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11
12 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **IN AND FOR THE COUNTY OF ALAMEDA**
14 **UNLIMITED CIVIL JURISDICTION**

15 **LATASHA WINKFIELD,**

16 Plaintiff,

17 v.

18 **CHILDREN'S HOSPITAL, et al.**

19 Defendants.

Case No.: PR13-707598

**WRIT OF ERROR CORUM NOBIS AND
MEMORANDUM REGARDING COURT'S
JURISDICTION TO HEAR PETITION FOR
DETERMINATION THAT JAHİ MCMATH
IS NOT BRAİN DEAD**

20
21
22 **INTRODUCTION**

23 Jahi McMath, by and through her Guardian Ad Litem and Mother, Nailah (Latasha) Winkfield,
24 hereby petitions this Court, pursuant to a Writ of Error Corum Nobis, to reverse the brain death
25 determination of Jahi McMath. In the alternative, Plaintiff pleads under the Court's inherent power to
26 affect the interests of justice, that the Court exercise its powers to affect a remedy where, as is here,
27 dramatic changes have occurred making the previous determination now erroneous.

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1 Petitioner could not have known of these conditions, i.e., unequivocal evidence of brain
2 existence and function, at the time the Court made its finding. Indeed, no one could as Jahi's brain,
3 according to Dr. Fischer, as confirmed by Cerebral Blood Flow Studies and an EEG (Petitioner's
4 attorney has requested these studies but has of yet received the raw data and images for the scientists
5 to review) at that time, appeared to have met the Brain Death Criteria. Moreover, in the history of the
6 State of California, and apparently the U.S., there has been no case where a supposedly brain dead
7 individual was ever removed not from a vent, but instead, from the facility that wanted to remove the
8 vent. There is but one other case, in the Middle-East, where a young woman, declared brain dead by a
9 host of U.S. doctors, was later examined and treated by the International Brain Research Foundation
10 and she was removed from the stigma of a brain death diagnosis, to an altered state of consciousness.

11 As can be seen from the Declaration of Christopher Dolan, and that of Phil De Fina PhD,
12 Plaintiff has acted with all due diligence (testing having been preformed less than one week ago) to
13 bring this matter before the Court. The interests of justice require the Court enter a New Judgement
14 finding that Jahi does not meet the criteria for brain death.

15 Petitioner supports this Petition with multiple Declarations from Board Certified experts in the
16 area of Brain Function and Brain Death. Plaintiff is publishing to the Court, and to the world, the
17 evidence which supports these conclusions, as well as a video depicting Jahi McMath following her
18 mother's command. Personal medical details are being revealed, without a wholesale waiver of Jahi's
19 Privacy Rights, to satisfy doubters and to allow others to evaluate the findings of the experts.

20 It should be noted that these are not Petitioner's experts, these are experts who have stepped
21 forward with an interest in brain research and out of a humanitarian gesture as medical professionals
22 dedicated to the care of patients such as Jahi McMath. No payment for expert opinions has been made
23 by Petitioner or her Attorney.

24 In the alternative Petitioner provides analysis as to why, using other, statutory mechanisms the
25 Court may exercise its jurisdiction in the interests of the furtherance of justice.

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1 **PETITIONER OBJECTS TO CHILDREN'S HOSPITAL**
2 **PARTICIPATING IN THESE HEARINGS THEY HAVE NO STANDING**

3 It is axiomatic that in order for a party to have standing as to come before the court to argue
4 for or against a proposition or motion, they must have standing, an actual interest in the instant
5 controversy. Children's Hospital has no such interest. Their standing during the time of the
6 Injunction Hearings, which played out before this Court in December and January of 2013-2014, was
7 based on the fact that Jahi McMath was within their hospital. Plaintiff sought an Injunction against
8 Children's Hospital removing Jahi's life support. Jahi was at that point characterized by Children's
9 Hospital as merely ventilating a dead body. Additionally, they opposed the Petitioner's efforts to seek
10 a Court Mandate that they care for Jahi as a living human being so as to provide her with basic
11 medical care such as food, insertion of a trachea tube, and other treatments which would have
12 provided Jahi with the best opportunity to improve her condition. Even though Jahi was preserved,
13 thankfully, by the injunction and its extension and finally the removal of Jahi from Children's Hospital
14 Oakland, Children's Hospital's interest in this case ended when Jahi's body was signed over to the
15 Coroner.

16 Other than seeking to be right at any cost to avoid some public embarrassment, and to avoid
17 potential liability for the harms caused to Jahi and her family (which could be greatly reduced if they
18 can continue to maintain the artifice of Jahi's death or to advance some agenda other than the specific
19 issues concerning Jahi McMath), Children's Hospital has no "dog in this fight" now.

20 Petitioner is not seeking to be re-admitted to Children's hospital, (indeed, far from it), she does
21 not seek to compel Children's Hospital to do anything. Instead, Petitioner and her daughter, Jahi, seek
22 mercy and justice from this Court to reverse an error that was unknown to anyone at the time of the
23 Court's Determination, that Jahi's "brain death" was a *complete and irreversible cessation of all*
24 *neurological function*, including at the Brain Stem. So, what justifiable rational does Children's have
25 to argue to keep the shroud of death surrounding Jahi? The Court should rule that Children's Hospital
26 has no standing in the matter.

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WRIT OF CORAM NOBIS'

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3 Petitioner's counsel, cross-eyed from researching for a case of a brain death person having
4 their death determination reversed, after days of study, can find no case like the one before the Court.
5 The rational is simple, this is because this has never been attempted or done before. The lack of case
6 law is not a reflection of the fact that no such remedy should be available to Jahi, under the law, it
7 reflects more on how our society has reacted to the pronouncement of brain death and the emergence
8 of protocols involving organ transplant that require prompt determination and rapid harvesting of
9 organs while the heart is pumping blood to the healthy organs. Transplantation is a vital and valuable
10 component to treating the sick in our society, indeed Petitioner's counsel is a registered organ donor. It
11 is not organ donation as a philosophy which has led to this dearth of evidence and case law, it is the
12 manner in which it must be executed so as to have maximum effect, quickly after brain death has been
13 determined.

14 Brain death is a concept that developed in the '80s when technology had gotten to the point
15 where the heart could still beat, yet doctors, needing legal, ethical, and moral authority through a
16 bright line determination, to determine when organs could be harvested. This led to the Uniform
17 Determination of Death Act in the 80's. The Uniform Determination of Death Act, stated that when
18 one is "brain dead" they no longer have an ability to regain *any* brain activity ever and this, combined
19 with a lack of sensation of pain, justifies organ harvesting. (The reader may find the term harvesting
20 to be offensive. This is the term used within the transplant community).

21 The writ of error coram nobis is issued to correct an error of law that is based upon some issue
22 of fact. *People v. Reid*, 195 Cal. 249; *People v. Darcy*, 79 Cal.App.2d 683; *People v. Dale*, 79
23 Cal.App.2d 370. Whatever may be said about the inception of the writ, the recognized present
24 purpose is to correct an error of fact which was unrecognized prior to the final disposition of
25 the proceeding. It is not intended as a means of revising findings based on known facts, or facts
26

27 ¹A most excellent law review article maybe found authored by Morgan Pickett The Writ of Error
28 Coram Nobis in California *Santa Cara Law Review* (1990) Volume 30, Number (hereinafter "*Pickett*").

1 that should have been known by the exercise of ordinary and reasonable diligence. *People v.*
2 *Reid*, supra; *People v. Mooney*, 178 Cal. 525; *People v. Cabrera*, 7 Cal.2d 11, *In re Paiva*, 31
3 Cal.2d 503. To correct an error of fact it is often necessary to modify a legal ruling, order,
4 judgment or decree, but it is the fact and not the law that is the subject of change.

5 (*In re Dyer* (1948, First App. Dist.)) 85 Cal.App.2d 394, 399.)
6

7 Where the errors are of “the most fundamental character,” such that the proceeding itself is
8 rendered “invalid,” the writ of coram nobis permits a court to vacate its judgments. *Hirabayashi v.*
9 *United States*, 828 F.2d 591, 604 (9th Cir.1987) (quoting *United States v. Mayer*, 235 U.S. 55, 69, 35
10 S.Ct. 16, 19–20, (1914)). Federal District courts have authority to issue the writ under the All Writs
11 Act, 28 U.S.C. 1651(a), and they review a denial of the writ *de novo* as if it were a dismissal of a claim
12 under 28 U.S.C. § 2255. *Walgren*, 885 F.2d at 1420. (*Estate of McKinney By and Through McKinney*
13 *v. U.S.* (9th Cir. 1995) 71 F.3d 779, 781.)

14 Repeatedly it has been said that the writ of error *coram nobis* is a limited writ aimed at
15 reaching errors of fact outside of the record and is available only where no other remedies exist. The
16 office of the writ is to bring to the attention of the trial court errors of fact, which, without negligence
17 on the part of the defendant, were not presented to the court at the time of trial. *People v. Tuthill*, 32
18 Cal.2d 819, 821; *People v. Gennaitte*, 127 Cal.App.2d 544, 548. (*People v. Gamboa* (1956) 144
19 Cal.App.2d 588, 590.)

20 The writ of error coram nobis may be used following judgment in a civil proceeding. In *Phelan*
21 *v. Tyler*, 64 Cal. 80, 82, 83 the Court upheld the use of the Writ in a civil proceeding. Hence a
22 proceeding for writ of error coram nobis constitutes a novel means of attacking a judgment. (*In re*
23 *Dyer* (1948) 85 Cal.App.2d 394, 400.)
24

25 Where an issue in fact has been decided, there is . . .no appeal in the English law from its
26 decision, . . . and its being wrongly decided is not error in that technical sense to which a writ
27 of error refers. So, if a matter of fact should exist, which was not brought into issue, but which,
28 if brought into issue, would have led to a different judgment, the existence of such fact does

1 not, after judgment, amount to error in the proceedings. . . . But there are certain facts which
2 affect the validity and regularity of the legal decision itself . . . Such facts as these, however late
3 discovered and alleged, are errors in fact, and sufficient to traverse the judgment upon writ of
4 error. To such cases the writ of error coram nobis applies; "because the error in fact is not the
5 error of the judges, and reversing it is not reversing their own judgment."²

6 The function of the Writ is to bring to the attention of a court errors of fact which could not
7 have been discovered by the petitioner at an earlier date, and which if known to the court at the time
8 would have prevented entry of the judgment. (*Pickett at p.15 citing e.g., People v. Shipman, (1965)*
9 *62 Cal. 2d 226, 230,; People v. Tuthill, (1948) 32 Cal. 2d 819, 821,; Reid, 195 Cal. at*
10 *255.*)

11 Neither Dr. Fischer, Petitioner, or even Children's Hospital could have known that an error had
12 been committed stating that all and irreversible brain death had occurred. As no patient has ever lived
13 this long before, (and Jahi is a pediatric patient) this fact could only have been and was just actually,
14 discovered in the last month. Petitioner has acted with all due haste (within 4 days).

15 This error could not have been brought to the attention of the Court within the time to appeal
16 as there was no way to have tested Jahi during that period and, even if she had been tested, the
17 findings would not be as they are now, nine months later. It is this passage of time which creates the
18 evidence that total and irreversible is an error that no one could have predicted. Had the court been
19 informed of what we know now, the court would have ruled Jahi was not brain dead because, as is the
20 case now, she would not have met the definition of brain death.

21 A petition for a Writ of Error Coram Nobis is the legal equivalent of a simple motion to vacate
22 a judgment. (*Pickett at 19*)

23 Although the writ may be sought in both criminal and civil actions, the proceedings for it are
24 civil in nature. A petition for the writ does not initiate a new adversary suit or an independent
25 proceeding; it instead is a continuation of the original proceeding. (*Pickett at 21 citing In re Paiva*
26 *(1949) 51 Cal.2d 505.*) It allows the court to reconsider the judgment in light of the evidence of which

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28 ² *Pickett* citing

1 the Court was previously unaware. (*Pickett* at 23 fn.108 (*citations omitted*)).

2 Herein, for the reasons stated, i.e., that no one could have known during the hearing (which ran
3 fast and furious, with one day only for the independent neurological exam) of the error of fact that
4 Jahi's condition was not a complete and irreversible cessation of al neurological function, including
5 the Brain Stem. Now, in the presence of the facts provided for by Declarations of multiple,
6 independent experts from numerous highly regarded institutions, the Judgment that Jahi McMath is
7 brain dead can no longer stand. It is within this Court's power, jurisdiction, and sound judgment to
8 reverse the determination to clear Jahi from the dark cloud of death and to restore her to humanity so
9 she can be treated not as "the body", but as Jahi.

10 **THE COURT HAS JURISDICTION AS A MATER OF CONTROLLING THE JUST**
11 **ADMINISTRATION OF IT'S ORDER**

12 On December 24, 2013, the Court concluded that there was "clear and convincing" evidence
13 that Jahi had suffered brain death, as defined under *Health and Safety Code* 7180 and 7181, and
14 declared her dead. The question now becomes does the court still retain jurisdiction over this matter
15 and, more specifically, to decide whether Jahi McMath is, currently, brain dead, as defined by those
16 same code section? Petitioner submits that the Court does, indeed, have jurisdiction and that the
17 interests of justice, which are literally those of life or death, demand that this Court exercise that
18 jurisdiction to prevent perpetuation of a grave injustice: continuing to declare that Jahi McMath is
19 dead when she is not.

20 In *Dority v Superior Court, San Bernardino* (1983) 145 Cal.App.3d 273, a 19 day old infant
21 suffered a medical condition that led to his health deteriorating to the point he was placed on a
22 ventilator. Later, a Cerebral Blood Flow (CBF) study and an Electroencephalograph (EEG) were done
23 showing electro cerebral silence and an absence of blood flow to the brain. The infant's physicians
24 determined that brain death had occurred and recommended removal of life support, i.e., a respirator.
25 The hospital anticipated that even with respiratory support the child's bodily functions could only be
26 maintained for several weeks. The child's organs continued to function beyond expectations and the
27 parents chose to withhold consent to remove life support. The hospital, desirous of removing said
28

1 support, petitioned the court for the appointment of a Temporary Guardian, the Director of the
2 Department of Public Social Services.³ The court appointed the guardian and, after taking unrefuted
3 medical testimony that the child was brain dead pursuant to the statutory definition, the court declared
4 the child dead and ordered the temporary guardian to provide consent to the healthcare providers to
5 remove the ventilator. The parents and counsel for the minor child petitioned the court for a writ of
6 prohibition against removing the life-support device. Before the court could act on the petition, the
7 infant's bodily functions ceased and the life-support device was removed.

8 The court, in addressing whether the petition was rendered moot by the child's demise held
9 that "[i]n light of the important questions raised by this case, this court has the discretion to render an
10 opinion where the issues are of continuing public interest and are likely to recur in other cases."
11 (*Dority at 276.*) The court further held that "[the novel medical, legal and ethical issues presented in
12 this case are no doubt capable of repetition and therefore should not be ignored by relying on the
13 mootness doctrine. This requires us to set forth a framework in which both the medical and legal
14 professions can deal with similar situations." (*Id.*) *Dority* recognized "the difficulty of anticipating the
15 factual circumstances under which a decision to remove life-support devices may be made, [and]
16 determined that it would be "unwise" to deny courts the authority to make such a determination when
17 circumstances warranted." (*Dority at 275.*)

18 In addressing the question of the court's jurisdiction over the review of the determination of brain
19 death, *Dority* states "[the jurisdiction of the court can be invoked upon a sufficient showing that [1] it is
20 reasonably probable that a mistake has been made in the diagnosis of brain death or [2] where the
21 diagnosis was not made in accord with accepted medical standards." (*Dority at 280.*) *Dority* is silent on
22 what showing is necessary to establish "reasonable probability of a mistake."

23 Like *Dority*, *Jahi McMath's* case was, and remains, a matter of international importance raising
24 significant issues of public concern. Therefore, as the court in *Dority* continued to have jurisdiction
25 following the complete death of the baby (both circulatory and brain death), even greater rational
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28 ³In *Dority* the parents were suspected to be a cause of the child's brain death and were determined
not to be suitable to act in the best interests of the child.

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1 exists for this court to continue to exercise its jurisdiction here where Jahi's circulatory system and,
2 indeed all of her organs, continue to function and world class experts in Neurology and Brain Death
3 will provide evidence that Jahi *no longer* meets the definition of brain death as she has neuralgic
4 function.

5 As stated by *Dority*, when it is reasonably possible that a mistake has been in the diagnosis of
6 brain death, the court has jurisdiction to hear the matter. Here, Petitioner has irrefutable evidence,
7 that Jahi is no longer brain dead. Petitioner does not believe it necessary to challenge Dr. Fischer's
8 diagnosis of the caseation of brain activity, at that time. The Petitioner challenges the determination
9 that it was *irreversible* and believes such a proclamation was mistaken. Clearly, Jahi's condition was
10 not "irreversible." This is not a failing of Dr. Fischer, there simply is no case, other than Jahi
11 McMath's, where a pediatric patient has been diagnosed as brain dead but has continued to receive
12 medical treatment and survived this long.

13 Petitioner, is in possession of current evidence, including MRI evidence of the integrity of the
14 brain structure, electrical activity in her brain as demonstrated by EEG, the onset of menarche (her
15 entering into puberty as evidenced by the beginning of menstruation) and her response to audible
16 commands given by both her mother and an examining physician demonstrating that Jahi McMath's
17 brain death was not "irreversible." Petitioner's experts will testify that Jahi may have, at the time of
18 Dr. Fischer's examination, demonstrated evidence of brain death due to the swelling of her brain
19 following the traumatic events that led to her suffering a loss of oxygen to her brain but, now that the
20 swelling has receded, and she has had time to receive proper post incident medical care, she has
21 demonstrable brain function.

22 DUE PROCESS

23 This Court, in it's Order of December 26, 2013, offered the following analysis canceling Jahi's
24 due process rights;

25
26 Regarding due process, the Court has considered the following general principles as stated in
27 *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal. 4th 371, 390-391:
28 Under the California Constitution, the extent to which procedural due process is available depends
on a weighing of private and governmental interests involved. The required procedural safeguards
are those that will, without unduly burdening the government, maximize the accuracy of the

1 resulting decision and respect the dignity of the individual subjected to the decision making
2 process. Specifically, determination of the dictates of due process generally requires consideration
3 of four factors: [1] the private interest that will be affected by the individual action; [2] the risk of
4 an erroneous deprivation of this interest through the procedures used and the probable value, if
5 any, of additional or substitute safeguards; [3] the dignitary interest of informing individuals of the
6 nature, grounds and consequences of the action and of enabling them to present their side of the
7 story before a responsible governmental official; and [4] the government interest, including the
8 function involved and the fiscal and administrative burdens that the additional or substitute
9 procedural requirements would entail.

6 The first three considerations, the private interest, the risk involved, and the dignitary interest of
7 the proceeding, all suggest that the due process rights of the party affected by a physician's
8 determination of death are substantial. The fourth factor, the government interest in the form of
9 administrative burden, is addressed by the focused nature of the inquiry under Health and Safety
10 Code sections 7180 and 7181.

9 Jahi's right to due process requires that this court provide a forum for this matter to be heard
10 and for her determination of death to be reversed.

11 THE COURT HAS JURISDICTION PURSUANT TO CCP § 128

12 *California Code of Civil Procedure*, Section 128, declares that the Court has inherent power
13 "to amend and control its process and orders so as to make them conform to law and justice." (CCP §
14 128(8).)

15
16 Courts have the inherent power to create new forms of procedure in particular pending cases.
17 "The . . . power arises from necessity where, in the absence of any previously established
18 procedural rule, rights would be lost or the court would be unable to function." (Witkin, *Cal.*
19 *Procedure* (2d ed.) Courts, s 123, p. 392.) This right is codified in Code of Civil Procedure
20 section 187 which provides that when jurisdiction is conferred on a court by the Constitution
21 or by statute ". . . all the means necessary to carry it into effect are also given; and in the
22 exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this
23 Code or the statute, any suitable process or mode of proceeding may be adopted which may
24 appear most conformable to the spirit of this Code." (See also *Code Civ.Proc.*, s 128(8).) As
25 the Supreme Court said in *People v. Jordan*, 65 Cal. 644 at p. 646, 4 P. 683 at p. 684, "in the
26 absence of any rules of practice enacted by the legislative authority, it is competent for the
27 courts of this State to establish an entire Code of procedure in civil cases, and an entire system
28 of procedure in criminal cases. . . ." (See also *Citizens Utilities Co. v. Superior Court*, 59
Cal.2d 805, 31 Cal.Rptr. 316, 382 P.2d 356 (1963), recognizing the inherent power of courts to
adopt "any suitable method of practice . . . if the procedure is not specified by statute or by
rules adopted by the Judicial Council.") (At p. 813, 31 Cal.Rptr. at 322, 382 P.2d at 362).

25 (*James v. Superior Court* (1978) 77 Cal.App.3d 169, 175.)

26 The instant petition is truly a case of first impression not only in California but, based on an
27 extensive search of all Federal authorities, nationally. There simply has been no case in which brain
28 death was determined and the patient managed to remove themselves, before cardiovascular death

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1 from the facility which had received permission from the court to discontinue life support. This Court
2 has the inherent power to adopt the requested process, as, in the absence of the Court exercising its
3 inherent power, Jahi McMath would continue to be declared legally brain dead when she isn't.
4 *Health and Safety Code* Section 7181 specifically limits the legal determination of brain death to
5 circumstances where there is "*irreversible cessation of all functions of the entire brain, including the*
6 *brain stem.*" This Court, having made such determination, must consider the change in circumstances
7 presented by Plaintiff's evidence which shows that Jahi's condition is now one in which Jahi now has
8 brain function. Should the court refuse to do so Jahi would be barred from regaining her rightful place
9 in our society as a living person.

10
11 **CONCLUSION**

12 In the interests of justice, and Jahi McMath's dignity and right to be considered a living human
13 being, rather than, as she has been portrayed, a corpse, this Court must grant Petitioner Nailah
14 Winkfield's Writ of Error Coram Noblis petition for hearing/reconsideration of this court's
15 determination of her being brain dead pursuant to California Health and Safety Code Section 7181.

16
17 DATED: October 3, 2014

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19 By: 

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22 Attorneys for Plaintiff
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