*, *supra* note 32.
[53] TEX. HEALTH AND SAFETY CODE ANN. § 313.002(5).
[54] *See id.*
[55] DeMartino et. al., *Who Decides When a Patient Can't? Statutes on Alternate Decision Makers*, NATIONAL LIBRARY OF MEDICINE (Jul. 26, 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5527273/.
[56] Erica Wood, *If There is No Advance Directive or Guardian, Who Makes Medical Treatment Choices?*, ABA (Oct. 1, 2015), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol_37/issue_1_october2015/hospitalist_focus_group/.
[57] *Id*.
[58] *Id.*

decisions.[59] The inability of patients to make autonomous medical decisions as a result of incapacitation is an issue of increasing significance in the United States, which has resulted in the creation of systems for family members and loved ones to make these decisions for a patient, even when this patient has left their families with little to no expression of their treatment wishes.[60]

1. How Treatment Decisions are Made for Incapacitated Individuals

In the United States, there are several prevalent ways that a medical decision-maker may be identified for an incapacitated individual.[61] The two most effective ways this individual may be selected are through: (1) an advance directive or medical power of attorney; or (2) a court order creating a guardianship.[62] While these methods are ideal when a patient is unable to communicate their wishes because they can help provide an insight into the patient's wishes, they are not always available if the patient did not indicate these preferences or execute such documents prior to incapacitation.[63] When a physician does not have any way of knowing a patient's wishes through these options, they must reference the default surrogate decision-maker statute of the specific state to locate the individual or individuals that are designated to make these decisions.[64] All fifty states have laws that broadly address this type of decision-making, however there is little to no uniformity in the way these situations are addressed.[65]

2. Medical Decisions for Incapacitated Individuals in Texas

In Texas, there are similarly several ways that medical decisions or a medical decision-maker is chosen for an incapacitated patient, including: (1) through their previously executed advance medical directive, (2) through their previously designated medical power of attorney, (3) through a guardianship of person ordered by a court to act on their behalf, and (4) through the statutory surrogate decision maker decided by Texas state law.[66] Both a medical power of attorney and a guardianship are methods that require action by the patient or the patient's family prior to incapacitation; however, surrogate decision makers are designated automatically by a hospital, physician, or other entity if it becomes necessary.[67]

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[59] *Id*.
[60] *Moore*, supra note 45.
[61] Amber Comer, "*What do you Mean I Cannot Consent for My Grandmother's Medical Procedure?": Key Issues with State Default Surrogate Decision Making Laws*, 14 IND. HEALTH L. REV. 1, 5 (2017).
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] DeMartino et. al., *Who Decides When a Patient Can't? Statutes on Alternate Decision Makers*, NATIONAL LIBRARY OF MEDICINE (Jul. 26, 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5527273/.
[66] *Appendix III, Legal Authority to Make Decisions,* TEXAS HEALTH AND HUMAN (July 7, 2019), *https*://www.hhs.texas.gov/handbooks/intellectual-developmental-disability-preadmission-screening-resident-review-idd-pasrr-handbook/appendix-iii-legal-authority-make-decisions
[67] *See* Comer, *supra* note 61.

B. Advance Directives & the Medical Power of Attorney

1. Advance Directives

One way for an individual to ensure their healthcare wishes are followed in the case they become incapacitated and unable to communicate their medical wishes is through an advance directive.[68] An advance directive is a set of legal documents that directs physicians on how exactly to proceed with medical decisions in the case of a patient's incapacity, and must be created while the executor is still competent.[69] The requirements for creating a valid advance directive vary by state, but attaining the help of a lawyer for this process is generally not necessary.[70] Many states provide their own forms that can be accessed and filled out at no cost.[71]

Types of advances directives include directives to physicians, a medical power of attorney, do-not-resuscitate orders, and declaration for mental health treatment.[72] Although these options are generally considered under the umbrella term of "advance directive", there are significant distinctions between these different legal documents.[73] A directive to physicians will directly tell the doctor whether or not a patient wishes to continue life-sustaining treatment in the case of a terminal or irreversible condition, while a do-not-resuscitate order particularly indicates the patient does not want to receive cardiopulmonary resuscitation if their heart stops beating.[74] In contrast, a declaration for mental health treatment allows an individual to make advance decisions regarding certain mental health options in the case of incapacity.[75] These documents are helpful in communicating a patient's wishes to their family, loved ones, and healthcare professionals in the event of incapacitation.[76]

2. Medical Power of Attorney

A medical power of attorney is an agent that a principal appoints to make their healthcare decisions in the case of incompetency that is appointed prior to illness or injury.[77] Contrasted with a surrogate decision-maker, this individual may hold full authority to act on behalf of the principal

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[68] *Advance Directives*, TEXASLAWHELP.ORG (Sept. 8, 2023), https://texaslawhelp.org/article/advance-directives#what-are-advance-directives-.
[69] *Id*.
[70] Mayo Clinic Staff, *Living wills and advance directives for medical decisions*, MAYO CLINIC https://www.mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/living-wills/art-20046303#:~:text=Creating%20advance%20directives,it%20is%20generally%20not%20necessary (last visited Jan. 31, 2024).
[71] *Advance Directives*, *supra* note 68.
[72] *Advance Directives*, TEXAS HEALTH AND HUMAN SERVICES, https://www.hhs.texas.gov/formas/advance-directives (last visited Jan. 31, 2024).
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] Vaughn James, *Planning for Incapacity: Helping Clients Prepare for Potential Future Health Crises,* 9 TEX. TECH EST. PL. & COM. PROP. J 230, 250 (2017).

for all medical decisions with no interference from other family members.[78] Appointing a medical power of attorney helps patients avoid unwanted care in the event of incapacity by selecting someone that is familiar with their wishes ahead of time.[79] This individual is to act in accordance with the patient's religious and moral beliefs when directing the patient's healthcare.[80] Further, the medical power of attorney should typically be someone who can be trusted to make decisions that coincide with a patient's wishes and values, is willing and able to discuss medical treatment with the patient and physicians, and can act as an advocate if there are disagreements with the course of treatment.[81]

3. The Effects of a Considerable Number of Americans Lacking an Advance Directive

It is estimated that approximately only one-third of Americans have any kind of advance directive in place to handle their healthcare decisions in such a situation.[82] This can be attributed to several factors, such as reluctance to consider the possibility of a life-threatening injury or illness, or the assumption that loved ones will simply make the decisions the patient would want.[83] As such, two-thirds of Americans are left allowing the statutory language of their state to choose their surrogate decision-maker for them if they were to become incapacitated unexpectedly, and are likely unaware of the way this process works.[84]

C. Guardianship of Person

A guardianship of person is another way an individual may hold decision-making authority over an incapacitated individual.[85] The need for a guardianship typically arises from a person's age, disability, or injury.[86] Texas courts have the ability to appoint a guardian to have either full or limited decisional authority over an incapacitated individual depending on the level of independence of the individual.[87] Particularly, a guardian of person (as opposed to a guardian of the estate) holds authority to decide the incapacitated individual's personal matters such as

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[78] *Id.*
[79] Yadav et al., *Approximately One in Three US Adults Completes Any Type of Advance Directive for End-Of-Life Care*, HEALTH AFFAIRS (July 2017), https://www.healthaffairs.org/doi/10.1377/hlthaff.2017.0175?url_ver=Z39.88-2003&rfr_id=ori%3Arid%3Acrossref.org&rfr_dat=cr_pub++0pubmed.
[80] Mayo Clinic Staff, *Living wills and advance directives for medical decisions*, MAYO CLINIC (Aug. 2, 2022), https://www.mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/living-wills/art-20046303
[81] *Id.*
[82] *See* Yadev et. al, *supra* note 79.
[83] Wood, *supra* note 56.
[84] *Id.*
[85] *Protecting the Incapacitated: A Guide to Guardianship in Texas from Application to Oath*, THE STATE BAR OF TEXAS (Oct. 2014), https://www.texasbar.com/AM/Template.cfm?Section=Veterans2&Template=/CM/ContentDisplay.cfm&ContentID=23612
[86] *Id.*
[87] *Id.*

housing, medical, and educational decisions.[88] The imposition of a guardianship is not taken lightly by the court, as it essentially removes rights from the individual and places certain duties in the hands of the guardian.[89] Only courts can create a guardianship through such a process.[90]

D. Surrogate Decision-Makers

When an incapacitated individual has no advance directive in place, nor a medical power of attorney or guardian to make their medical decisions, it becomes necessary to determine the proper surrogate decision-maker or makers by referencing the individual statute of the state.[91] A surrogate decision maker is an individual designated by statute to make healthcare decisions on behalf of a patient who has become incapacitated and unable to do so.[92] Over the last several decades, most states have enacted some form of legislation that creates a hierarchy of who may make these decisions.[93] These laws, or default surrogate statutes, provide the priority order of who may fill this role.[94] Typically, an individual's immediate family member or members will assume this role, as they are most likely to be familiar with the patient's preferences.[95] Turning to a specific state's surrogate decision-maker statute to determine who shall be appointed is only necessary when a patient is deemed to have lost decisional capacity and does not have a designated medical power of attorney or guardian.[96]

1. Standards for Surrogate Decision-Makers

To maintain the patient's autonomy and moral preferences, the surrogate should be a person who knows the patient's needs, goals, and desires.[97] The surrogate decision-maker should make medical decisions for the incapacitated patient in a way they believe the patient would have themselves.[98] Most surrogate decision maker statutes include a provision of some kind stating that the surrogate should in some way follow the patient's known wishes, including Texas, which states: "A treatment made under Subsection (a) or (b) must be based on knowledge of what the

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[88] *Guardianship*, TEX. LAW HELP https://texaslawhelp.org/article/guardianship#:~:text=A%20guardian%20of%20the%20person,person%20and%20of%20the%20estate (Sept. 5, 2023).
[89] *Protecting the Incapacitated: A Guide to Guardianship in Texas from Application to Oath*, THE STATE BAR OF TEXAS (Oct. 2014), https://www.texasbar.com/AM/Template.cfm?Section=Veterans2&Template=/CM/ContentDisplay.cfm&ContentID=23612
[90] *Id*.
[91] *See* DeMartino et. al., *supra* note 65.
[92] *Id.*
[93] *Id.*
[94] Marlene Arias, *Recent Updates to Default Surrogate Statutes*, ABA (Jan. 12, 2023), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol44/bifocal-vol-44-issue3/recent-updates-to-default-surrogate-statutes/.
[95] Comer, supra note 61.
[96] *Id.*
[97] *Id.*
[98] *Id*.

patient would desire, if known."[99] This approach followed by Texas only requires that the surrogate or surrogates follow the patient's medical preferences if they are familiar with them, and does not require that the surrogate themselves know the patient closely or maintain regular contact with them.[100] Other states, such as Nebraska, follow a more strict approach, stating that a surrogate decision maker chosen by the statutory hierarchy should be: "A person who has exhibited special care and concern for the individual, who is familiar with the individual's personal values, and who is reasonably available to act as a surrogate is eligible to act as a surrogate under subsection (2) of this section."[101]

This approach requires that the proposed surrogate maintain some sort of contact with the patient and is familiar with their values.[102] Some states, excluding Texas, consider and provide guidelines for how to best ascertain what the patient would have wanted for their care if the surrogate or surrogates do not have this information available to them.[103] Delaware has such a provision included in its surrogate decision maker statute:

> 2. If the patient's instructions or wishes are not known or clearly applicable, the surrogate's decision shall conform as closely as possible to what the patient would have done or intended under the circumstances. To the extent the surrogate knows or is able to determine, the surrogate's decision is to take into account, including, but not limited to, the following factors if applicable: A. The patient's personal, philosophical, religious, and ethical values; B. The patient's likelihood of regaining decision-making capacity; C. The patient's likelihood of death; D. The treatment's burdens on and benefits to the patient; E. Reliable oral or written statements previously made by the patient, including, but not limited to, statements made to family members, friends, health care providers or religious leaders.[104]

This language provides a way for surrogate decision makers to best determine what the patient would have wanted in the event of their current medical scenario.[105] It may be helpful for this information to be considered when making a medical decision for someone else, as sometimes surrogates may instead focus more on what they would do for themselves in the situation.[106]

2. Lack of Consensus in Surrogate Decision-Maker Statutes

As of December 2022, forty-six of the fifty states have default surrogate decision-maker laws in place that provide a priority order, excluding Massachusetts, Minnesota, Missouri, and

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[99] TEX. HEALTH AND SAFETY CODE ANN. § 313.004(c); TEX. HEALTH AND SAFETY CODE ANN. § 166.039(c)
[100] TEX. HEALTH AND SAFETY CODE ANN. § 313.004(c); TEX. HEALTH AND SAFETY CODE ANN. § 166.039(c)
[101] NEB. REV. STAT. § 30-604(3).
[102] *See id.*
[103] *See* DEL. CODE ANN. 16 § 2507(8)(b)(2).
[104] *Id.*
[105] *See id*.
[106] *See id.*

Rhode Island.[107] As previously stated, only around thirty percent of Americans have an advance directive in place, leaving the default surrogate as the most typical avenue for medical surrogate selection.[108] The highest priorities typically include immediate family members such as spouses, children, or parents, and some states provide language for a non-familial adult to step in if appropriate, such as somebody who maintains close contact with the individual or a religious leader.[109]

Across the United States there is little consensus in state laws designed to help determine who holds decision-making authority for those patients who did not complete an advance directive before incapacitation.[110] Most states' provisions address at least four key concepts: "The priority of surrogates who may legally act in the absence of an appointed agent or guardian with health care powers, limitations on the types of decisions the surrogate is empowered to make; the standards for decision making; and the process for resolving disputes among equal priority surrogates."[111] However, not only are state's statutes inconsistent on their priority order for who can serve as a surrogate decision-maker, but many are ambiguous and unhelpful for families in these situations.[112]

Surrogate decision-maker statutes leave room for two – or potentially many more – individuals to meet the criteria to end up in the same priority level, which results in the group needing to act as equal priority decision-makers and come to a decision on treatment that they are all able to agree on.[113] This is often the case when a person still has two parents, multiple children, or several siblings that are willing to act and want to make decisions for the patient.[114] Inevitably, in some instances these members of the same priority level are incapable of functioning as a decision-making unit as a result of disagreements on fundamental moral or religious opinions.[115]

Predominantly at issue, there is little harmony regarding what to do when equal priority surrogates disagree on the course of treatment for their incapacitated loved one, and this remains an open-ended question in healthcare law.[116] The bright-line rules provided by state statutes identify who the proper person or persons are to act as a surrogate, which can be helpful in avoiding

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[107] *See* Arias, *supra* note 94.
[108] Wood, *supra* note 56.
[109] *See* DeMartino et. al., *supra* note 41.
[110] *Id.*
[111] *Decisions by Surrogates: An Overview of Surrogate Consent Laws in the United States*, ABA (Oct. 1, 2014), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol_36/issue_1_october2014/default_surrogate_consent_statutes/.
[112] *See* Comer, *supra* note 65.
[113] Matthew Shea, *The Ethics of Choosing a Surrogate Decision Maker When Equal-Priority Surrogates Disagree*, NARRATIVE INQUIRY IN BIOETHICS (2011), https://muse.jhu.edu/article/800079#:~:text=If%20the%20conflicting%20members%20stand,138).
[114] *See id.*
[115] *Id.*
[116] *Id.*

case-by-case judicial intervention.[117] However, these surrogate hierarchies do not consider the complexities that may arise within each individual family and the potential for disagreements.[118] These medical decisions that families and loved ones must make can be life or death decisions, which often can often turn on differing moral and religious viewpoints.[119] Family members may have varying viewpoints and differing opinions regarding the patient's best interests, and family members outside of the prevailing priority group may believe they have the best information to make the patient's medical decision.[120]

3. The Uniform Health Care Decisions Act

In 1993 the Uniform Law Commissioners enacted the Uniform Health Care Decisions Act to try and create uniformity within state healthcare laws.[121] Although the Act is not binding on the states, it is one method attempting to bring some kind of consistency to healthcare law within the United States.[122] Most recently updated in July of 2023, the Act includes recommended language for states to follow when drafting their surrogate decision-maker statutes, including the recommended priority order to incorporate into their statute and the procedure to implement when equal priority surrogates disagree.[123]

However, the Act's language regarding disagreement among default surrogates still falls short.[124] The proposed priority order recommended by the statute includes the individual's spouse, adult child or parent, cohabitant, adult sibling, adult grandchild or grandparent, or any other adult who has assisted with the individual's supported decision-making routinely for the past six months.[125] This proposed hierarchy, while providing more options for who the surrogate should be than that of Texas's statutes, still leaves room for nearly all of these classes to contain more than one individual and lacks a sufficient recourse for disagreement.[126]

The comments provided by the Uniform Law Commissioners alongside the Act provide the following for its reasoning on why such language was chosen for the recommended statute:

> The priority list is designed to approximate the likely wishes of as many individuals as possible. Empirical research on surrogate decision-making indicates that most Americans choose close relatives as their health-care agents, with spouses being the most common first choice and children being the most common second choice. … Consistent with this, spouses and domestic partners are given top priority in the

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[117] Duncan Moore, *Medical Surrogacy Mediation: Expanding Patient, Family, and Physician Rights and Reformulating The Virginia Health Care Decisions Act*, 10 VA. J. SOC. POL'Y & L. 410, 412 (2002-2003).
[118] *See id.*
[119] *See id.*
[120] *Id.* at 435-436.
[121] UNIF. HEALTH-CARE DECISIONS ACT § 13 (UNIF. L. COMM'N 2023).
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.* at § 12.
[126] *Id.*

> Act's priority list, and adult children are placed in the next priority group. Nevertheless, the priority list may be a poor fit for some individuals[.][127]
>
> By adopting a priority list, the Act rejects an alternative approach taken by a minority of states that gives a patient's physician substantial discretion to select among potential surrogates. This choice reflects several considerations. First, the Act's approach appears to be more consistent with the preferences of most Americans… (citation omitted). Second, one role of the surrogate is to provide a check on health-care professionals. If health-care professionals have discretion to choose among potential surrogates, they would have the ability to choose surrogates whose views accord with their own, thus blunting any ability for the surrogate to serve as such a check. Third, many Americans do not have a close and trusting relationship with a physician. The physician treating the individual may not know the individual's values and preferences to the extent that would allow the physician to select a surrogate based on more than convenience or the physician's own assessment of a potential surrogate's capacities. Fourth, although it adopts a clear priority list, the Act does empower a responsible health-care professional to recognize a surrogate other than one with top priority under the limited circumstances set forth in subsection (d).[128]

While it is true that the majority of Americans would prefer close relatives as their surrogate decision makers, these comments admit that this may be a poor fit for some.[129] The comments continue to acknowledge that Americans struggle to maintain trusting relationships with physicians, which is why the physician should not be involved in the decision.[130] However, this will only continue to promote this distrust by not giving the family and the physician the opportunity to work together to reach a common goal for the patient.[131]

The recommended provision regarding disagreements given by the Uniform Health Care Decisions Act provides that when two or more members of an equal priority class disagree, the decision of the majority of the members shall rule.[132] It continues to read that if these members are evenly divided, the healthcare professional "shall make a reasonable effort to determine the views of members of this class who are reasonably available but have not yet communicated their views to the professional." Practically, this may look like the professional seeking out the opinion of a child or sibling of the patient who had previously chosen to not participate in the decision and allow them to break the evenly divided disagreement.[133]

However, this section ends by providing that if the surrogates are evenly divided concerning the healthcare decision, "the healthcare decision must be made as provided by other law of this

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[127] *Id.*
[128] *Id.*
[129] *See id*.
[130] *See id.*
[131] *See id*.
[132] *Id.*
[133] *See id.*

state regarding the treatment of an individual who is found to lack capacity."[134] Consequently, even states that adopt the recommended language of the Uniform Law Commission are left on their own to figure out how these disagreements should be handled, resulting in differing laws across each state.[135] The Act provides the following comments regarding disagreements among potential surrogates:

> This Section addresses the situation where more than one member of the same class of default surrogates has assumed authority to act and a disagreement over a health-care decision arises of which a responsible health-care professional is informed. Should that occur, a responsible healthcare professional must comply with the decision of a majority of the members of that class who have communicated their views to the professional and who the professional reasonably believes are acting in a manner that is consistent with their duties under Section 17. If the class is divided, a responsible health-care professional should make reasonable efforts to solicit the views of class members who have yet to make their views known. If the disagreement persists, however, the decision must be made as provided by other law of the state governing incapacity issues.[136]

This comment provided by the Uniform Law Commissioners does not provide an explanation for why the majority rule is the most effective solution possible for disagreeing surrogates.[137] Additionally, there is no explanation given for why further laws regarding disagreements must be deferred to the states and offers no guidance for states when creating these laws.[138] Thus, the recommended language offered by the Uniform Law Commissioners does not provide the states with direction to deal with this common situation.[139]

E. Texas's Surrogate Decision-Maker Statutes

Texas is one of the many states that has not adopted the language recommended by the Uniform Health Care Decisions Act.[140] Texas has codified the priority order for surrogate decision-makers and its solution for potential disagreements in its Health and Safety Code.[141] There are two separate provisions in different chapters regarding who can make these decisions in different medical scenarios: one for the withholding of life-sustaining treatment, and one for the majority of remaining healthcare decisions for patients.[142]

1. Texas Health and Safety Code Section 313.004

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[134] *Id.*
[135] *See id*.
[136] *Id.*
[137] *See id.*
[138] *See id.*
[139] *See id.*
[140] *See id.*
[141] TEX. HEALTH AND SAFETY CODE ANN. § 313.004(a).
[142] *Id*.; TEX. HEALTH AND SAFETY CODE ANN. § 166.039.

Texas Health and Safety Code Section 313.004(a) provides the priority order to be followed for surrogate decision makers for hospital patients, and for other places a patient may be located such a nursing home or jail.[143] This chapter of the code allows the surrogate or surrogates to make medical decisions for the patient, excluding the withdrawal of life-sustaining treatment, psychotropic medication, involuntary inpatient mental health services, or psychiatric services calculated to restore competency to stand trial.[144] As previously stated, this section was recently amended in September of 2023, which included changes to the language of the statutory priority order.[145] Prior to the September 2023 amendment, the priority order provided in Texas's surrogate decision-maker statute remained unchanged since 1993.[146] The previous language provided that the priority order was as follows:

> (1) the patient's spouse; (2) an adult child of the patient who has the waiver and consent of all other qualified of the patient to act as the sole decision maker; (3) a majority of reasonably available adult children; (4) the patient's parents; or (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. [147]

While this provision did not completely solve the issue of disagreements among adult children or parents, it did allow for either one child to take control or for a majority to decide.[148] Additionally, the statute allowed for a non-family member to take the position if necessary, such as a member of the clergy or a clearly identified indiviudal, providing several options for those who may lack close family members.[149]

As of September 2023, the Texas Legislature amended Texas Health and Safety Code Section 313.004(a) to read as follows: "(1) the patient's spouse; (2) the patient's adult children; (3) the patient's parents; or (4) the patient's nearest living relative."[150] Looking at the previous language of the statute, the legislature opted to remove the provision allowing the majority of children or one designated child to decide.[151] The statute also no longer provides the option for a member of the clergy or an individual clearly identified by the patient to make decisions, which may possibly be the person best suited to do so.[152]

This new language has left Texas's surrogate decision maker statute with fewer options for surrogate decision makers and provides families with little recourse for resolving a disagreement

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[143] TEX. HEALTH AND SAFETY CODE ANN. § 313.004(a).
[144] TEX. HEALTH AND SAFETY CODE ANN. § 313.003(b); TEX. HEALTH AND SAFETY CODE ANN. § 313.004(d).
[145] 88(R) H.B. 3162 (2023).
[146] *Id*.
[147] *Id*.
[148] *Id.*
[149] *Id.*
[150] TEX. HEALTH AND SAFETY CODE ANN. § 313.004(a).
[151] *See id.*
[152] *See id.*

on treatment due to the removal of the language allowing a majority of adult children to control a disagreeing class.[153]

2. Texas Health and Safety Code Section 166.039

Texas Health and Safety Code Section 166.039 similarly, but with certain notable differences, codifies the priority order physicians are to follow when selecting the correct individual or individuals to make medical decisions regarding withholding life-sustaining treatment for an incapacitated patient that lacks a guardian or medical power of attorney.[154] This section is applicable in situations where a surrogate decision-maker is needed to make a decision for an incompetent patient to withhold or withdraw life-sustaining treatment.[155] The statute states as follows:

> (a) If an adult qualified patient has not executed or issued a directive and is incompetent or otherwise mentally or physically incapable of communication, the attending physician and the patient's legal guardian or agent under a medical power of attorney may make a treatment decision that may include a decision to withhold or withdraw life-sustaining treatment from the patient.
> (b) If the patient does not have a legal guardian or an agent under a medical power of attorney, the attending physician and one person, if available, from one of the following categories, in the following priority, may make a treatment decision that may include a decision to withhold or withdraw life-sustaining treatment[.][156]

The statute proceeds to provide the proper priority order for surrogate decision-makers.[157] The language of the priority order is practically identical to that of Texas Health and Safety Code Section 313.004(a), providing: "(1) the patient's spouse; (2) the patient's reasonably available adult children; the patient's parents; or (4) the patient's nearest living relative." It is also important to note that this section includes a provision indicating that a patient's lack of advance directive does not create a presumption that the patient is against a decision to withdraw or withhold treatment sustaining their life.[158] Due to the language of these statutes, patients with more than one adult child, more than one parent, or more than one equal priority nearest living relative may be left with a family fighting in their greatest time of need.[159]

F. Problems with Texas Health & Safety Code Section 313.004 and Section 166.039

1. Current Law Regarding Disagreements in Texas

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[153] *See id.*
[154] TEX. HEALTH AND SAFETY CODE ANN. § 166.039.
[155] *Id.*
[156] *Id.*
[157] *Id.* § (b)(1-4).
[158] *Id.*
[159] *See id.*

When equal priority surrogate decision makers are unable to come to a consensus on treatment for their loved one, there are several solutions that may come to mind.[160] The surrogates could simply flip a coin or draw straws to determine the surrogate, go with the majority rule, or decide who is closest to the patient and knows them best.[161] While these may seem like simple ways to solve this problem, it must be considered that there may not be a majority in the case of even numbers, or parties when disagree on who they believe really knows the patient the best or what the patient's medical wishes are.[162]

In this scenario, there comes a point when the parties must look elsewhere to find a solution when it appears the parties are at a roadblock and it will be impossible to reach an agreement on treatment.[163] Currently, the only option in Texas for disagreements among medical surrogate decision-makers with equal priority is judicial recourse in the form of petitioning a court for a guardianship of the patient.[164] This is codified in Texas Health and Safety Code Section 313.004(b), which states: "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 of proceedings under Title 3, Estates Code." Similarly, Section 166.039(g) states: "A person listed in subsection (b) who wishes to challenge a treatment decision made under this section must apply for a temporary guardianship under Chapter 1251, Estates Code."[165]

As a result of these provisions, the only remedy for disagreeing parties is to turn to the court system for help when they cannot agree on treatment for an incapacitated patient.[166] Practically, this would look like the disagreeing family members going to the probate court to petition for a temporary guardianship under Title 3 of Texas Estates Code in order to gain the sole authority to act as the decision maker from the court.[167] This means that families and loved ones of a patient would be left with no option but to take each other to court if they are unable to decide on a treatment decision for their child.[168] Realistically, this could be a husband and wife or a pair of siblings that must pursue judicial action against their own family.[169]

2. Title 3 Texas Estates Code: Guardianship and Related Procedures

When an individual is faced with an immediate health emergency, an option for a person who has lost capacity to make their own medical decisions is to have a temporary guardian

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[160] *Shea*, supra note 113.
[161] *Id.*
[162] *See id.*
[163] *See id*.
[164] TEX. HEALTH AND SAFETY CODE ANN. § 313.004(b).
[165] TEX. HEALTH AND SAFETY CODE ANN. § 166.039(g).
[166] TEX. HEALTH AND SAFETY CODE ANN. § 313.004(b); TEX. HEALTH AND SAFETY CODE ANN. § 166.039(g).
[167] TEX. EST. CODE tit. 3.
[168] *See* TEX. HEALTH AND SAFETY CODE ANN. § 313.004; *See also* TEX. HEALTH AND SAFETY CODE ANN. § 166.039.
[169] *See* TEX. HEALTH AND SAFETY CODE ANN. § 313.004; *See also* TEX. HEALTH AND SAFETY CODE ANN. § 166.039.

appointed by the court.[170] The process of appointing or petitioning for a guardianship in Texas is governed by Title 3 of the Texas Estates Code.[171] These guardianships are appointed on an as-needed basis and to protect and promote the well-being of an incapacitated individual.[172] A court may appoint a temporary guardian when it is provided with substantial evidence that an individual may be an incapacitated person and has probable cause that the immediate appointment of a guardian is necessary.[173]

To become the guardian of an individual a person must first file a written application in a court with proper jurisdiction and venue, including information about the potential guardian's relationship to the incapacitated and their interest in becoming the guardian.[174] This will include facts that show the imminent danger to the individual that deems a guardianship necessary.[175] The court will then set a date for a hearing.[176] In the case that more than one person qualifies to act as guardian of the person, the court must decide who is the best choice.[177]

The court will appoint a guardian if the court determines that "the applicant has established that there is substantial evidence that the proposed ward is an incapacitated person, that there is imminent danger that the proposed ward is an incapacitated person, [and] that there is imminent danger that the proposed ward's physical health or safety will be seriously impaired[.]"[178] However, other parties are permitted to object to a proposed guardianship during the hearing.[179] When more than one party petitions the court to act as guardian, a trial before a judge may become necessary.[180]

III. JUDICIAL RECOURSE IS NOT A SUFFICIENT SOLUTION FOR DISAGREEING EQUAL PRIORITY SURROGATES

A. The Impracticalities and Ethical Issues of Judicial Recourse

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[170] Catherine H. Goodan & R. Dyann McCully, *Extraordinary Remedies in Guardianships*, 7 TEX. TECH EST. PLAN COM. PROP. LJ 159, 161 (2014).
[171] *Id.*
[172] *What is the Difference Between Permanent and Temporary Guardianships in Texas?,* KRUPA DOWNS LAW HTTPS://WWW.KRUPADOWNSLAW.COM/DIFFERENCE-BETWEEN-PERMANENT-AND-TEMPORARY-GUARDIANSHIPS-IN-TEXAS/#:~:TEXT=IF%20THERE%20IS%20NO%20IMMEDIATE,PERMANENT%20GUARDIANSHIP%20DURING%20THIS%20TIME., (last visited Dec. 15, 2023); TEX. EST. CODE ANN. tit. 3, § 1001.001(a).
[173] TEX. EST. CODE ANN. tit. 3, § 1251.001.
[174] V.T.C.A., Estates Code § 1101.001.
[175] *Id.*
[176] *Id.*
[177] Keith Morris, *Frequently Asked Questions about Guardianships in Texas*, KEITH MORRIS ATTORNEY AT LAW (https://www.texas-probate-attorney.net/our-services/guardianship-litigation-administration/guardianship-faqs/ (last visited Dec. 15, 2023).
[178] Tex. Est. Code tit. 3, § 1251.001.
[179] *Who is Permitted to Object to a Guardianship by Law?*, THE LAW OFFICE OF SOHEILA AZIZI & ASSOCIATES (Mar. 20, 2017), https://www.azizilaw.com/object-guardianship-law/.
[180] *Id.*

The process of creating a guardianship in Texas is far more work than it would be to draft an advance directive or appoint a medical power of attorney while competent, and it is far more expensive, time consuming, and straining on familial harmony.[181] Consequently, when a patient requires urgent medical decisions and equal priority surrogate decision-makers cannot come to a consensus, judicial recourse is not a practical nor ethical solution for selecting this individual.[182] Petitioning the court for a guardianship can take weeks or months to resolve, which in the case of life or death healthcare decisions is simply not feasible.[183] Further, it is estimated that the cost of obtaining a guardianship in Texas can range anywhere from $2,000 to $5,000, depending on the complexity of the case at hand.[184]

There is little that the legal system can do to help solve the emotional pain and suffering of families in these situations, and this is by far not the ideal method to deal with these disputes.[185] The fate of a patient's medical decisions or life is essentially left in the hands of a trial court judge who must decide who is the best guardian for the patient.[186] Even when presented with evidence about who may be best suited, a judge does not know the intricacies of the relationships between the parties and the incapacitated patient and may not make the decision truly in the best interest of the patient.[187] Most courts allow these decisions to be made with little to no evidence of what the patient would truly want for their care.[188] Turning to courts in these situations is considered to be an avenue of last resort in this type of situation when family members cannot agree on treatment for a loved one, as a court's appointment of a guardian can ultimately be objected to, leading to even more litigation that will be both time and money consuming.[189] Further, if one party has the resources to obtain effective counsel to assist them in this process, this party will likely prevail over one that cannot and is forced to represent themselves in the proceeding, lacking the legal knowledge to help them be successful.[190]

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[181] *See* Chris Peterson, *Guardianships in Texas: What to Know*, PETERSON LAW GROUP (Apr. 27, 2021), https://www.brazoslawyers.com/guardianships-in-texas-what-to-know.
[182] *See* Shea, *supra* note 113.
[183] *Id.*
[184] Legal Guardianship for Young Adults with Disabilities, NAVIGATE LIFE TEXAS, https://www.navigatelifetexas.org/en/transition-to-adulthood/legal-guardianship-for-young-adults-with-disabilities-1#:~:text=Lawyer%20and%20court%20costs%20are,applications%20at%20a%20reduced%20cost. (last visited Jan. 2, 2024).
[185] Michael P. Allen, *Life, Death, and Advocacy: Rules of Procedure in the Contested End-of-Life Case*, 34 STETSON L. REV. 55, 56 (2004).
[186] *See Id.*
[187] *See id*.
[188] Rich, *supra* note 48.
[189] Anthony Moccia, *What Happens if My Sibling and I Disagree about Medical Treatment for My Father?*, ESTATE, TRUST PLANNING & ELDER LAW INFORMATION CENTER, (Nov. 5, 2019) https://www.kobricklaw.com/what-happens-if-my-sibling-and-i-disagree-about-medical-treatment-for-my-father/#:~:text=If%20all%20else%20fails%2C%20you,will%20give%20you%20that%20authority.
[190] *See id.*

B. Other State's Surrogate Decision-Maker Statutes

Currently, forty-six states have enacted some form of default surrogate decision-maker statutes.[191] A majority of these statutes offer some type of solution for when a patient's equal priority surrogate decision-makers do not agree on course of treatment.[192] Aside from Texas, six other states including Alabama, Arkansas, California, Connecticut, Montana, and New York similarly only provide judicial recourse as a remedy, which will lead the surrogates to court to resolve the matter.[193] Twenty-three states have some sort of provision in their surrogate decision-maker statutes which state that a majority of the disagreeing class will rule in the case of disagreement, however the details of these provisions vary by state.[194] Additionally, six states provide no process for disagreement among equal priority surrogate decision-makers whatsoever.[195]

Although the majority rule is a widely utilized option and this option provides at least some form of remedy, these majority rule provisions still leave a large gap for situations where there are an even number of people disagreeing and there is no majority, leaving them stuck with judicial recourse as their only option.[196] So, even though it appears the states have a disagreement process in place, this practically may accomplish nothing when there is an equal disagreement.[197] As a majority rule is not the ideal solution, there are several states that provide an even more detailed provision for what should happen in the case of equal priority surrogate decision-makers unable to decide on a course of treatment.[198]

1. Disqualification of Parties

In 2018, Nebraska updated its surrogate decision-maker statute to include a provision detailing how disagreements between a class of surrogates should be resolved.[199] This language is codified in the Nebraska Revised Statutes Section 30-604.[200] Like Texas, Nebraska's statute provides a priority order including the patient's spouse, adult children, parents, and other close relatives.[201] However, the statute also includes several subsections providing a roadmap for what to do when equal priority surrogates disagree.[202] The first step in this process provides that these individuals shall confer with each other regarding the individual's known personal values, religious beliefs, and best interests, and consult with the primary healthcare provider about the nature of the

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[191] Arias, *supra* note 94.
[192] *Id.*
[193] *Default Surrogate Consent Statutes*, ABA (Oct. 2022), https://www.americanbar.org/content/dam/aba/administrative/law_aging/2019-sept-default-surrogate-consent-statutes.pdf.
[194] *Id.*
[195] *Id.*
[196] *See id.*
[197] *See id.*
[198] *See infra* Section III.B.1-3.
[199] Arias, *supra* note 94.
[200] NEB. REV. STAT. § 30-604.
[201] *Id.* § (2)(b)(i-iv).
[202] *Id.* § (5)(b)(i-iv).

disagreement.[203] Next, the healthcare provider may convene a meeting with themselves, the equal priority surrogates, and other health care personnel as needed for a discussion on the patient's condition, prognosis, and options for treatment to help resolve the disagreement.[204] When these options are exhausted, if persons in the same class of priority cannot come to an agreement on treatment, the Nebraska statute states these individuals shall be disqualified from making healthcare decisions for the patient, according to the follow guidelines:

> If a consensus about the health care decisions cannot be attained between the persons of the same class of priority claiming authority to act as the individual's surrogate to enable a timely decision to be made on behalf of the individual, then such persons shall be deemed disqualified to make health care decisions on behalf of the individual. The primary health care provider may then confer with other persons in the same class or within the other classes of lower priority consistent with subsection (2) of this section who may be reasonably available to make health care decisions on behalf of the individual.[205]

After disqualification, this decision will go to those falling in the next level of priority provided in the surrogate hierarchy, and the original surrogates will be unable to contribute to the decision.[206]

There are both pros and cons to this solution; disqualification may or may not be in the best interest of the interested parties or the patient.[207] While this may seem like a rather harsh solution, it is a last resort after several attempts to encourage agreement that can help to move the decision-making process along.[208] Although this is an efficient way to quickly reach a decision, it may disqualify a party that is the potential surrogate who truly knows the patient's wishes the best.[209] For example, suppose an unmarried man has two children, one of whom he had discussed his with medical preferences with, and deceased parents.[210] If the siblings cannot agree, the man's medical decisions would potentially be put in the hands of a lower priority class member, even though the one child knew specifically what the patient wanted.[211]

2. Recommendation to a Third Party

Several states including Alaska, Maryland, Delaware, and Maine include a provision codified in their surrogate decision maker statutes that offers a solution to disagreements involving deference of the decision to some manner of third party.[212] In some instances, this third party's decision may be binding on the patient's care if the surrogates are not able to come to a consensus,

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[203] *Id*.
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *See id.*
[208] *See id.*
[209] *See id*.
[210] *See id*.; Author's original hypothetical.
[211] Author's original hypothetical; NEB. REV. STAT. § 30-604(5)(b)(i-iv).
[212] MD. HEALTH-GENERAL CODE ANN.; § 5-605; DEL. CODE ANN. 16 § 2501.

or it may simply act as a tool to encourage the parties to come to an agreement.[213] This option is a way to provide the surrogates with an opinion provided by a party outside of their own group that the surrogates may be more adaptable to.[214]

a. Alaska's Surrogate Decision Maker Statute

Alaska is one of the few states that provides a recourse in the event that (1) there is disagreement among surrogates, and (2) a majority would rule, but there is no majority due to an evenly divided class.[215] Unlike most majority rule states, which direct the parties to judicial recourse, this statute provides the following:

> If more than one member of a class under (c)(2)-(4) of this section assumes authority to act as surrogate, the members of that class do not agree on a health care decision, and the super vising healthcare provider is informed of the disagreement, the supervising healthcare provider shall comply with a majority of the members of that class who have communicated their views to the provider. If the class is evenly divided concerning the health care decision and the supervising health care provider is informed of the even division, that class and all individuals having a lower priority under (c)(2)-(4) of this section are disqualified from making the decision, and the primary physician, after consulting with all individuals in that evenly divided class who are reasonably available, shall make a decision based on the consultation and the primary physician's own determination of the best interest of the patient.[216]

This statute is unique in that it allows for the physician to take over the role of the surrogate decision-makers when a group of surrogates is unable to come to an agreement on a patient's treatment.[217] This may be an effective solution when a decision needs to be made quickly, however, it is likely this is an option that neither the family nor the patient would be happy with.[218] However, when a decision needs to be made, it is possible that this may be the most efficient option to ultimately achieve the best interests of the patient.[219]

b. Maryland and Delaware's Surrogate Decision-Maker Statutes

Maryland and Delaware have virtually identical statutes regarding disagreements among equal level surrogates.[220] Under these surrogate decision-maker statutes, Delaware Code Annotated Section 5-605(b)(1) and Maryland Health General Code Annotated Section 5-

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[213] MD. HEALTH-GENERAL CODE ANN.; § 5-605; DEL. CODE ANN. 16 § 2501.
[214] MD. HEALTH-GENERAL CODE ANN.; § 5-605; DEL. CODE ANN. 16 § 2501.
[215] ALASKA STAT. § 13.52.030(f).
[216] *Id.*
[217] *See id.*
[218] *See id.*
[219] *See id.*
[220] MD. HEALTH-GENERAL CODE ANN.; § 5-605; DEL. CODE ANN. 16 § 2501.

607(b)(9), when there is disagreement among equal level surrogates the attending physician is to refer the case to the institution's patient care advisory committee, or other appropriate committee within the healthcare institution for a recommendation, and the attending physician may act in accordance with the recommendation of the committee.[221] The statutes, maintaining essentially identical language, state:

> If persons with equal decision making priority under subsection (a) of this section disagree about a health care decision, and a person who is incapable of making an informed decision is receiving care in a hospital or related institution, the attending physician or an individual specified in subsection (a) of this section shall refer the case to the institutions patient care advisory committee and may act in accordance with the recommendation of the committee.[222]

The statutes continue to provide that "a physician who acts in accordance with the recommendation of the committee is not subject to civil or criminal liability or to discipline for unprofessional conduct for any claim based on lack of consent or authorization for the action."[223] Therefore, with this option, the decision of the hospital's committee is not binding on the patient, but the physician has the option to follow it without consequence, and the surrogates cannot intervene.[224]

There are also advantages and disadvantages with this approach.[225] Referring the case to an unbiased advisory committee may result in a treatment option that is in the best interest of the patient medically speaking.[226] This could be a productive way to present the disagreeing surrogates with a neutral solution they may be more amenable to.[227] However, of course, this advisory committee of strangers does not know the wishes of the patient when making their decision, like the surrogates possibly do.[228] In the case that a physician follows the order of the advisory committee against the wishes of the surrogates, this decision may end up being contrary to what the patient may have wanted for themselves.[229]

c. Maine's Surrogate Decision-Maker Statute

Maine's surrogate decision maker statute, codified in the Maine Revised Statutes, offers a provision that states that when equal level surrogates disagree, the healthcare provider may refer the classes to a neutral third party for assistance resolving the dispute before more extreme action

[221] MD. HEALTH-GENERAL CODE ANN.; § 5-605; DEL. CODE ANN. 16 § 2501.
[222] MD. HEALTH-GENERAL CODE ANN.; § 5-605; DEL. CODE ANN. 16 § 2501.
[223] MD. HEALTH-GENERAL CODE ANN.; § 5-605(b)(1); DEL. CODE ANN. 16 § 2510.
[224] MD. HEALTH-GENERAL CODE ANN.; § 5-605(b)(1); DEL. CODE ANN. 16 § 2510.
[225] *See* MD. HEALTH-GENERAL CODE ANN.; *See* § 5-605; DEL. CODE ANN. 16 § 2501.
[226] *See* MD. HEALTH-GENERAL CODE ANN.; *See* § 5-605; DEL. CODE ANN. 16 § 2501.
[227] *See* MD. HEALTH-GENERAL CODE ANN.; *See* § 5-605; DEL. CODE ANN. 16 § 2501.
[228] *See* MD. HEALTH-GENERAL CODE ANN.; *See also* § 5-605; DEL. CODE ANN. 16 § 2501.
[229] *See* MD. HEALTH-GENERAL CODE ANN.; *See also* § 5-605; DEL. CODE ANN. 16 § 2501.

is taken.[230] This differs slightly from that of Maryland and Delaware, as the statute does not specify that this third party should be a healthcare advisory committee.[231] The statute reads as follows:

> If more than one member of a class assumes authority to act as surrogate and they, or members of a different classes who are reasonably available, do not agree on a health care decision and the supervising health care provider is so informed, the supervising health care provider may … refer the members of the class or classes to a neutral 3rd party for assistance in resolving the dispute[.][232]

The language of this statute appears to lean towards a mediation or arbitration approach.[233] This approach may be beneficial to parties who are more willing to compromise and are not as set in their positions.[234] Arbitration or mediation may be an extremely helpful option if the parties are willing to participate, as this could be binding on the parties if so agreed.[235] However, similar to the statutes of Maryland and Delaware, this is not an option that the parties are bound to exercise, which unfortunately may leave those in a strong disagreement still left to turn to a court for resolution.[236]

3. Determination of the Person Best Qualified

Possibly the most unique surrogate decision maker statute has been adopted in two states: Tennessee and West Virginia.[237] These statutes include provisions in their surrogate decision-maker statutes that essentially remove the possibility for disagreements altogether by including guidelines for physicians to choose who will be the best person to act as the surrogate.[238]

Both Tennessee and West Virginia's surrogate decision maker statutes are unique in that once the physician determines the patient lacks a medical power of attorney or guardian, and finds there are multiple surrogate decision makers that fall within the same priority level, the attending or advanced nurse practitioner has the authority to select the surrogate they believe is best qualified.[239] In this instance, the physician must make a reasonable inquiry into who appears to be best qualified based on the following criteria:

> (A) Whether the proposed surrogate reasonably appears to be better able to make decisions either in accordance with the known wishes of the person or in accordance with the person's best interests;
> (B) The proposed surrogate's regular contact with the person prior to and during the incapacitating illness,

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[230] ME. REV. STAT. ANN. tit. 18-C, § 5-806(5).
[231] *Id.*
[232] *Id.*
[233] *See id*.
[234] *See id.*
[235] *See id.*
[236] *See id.*
[237] W. VA. CODE ANN. § 16-30-8(b)(1)(A-E); TENN. CODE ANN. § 68-11-1806(c)(4)(A-E).
[238] W. VA. CODE ANN. § 16-30-8(b)(1)(A-E); TENN. CODE ANN. § 68-11-1806(c)(4)(A-E).
[239] W. VA. CODE ANN. § 16-30-8 (b)(1)(A-E); TENN. CODE ANN. § 68-11-1806(c)(4)(A-E).

> (C) The proposed surrogate's demonstrated care and concern;
> (D) The proposed surrogate's availability to visit the incapacitated person during his or her illness; and
> (E) The proposed surrogate's availability to engage in face-to-face contact with health care providers for the purpose of fully participating in the decision-making process.[240]

This criterion is used for the physician to select the best qualified surrogate in the case there are multiple possible surrogate decision makers at the same priority level.[241] However, there is one notable difference between these statutes: West Virginia's surrogate decision maker statue allows the physician to select a surrogate of a lower ranked priority, while Tennessee's does not.[242] This language of the West Virginia statute provides the following: "The attending physician or the advanced nurse practitioner may select a proposed surrogate who is ranked lower in priority if, in his or her judgment, that individual is best qualified, as described in this section, to serve as the incapacitated person's surrogate."[243] The physician may use the same criteria provided above to determine if they feel a lower-ranked individual is the better qualified over the higher-ranked surrogates.[244] Allowing an individual of a lower priority level to act as the patient's surrogate because the physician deems them better qualified is unique to all other states.[245]

Not unlike the statutes of other states, this solution has its own set of strengths and weaknesses.[246] This method allows the physician to quickly choose a surrogate for an incapacitated patient, which is important when urgent medical decisions need to be made.[247] However, it may be difficult for a physician to decide who is best fit to make the patient's medical decisions based on the criteria provided when they aren't as familiar with the individuals of the group and their relationships.[248] Many patients and families may be uncomfortable with a physician making this type of decision for their family.[249]

It is also important to note that it is unclear what exactly constitutes a "reasonable inquiry" into who appears to be best qualified, as there is no further description of how the physician should conduct this other than the criteria provided.[250] It is possible that the statutes should provide a clear guideline as to exactly how the physician should perform this reasonable inquiry, whether that be through affidavits or through notes that the

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[240] W. VA. CODE ANN. § 16-30-1-25 (b)(1)(A-E); TENN. CODE ANN. § 68-11-1806(c)(4)(A-E).
[241] W. VA. CODE ANN. § 16-30-1-25 (b)(1)(A-E); TENN. CODE ANN. § 68-11-1806(c)(4)(A-E).
[242] W. VA. CODE ANN. § 16-30-1-25 (b)(1)(A-E); TENN. CODE ANN. § 68-11-1806(c)(4)(A-E).
[243] W. VA. CODE ANN. § 16-30-1-25 (b)(1)(A-E).
[244] *See id.*
[245] *See id*. § (b)(2).
[246] *See id*. (b)(1)(A-E); *see also* TENN. CODE ANN. § 68-11-1806(c)(4)(A-E).
[247] *See* W. VA. CODE ANN. § 16-30-1-25 (b)(1)(A-E); *see also* TENN. CODE ANN. § 68-11-1806(c)(4)(A-E).
[248] *See* W. VA. CODE ANN. § 16-30-1-25 (b)(1)(A-E); *see also* TENN. CODE ANN. § 68-11-1806(c)(4)(A-E).
[249] *See* W. VA. CODE ANN. § 16-30-1-25 (b)(1)(A-E); *see also* TENN. CODE ANN. § 68-11-1806(c)(4)(A-E).
[250] *See* W. VA. CODE ANN. § 16-30-1-25 (b)(1)(A-E); *see also* TENN. CODE ANN. § 68-11-1806(c)(4)(A-E).

physician logs through the course of their interactions with the potential surrogates.[251] This way, this information would be available for review to anyone who wished to review the physician's decision.[252]

C. Proposed Amendment to Texas Health and Safety Code Sections 313.004 and 166.039

Texas Health and Safety Code Sections 313.004 and 166.039 require amendment to support equal priority surrogate decision-makers that cannot come to an agreement while making difficult medical decisions for their loved ones.[253] The amendments to the Health and Safety Code should include a combination of the language of other states' surrogate decision-maker statutes that have already chosen to provide a remedy for these situations and leave less holes that may produce ambiguities or confusion.[254] Multiple provisions should be added by the Texas Legislature in order to achieve this goal.[255] This amendment should practically look like a list of options for the primary healthcare provider to follow chronologically after recognizing that a disagreement is afoot.[256]

The first amendment to Texas's surrogate decision-maker statutes should include a revision to sections 313.004(c) and 166.039(c) regarding the standard for how medical decisions should be made for an incapacitated patient and who is proper to make them.[257] As previously mentioned, Sections 313.004(c) and 166.039(c) both provide that the treatment decision must be made based on knowledge of what the patient would desire, if this information is known.[258] Unlike that of other states, this approach provides no real standard for who may properly act as a surrogate or any standard for which the surrogate or surrogates should make decisions for the patient.[259] This lack of criteria in the Texas statutes could make it possible for a patient to be left with a surrogate decision maker they are estranged from or have not maintained regular contact with.[260] In order to better fit with the remaining proposed language, these sections should be amended to reflect a combination of Nebraska and Delaware's surrogate decision-maker statutes.[261] This section should read as follows, stating that the surrogate decision-maker should be:

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[251] *See* W. VA. CODE ANN. § 16-30-1-25 (b)(1)(A-E); *see also* TENN. CODE ANN. § 68-11-1806(c)(4)(A-E).
[252] *See* W. VA. CODE ANN. § 16-30-1-25 (b)(1)(A-E); *see also* TENN. CODE ANN. § 68-11-1806(c)(4)(A-E).
[253] Author's original proposal.
[254] *Id*.
[255] *Id.*
[256] *Id.*
[257] *Id.*; TEX. HEALTH AND SAFETY CODE ANN. § 313.004(c); TEX. CODE AND SAFETY CODE ANN. § 166.039(c).
[258] Author's original proposal; TEX. HEALTH AND SAFETY CODE ANN. § 313.004(c); TEX. CODE AND SAFETY CODE ANN. § 166.039(c).
[259] *See* TEX. HEALTH AND SAFETY CODE ANN. § 313.004(c); *See also* TEX. CODE AND SAFETY CODE ANN. § 166.039(c).
[260] *See* TEX. HEALTH AND SAFETY CODE ANN. § 313.004(c); *see also* TEX. CODE AND SAFETY CODE ANN. § 166.039(c).
[261] Author's original proposal.

> (1) A person who has exhibited special care and concern for the individual, who is familiar with the individual's personal values, and who is reasonably available to act as a surrogate is eligible to act as a surrogate under subsection (2) of this section. If there is a dispute as to this fact, the physician may request an affidavit providing specific facts demonstrating the proposed surrogate has maintained regular contact with the patient and is familiar with the patient's health and personal beliefs.
> (2)(i)The surrogate shall make a health-care decision to treat, withdraw, or withhold treatment in accordance with the patient's instructions, if any, and other wishes known by the surrogate.
> (ii) If the patient's instructions or wishes are not known or applicable, the surrogate shall make a decision that conforms as closely as possible with what the patient would have done or intended under the circumstances, taking into account the following factors if applicable:
> A) The patient's personal, philosophical, religious, and ethical values;
> B) The patient's likelihood of regaining decision-making capacity;
> C) The patient's likelihood of death;
> D) The treatments burdens on and benefits to the patient;
> E) Reliable oral or written statements previously made by the patient, including, but not limited to, statements made to family members, friends, health care providers, or religious leaders.[262]

This amendment to Sections 313.004(c) and 166.039(c) is important to include because this process may eliminate a person in a particular class, eradicating the possibility of potential disagreement in the first place.[263] With the first section of this proposed amendment in place, it avoids the possibility of a family member who may be highest on the hierarchical surrogate model making medical decisions for a patient who they are not familiar with and have not maintained regular contact with.[264] By forcing the potential surrogate to show that they are familiar with the patient and they have maintained regular contact with them, there is a better chance of eliminating improper surrogates from making decisions when they are not equipped with the information to do so.[265]

The second section of this proposed language is important to add to the current Texas statute, as this amendment will provide a guideline for the surrogate when they do not have the black and white information about what exactly the patient wanted and allows them to consider several factors about the patient and make the decision holistically.[266] This is a far more productive solution to this issue as opposed instructing the surrogate to simply follow the patient's preference if they know it.[267]

The second amendment to Texas Health and Safety Code Sections 313.004 and 166.039 should include adding a provision that would model subsection 5(b)(i-ii) of Nebraska's surrogate

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[262] *Id.*; NEB. REV. STAT. § 30-604(3); DEL. CODE ANN. 16 § 2507(b)(8).
[263] *Id.*; *See* NEB. REV. STAT. § 30-604(3); *See also* DEL. CODE ANN. 16 § 2507(b)(8).
[264] Author's original proposal.
[265] *Id.*
[266] *Id.*
[267] *Id.*

decision-maker statute.[268] This language would provide, as a first option, that the disagreeing surrogates shall consult with a third party or parties within the hospital that may include physicians and other healthcare workers that are familiar with the patient's case.[269] The language of this provision could be similar to the following example:

> If two or more equal priority surrogate decision makers are not in agreement on treatment for the individual, the primary health care provider may convene a meeting including the disagreeing members, the primary health care provider, and other health care personnel that are involved and familiar with the patient's condition. The parties shall discuss the patient's condition, prognosis, and options for treatment, taking into account the individual's known desires, religious beliefs, and best interests for the purpose of the surrogates coming to an agreement.[270]

The purpose of this provision is to incentivize agreement by bringing in a neutral third party to provide their opinion on the case at hand.[271] Although this option in no way forces the parties to decide on a treatment decision, it may be helpful for the parties to hear an outside opinion on the case.[272] This first option will hopefully promote harmony for the disagreeing surrogates in a non-binding, low pressure manner that helps inform the parties of the facts and options.[273] This option would likely be more helpful for a group that is unsure about the proper treatment option and perhaps feels as though they need more information, as opposed to a group who is set in their contrasting opinions.[274]

Another subsection should follow, acting as the next step in the chronological process a physician should follow.[275] This amendment should include language that models that of Maryland and Delaware's surrogate decision-maker statutes.[276] This amendment should include language that instructs the primary healthcare provider to a refer the case to the institution's patient care advisory committee for recommendation.[277] This recommendation will not be binding on the patient's care, but act as a vehicle to promote a consensus.[278] The language of this amendment might look similar to the following:

> If, after following the instructions of (the prior subsection), equal surrogates are still not in agreement on course of treatment, the primary health provider shall refer the case to the institution's patient care advisory committee (or the institution's

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[268] *Id.*; NEB. REV. STAT. § 30-604(5)(b)(i-ii).
[269] Author's original proposal; NEB. REV. STAT. § 30-604(5)(b)(i-ii).
[270] *Id.*; NEB. REV. STAT. § 30-604(5)(b)(i-ii).
[271] Author's original proposal; NEB. REV. STAT. § 30-604(5)(b)(i-ii).
[272] Author's original proposal; NEB. REV. STAT. § 30-604(5)(b)(i-ii).
[273] Author's original proposal.
[274] *Id*.
[275] *Id*.
[276] *Id*.; MD. HEALTH-GENERAL CODE ANN.; § 5-605; DEL. CODE ANN. 16 § 2507(9).
[277] Author's original proposal; MD. HEALTH-GENERAL CODE ANN.; § 5-605; DEL. CODE ANN. 16 § 2507(9).
[278] Author's original proposal; MD. HEALTH-GENERAL CODE ANN.; § 5-605; DEL. CODE ANN. 16 § 2507(9).

> functional equivalent) for recommendation on treatment and relay their recommendation to the equal-level surrogates, which they may accept as the course of treatment for the patient.[279]

The hope is that the surrogates will accept the hospital's recommendation as the best course of treatment for the patient.[280] When the surrogates hear the recommendation from a panel of qualified individuals, this will hopefully encourage them to see that this course of treatment might truly be what is best for the patient and be able to put their personal opinions aside.[281] Although this recommendation would not be binding on the patient's care, it will act as a final vehicle to promote agreement prior to the fourth and final proposed amendment, where an individual is singled out as the sole decision-maker.[282]

The final amendment to Texas Health and Safety Code Sections 313.004 and 166.039 should model that of West Virginia and Tennessee's surrogate decision-maker statutes.[283] If, after exhausting both options suggested above, the surrogates are still in disagreement on course of treatment, Texas's surrogate decision-maker statutes shall be amended to allow the primary health provider to select the surrogate best qualified to act as the sole decision-maker.[284] The proposed language should also include that the physician has authority to select a lower-ranked surrogate if they feel this person is better qualified after their inquiry.[285] This will differ from that of West Virginia and Tennessee in that this option will only be exercised if the surrogates are in disagreement and the prior proposed options were already attempted and failed.[286] This option should be one of last resort, as it would be preferred for the surrogates to come to some kind of agreement without excluding someone from the decision.[287] The language of the final amendment should read as follows:

> (1) If, after exhausting the previous options, the equal level surrogates are still not in agreement on course of treatment for the patient, the primary healthcare provider shall make a reasonable inquiry as to which of the surrogates is the best qualified to make healthcare decisions for the incapacitated individual. The physician shall make this determination based on the following criteria:
> (A) Whether the proposed surrogate reasonably appears to be better able to make decisions either in accordance with the known wishes of the person or in accordance with the person's best interests;
> (B) The proposed surrogate's regular contact with the person prior to and during the incapacitating illness or injury,

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[279] Author's original proposal; MD. HEALTH-GENERAL CODE ANN.; § 5-605; DEL. CODE ANN. 16 § 2507(9).
[280] Author's original proposal.
[281] *Id*.
[282] *Id*.
[283] *Id.*; W. VA. CODE ANN. § 16-30-1-25(b)(1)(A-E); TENN. CODE ANN. § 68-11-1806(c)(4)(A-E).
[284] Author's original proposal.
[285] *Id*.; W. VA. CODE ANN. § 16-30-1-25(b)(2); TENN. CODE ANN. § 68-11-1806(c)(4)(A-E).
[286] Author's original proposal; W. VA. CODE ANN. § 16-30-1-25 (b)(1)(A-E); TENN. CODE ANN. § 68-11-1806(c)(4)(A-E).
[287] Author's original proposal.

> (C) The proposed surrogate's demonstrated care and concern;
> (D) The proposed surrogate's availability to visit the incapacitated person during his or her illness; and
> (E) The proposed surrogate's availability to engage in face-to-face contact with healthcare providers for the purpose of fully participating in the decision-making process.
> (2) The attending physician or the advanced nurse practitioner may select a proposed surrogate who is ranked lower in priority if, in his or her judgment, that individual is best qualified, as described in this section, to serve as the incapacitated person's surrogate. The attending physician or the advanced nurse practitioner shall document in the incapacitated person's medical records his or her reasons for selecting a surrogate in exception to the priority order provided in subsection (a) of this section.[288]

The physician, during the time they spend caring for the patient, will hopefully be able to gather an understanding of who may be best suited to make decisions, based on the practical issues that come with being a surrogate decision-maker such as work schedules, availability, and knowledge of the patient's wishes.[289] There is reasonable concern that allowing the physician to select who they deem best fit to make medical decisions may not be practical if the physician does not spend a lot of time with the patient and family and a decision must be made quickly.[290] However, when parties have already received a second opinion from two different sources and still cannot agree, there should be a way to expedite the decision-making process that does not involve going to the court.[291]

Additionally, the physician should potentially be required to document what they have observed of the potential surrogates which led them to the decision they made, to be preserved as evidence of their decision if a party chose to challenge the decision.[292] This is a requirement that is lacking from the surrogate decision-maker statutes of West Virginia and Tennessee, but very important to maintain the integrity of the process.[293] The second section authorizing the physician to select a surrogate of lower priority is important to include because the physician might find that such a person is the one who best fits the criteria provided and could make a decision in the best interest of the patient.[294] It should be necessary to consider whether an individual ranked lower on the surrogate hierarchy may be better suited to make a patient's medical decisions in the case they are more familiar with the patient's desires and beliefs.[295] Many families have dysfunctional relationships, and often times an individual may not have a close relationship with their parent, or

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[288] Author's original proposal; W. VA. CODE ANN. § 16-30-1-25 (b)(1)(A-E); TENN. CODE ANN. § 68-11-1806(c)(4)(A-E).
[289] Author's original proposal.
[290] *Id*.
[291] *Id*.
[292] *Id.*
[293] *Id.; See* W. VA. CODE ANN. § 16-30-1-25 (b)(1)(A-E); *See also* TENN. CODE ANN. § 68-11-1806(c)(4)(A-E).
[294] Author's original proposal; *See* W. VA. CODE ANN. § 16-30-1-25 (b)(2).
[295] Author's original proposal.

adult child, or sibling, and this person may not be the best fit to make the patient's medical decisions.[296]

An important point to consider is an instance where the events leading up to the necessary medical decision occur quickly, leaving the physician with little time to no time to gather observations and make an informed decision.[297] In an ideal world, the physician would have the time to gather such information, but, in such a scenario, the physician should do their best to gather this information quickly and may make their notes after the fact, if necessary.[298] While this is not the ideal option, it is still one that is better suited for families who would like to refrain from seeking judicial recourse.[299]

Further, there is cause for reasonable concern that this proposed amendment does not solve the ethical dilemmas that come along with allowing an outside party, such as a physician or an advisory committee, to choose the proper surrogate for an incapacitated patient over a family member or other loved one.[300] It is understandable to be concerned the physician would not have the full picture when choosing the proper surrogate.[301] However, exhausting the proposed options prior to allowing a physician to select who they best see fit is still a far more just option for the involved parties than sending the case straight to the probate court.[302] With the proposed amendment, the physician will still be able to see first-hand which of the surrogates has been there with the patient, who is available when needed, and overall who is the proper option, without the waters becoming muddied by going to court and seeing who can afford the more strategic lawyer.[303] Additionally, if a person is concerned about the idea of a third party making this type of decision for them, they always have the option available to them to simply execute an advance directive or designate a medical power of attorney prior to incapacitation.[304]

It is important to address whether these efforts are futile, considering the possibility that the losing surrogate may simply challenge the selected surrogate in court after all the proposed amendment's required steps have been taken.[305] Many states, in addition to providing other solutions for disagreements, still require that someone who has good reason to challenge the decision of a surrogate may do so through judicial recourse.[306] Although this is a reasonable possibility, requiring the physician to follow these measures still promotes family harmony in a way that the original statutes fail to by automatically directing the parties to the court.[307] It is more than possible that through these efforts judicial recourse could be avoided by utilizing one of the several options in the proposed amendment, because the surrogates will be given several other opinions on the matter and opportunities to reconcile.[308]

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[296] *Id.*
[297] Author's original hypothetical.
[298] *Id.*
[299] *Id.*
[300] Author's original proposal.
[301] *Id.*
[302] *Id.*
[303] *Id.*
[304] *Id.*
[305] *Id.*
[306] *Id.*; DEL. CODE ANN. 16 § 2511(a)(1-3).
[307] Author's original proposal.
[308] *Id.*

What the legislature should ultimately consider is what is best for Texas, and what can be done to better promote a humanistic approach and family harmony?[309] The proposed amendment offered in this Comment offers an approach to this issue that encourages families and loved ones to work together, and discourages the possibility of litigation between people who are supposed to find a way to work together.[310] These proposed amendments to Texas's surrogate decision-maker statutes would allow families several options to exhaust when dealing with such a disagreement, which would hopefully result in a decision being made that everyone may agree with.[311] As medical decisions can be urgent in nature, these remedies – while not perfect – are far more practical and ethical than judicial recourse when dealing with an incapacitated patient.[312] The Texas Legislature should adopt this proposed amendment to both Sections 313.004 and 166.039 of the Texas Health and Safety Code in order to minimize the need to put already struggling families through more hardship by forcing them to go to the probate court to resolve a disagreement.[313]

IV. CONCLUSION

If this proposed amendment were in place, Steve's family and his physician would have a roadmap to help them make sense of these decisions through this understandably difficult time.[314] Following the priority order of Texas's surrogate decision-maker statute, the physician has already let Steve's children know that they have the statutory priority to make this decision.[315] It has now been two days since Steve's accident and the physician has let the family know his condition has deteriorated and it may be the appropriate time to withdraw treatment if they wish to do.[316] As provided in the original hypothetical, Steve's children, Carolyn and Adam, hold differing moral and religious views and do not agree on whether or not their father would want to be kept alive in this manner.[317] Adam reveals that his father had once mentioned to him that he never wanted to be kept alive by means of life-sustaining measures, but Carolyn's religious beliefs prevent her from accepting this possibility.[318] Adam is unwavering in his opinion that their father would not want to live in this way.[319]

After recognizing this, the physician considers the language of the proposed amendment to Sections 313.004(c) and 166.039(c), providing a heightened standard for who may make treatment decisions, which may uncover the possibility that one of the children is not found to be a proper surrogate to make medical decisions for Steve.[320] For example, Adam may let the physician know that Carolyn has not seen her father in several years, leading to the physician requesting affidavits

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[309] *Id*.
[310] *Id*.; *supra* Section III.C.
[311] Author's original proposal.
[312] *Id.*
[313] Author's original proposal.
[314] Author's original hypothetical.
[315] *Id*.
[316] *Id*.
[317] *Id*.
[318] *Id*.
[319] *Id.*
[320] *Id.*

from Carolyn and Adam with specific facts regarding their relationship with their father.[321] It may be revealed that Carolyn has not spoken to her father in years and is no longer familiar with his lifestyle or personal beliefs.[322] Thus, in such a case, it would not be proper for Carolyn to act as a surrogate for Steve and the decision would be for Adam to make.[323]

If this was not the case, and both Carolyn and Adam proved to be proper surrogates, the physician continues by following the language of the second proposed amendment by first convening a meeting with themself, Carolyn and Adam, and another physician who has been involved with Steve's care.[324] In this meeting, the group will discuss Steve's prognosis, options for treatment, and consider his known desires and best interests.[325] The physician hopes this will allow the group to come to a decision based on what the group explains is in Steve's best interest.[326] However, the siblings are still not in agreement on whether to withdraw the life-sustaining treatment after considering all the facts presented to them in this meeting.[327]

As Carolyn and Adam are still at a roadblock, the physician refers the case for a recommendation from the institution's patient care advisory committee.[328] At this hospital, this is a team of physicians.[329] This team explains to Steve's children the realities of his condition and the chances of recovery.[330] Carolyn, after hearing these facts from a neutral committee of physicians and understanding what his condition entails, decides she is willing to set aside her beliefs and accept the fact that this may not be what her father wants and withdrawing treatment may be in his best interest from a medical standpoint.[331]

This hypothetical has been just one example of the countless scenarios where potential surrogate decision-makers may be unable to come to an agreement on treatment for their loved one.[332] The implementation of the proposed amendment to Texas's surrogate decision-maker statutes would provide a clear guide for how to proceed when this scenario arises.[333] This Comment has explained the impracticalities of judicial recourse as the only option in Texas for these families struggling to come to a consensus and has provided a more ethical and practical solution that is best for Texas to help promote family harmony and encourage a humanistic approach.[334] Texas's surrogate decision-maker statutes, codified in Texas Health and Safety Code Sections 313.004 and 166.039, require amendment to prevent further difficulties for the loved ones of an incapacitated patient in an already difficult time.[335]

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[321] *Id.*
[322] *Id.*
[323] *Id.*
[324] *Id.*
[325] *Id.*
[326] *Id.*
[327] *Id.*
[328] *Id*.
[329] *Id*.
[330] *Id.*
[331] *Id*.
[332] *Id*.
[333] Author's original proposal.
[334] *Id*.
[335] *Id*.