FILED
SEP 26 2016
BY LAURIE LISINZIMER
CLERK OF DISTRICT COURT
PONDERA COUNTY, MONTANA
By_____DEPUTY

MONTANA NINTH JUDICIAL DISTRICT COURT, PONDERA COUNTY

IN THE MATTER OF THE GUARDIANSHIP OF A.C., a minor.	Cause No. DG-16-08 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

I. Procedural Background

A. On August 10, 2016, Tasha Callaway Neely filed a petition seeking to be appointed as the guardian of her minor son, A.C. Because there were no other interested parties, notice of a hearing was waived and on that date this Court issued its Order granting her petition, appointing her as the guardian of A.C., and confirming her authority to make medical decisions on behalf of A.C. until further order of this Court.

B. On August 15, 2016 Saint Vincent's Healthcare (hereinafter SVH) filed a Motion to Intervene as an Interested Party in these guardianship proceedings. The guardian did not object to the intervention of SVH, and agreed that this guardianship proceeding is the appropriate venue to resolve the disputes between the parties relating to the appropriate medical care of A.C.

C. In its Motion to Intervene, SVH requested declarations from this Court that (1) SVH be permitted, over the guardian's objections, to conduct testing on A.C. to determine his brain activity, (2) that the medical profession has the sole authority and competence to diagnose and

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declare death under the Montana Uniform Determination of Death Act (MCA § 50-22-101) (MUDDA), and (3) that A.C.'s physicians may cease all life-sustaining treatments if A.C. is declared dead.

D. In her response, the guardian asserted that (1) the results of a July 28 test brain activity examination conducted by SVH physicians showed brain activity, (2) the guardian has the fundamental right as A.C.'s mother to make medical decisions on A.C.'s behalf, including refusing to consent to any additional brain activity tests, and (3) SVH has neither established that its brain death examination procedures represent "accepted medical standards" as required by MUDDA nor that its procedures are adequate to establish the irreversible cessation of all functions of the entire brain, and that expert testimony is necessary to establish whether these two MUDDA requirements have been met.

E. SVH's Motion to Intervene and request for declaratory relief came on for hearing on August 29, 2016 before the Honorable Robert G. Olson. In its Order setting the hearing, the Court limited the hearing to "what, if any, testing should be administered at this time." The issues of whether SVH's procedures represent "accepted medical standards" and the adequacy of those procedures were not issues to be decided at the August 29, 2016 hearing, but would be the subject of a further hearing if the Court issued an order authorizing SVH to conduct the brain functionality examinations over the guardian's objections.

F. SVH's chief medical officer, Dr. Michael Bush, was present at the August 29, 2016 hearing along with SVH's attorney Jessica T. Fehr of Moulton, Bellingham PC. The guardian, Tasha Neely was present, represented by her attorney, Kristen G. Juras. The guardian's husband, Clint Stone, was also present. Witnesses testified under oath and exhibits were admitted.

Whether specifically mentioned or not, based upon the testimony and evidence presented,

the Court makes the following:

II. Findings of Fact

1. SVH and the guardian have stipulated that this Court has jurisdiction to resolve the issues raised by SVH and the guardian in their pleadings.

2. This dispute involves a minor, A.C., who nearly drowned at a remote Montana lake on July 22, 2016, a day before his 7th birthday. A.C. was pulled from the water after 5-15 minutes of submersion. CPR was immediately performed. Paramedics arrived, found sinus rhythm and a pulse, declared A.C. to be alive, and placed A.C. on a bag-valve-mask ventilator. A.C. was evacuated to a hospital in Butte and subsequently transferred to SVH in Billings.

3. A.C.'s medical records reflect that upon admittance on July 22, 2016 and through July 27, 2016, A.C. was spontaneously breathing over his ventilator and exhibited movement of extremities and withdrawal to pain.

4. A.C.'s medical records report a worsening neuro status on July 26, 2016 and monitoring for cerebral herniation. On July 27, 2016, SVH staff members advised the guardian that A.C.'s brain had apparently herniated.

5. On July 27, 2016, Dr. Barruga, one of SVH's pediatric intensivists, sought the consent of A.C.'s parents to perform procedures, including an apnea test, to determine the condition of A.C.'s brain. The terms "brain dead" or "brain death examination" were not used in explaining these procedures. The guardian consented to these procedures based on her understanding that the procedures were being conducted to determine the health of A.C.'s brain -- not for the purpose of declaring A.C. as dead. She was advised that A.C.'s care would not change as a result of the tests and that he would continue to be treated.

6. On the morning of July 28, 2016, physicians of SVH performed a series of medical

procedures to assess A.C.'s brain functionality for the purpose of determining whether under MUDDA there was an "irreversible cessation of all functions of the entire brain, including the brain stem."

7. SVH's Policy for Brain Death Determination for children requires the performance of two examinations, each including an apnea test, separated by an observation period of at least 12 hours.

8. On the morning of July 28, 2016, SVH healthcare providers performed a brain death examination on A.C., including a bedside examination by Dr. Venkataramana, a bedside examination by Dr. Barruga, and an apnea test conducted by Dr. Barruga. SVH also performed an electroencephalogram (EEG).

9. At the August 29, 2016 hearing, the Court took judicial notice of the fact that an apnea test is a medical procedure. Neither party objected.

10. A.C.'s stepfather, Clint Stone, was present during the apnea test, which lasted approximately 10 minutes. Mr. Stone observed that A.C. was under significant physical stress during the apnea test, struggling to breathe. During the 10-minute test, A.C.'s carbon dioxide level increased from 39 (normal is 40) to 100. A.C.'s pH level dropped from 7.5 to 7.15; normal is 7.35 to 7.45. Both Mr. Stone and the guardian believed that the apnea test caused pain, stress, and physical harm to A.C.

11. Dr. James Richards, director of the Neuroscience Department at SVH, gave his opinion that the apnea test and the increased level of carbon dioxide and decreased pH level did not harm A.C.

12. Dr. Barruga provided his opinion that A.C. had failed all components of the July 28 brain death examination and met the criteria for brain death. Dr. Barruga stated that he did not

consider the results of the EEG conducted as a part of the brain death examination because, in his opinion, it was not required.

13. Dr. Richards, who has performed over 200 brain death tests, gave his opinion that the July 28, 2016 examination showed no neurological function. Upon cross-examination, Dr. Richards confirmed that the EEG performed on July 28, 2016 showed two types of activity in A.C.'s brain – a low-level baseline brain activity throughout the EEG as well as a 6-second burst of "frontally dominant mixed alpha/beta activity." Dr. Richards admitted that because the EEG reflected brain activity, the MUDDA statutory requirement of "irreversible cessation of all functions of the entire brain" had not been met.

14. The testimony of Dr. Barruga and Dr. Richards further established that the medication effects of dosages of fentanyl and Dilantin administered to A.C. prior to the brain death examination had not been considered or excluded by Dr. Barruga. Dr. Richards testified that the brain examination would not have been performed on July 28, 2016 if the checklist attached to the SVH Policy had been properly completed, because the medication effects of fentanyl and Dilantin had not been excluded.

15. When Dr. Barruga discussed with the parents scheduling a second brain functionality examination the morning of July 29, 2016, the guardian refused to consent and requested SVH healthcare providers to continue to treat her son in a manner that would allow his brain to heal.

16. Although Dr. Richards and Dr. Barruga both testified that a second brain functionality exam is necessary in order to properly evaluate, care for, and treat A.C., SVH has in fact continued to appropriately treat and care for A.C. His blood pressure has stabilized, he is digesting, he is maintaining his body temperature, his white blood cell count is normal, he has an improved hemoglobin count, and his urine output is satisfactory. A.C. underwent a

tracheostomy and insertion of a GT feeding tube on August 19, 2016 to prepare him for transfer to a long-term care facility.

17. The guardian is a loving, devoted, and fit mother who is pursuing medical treatment for A.C. that is in his best interests – the healing of his brain. She has been with A.C. every day since the date of his accident and is actively involved in his health care decisions. Not a scintilla of evidence has been presented to suggest that the guardian is not a fit parent or that she is not considering A.C.'s best interests while making medical decisions on his behalf.

18. The absence of a second brain functionality exam has not caused A.C. harm nor has it prevented SVH from providing appropriate medical treatment to A.C. or interfered with his care.

19. It is not in A.C.'s best interests to perform a second brain functionality test at this time.

Based upon the foregoing FINDINGS OF FACT, this Court enters the following:

III. Conclusions of Law

20. This Court has jurisdiction over this matter.

21. Whether or not a hospital or physician may conduct a brain death examination on a minor child over the objections of the child's parent or guardian is a matter of first impression in Montana.

22. In 1983 the Montana legislature adopted MUDDA, which provides a means to determine "legal death" in the event of the "irreversible cessation of all functions of the entire brain, including the brainstem." Mont. Code Ann. § 50-22-101.

23. MUDDA does not mandate that health care providers conduct a brain death

examination, nor does MUDDA specifically grant the right to doctors or other health care providers to conduct a brain death examination procedure. The legislature could have discussed and deliberated making brain death examinations mandatory or granting to medical personnel (rather than patients or their surrogates) the authority to make such a critical medical decision; it chose not to do so.

24. An individual's right to choose or refuse medical treatment is protected under the personal autonomy component of the individual privacy guarantees of Article II, Sec. 10 of the Montana Constitution. *Armstrong v. State*, 1999 MT 261, ¶52. This includes the right to decide whether or not to conduct a brain death examination -- a medical procedure with significant repercussions.

25. A natural parent's right to the care and custody of her child is a "fundamental liberty interest" that is "perhaps the oldest of the fundamental liberty interests the [U.S.] Supreme Court has recognized under the Due Process Clause," applicable to the states under the Fourteenth Amendment. *Snyder v. Spaulding*, 2010 MT 151, ¶ ¶ 12-13. This includes the right of a parent to make medical decisions on behalf of her child. The constitutional rights of a natural parent to parent her child require "careful protection." Id. at ¶13.

26. If the parent is fit, then a presumption arises in favor of the parent's wishes. Even if this Court were to believe that administering a brain death examination were in the best interest of A.C. -- a conclusion that it cannot reach -- the Due Process Clause does not permit a court to infringe on the fundamental right of parents to make child rearing decisions simply because a medical care provider or judge may believe that "a 'better' decision could be made." *Polasek v. Omura*, 2006 MT 103, ¶ 15; *Snyder v. Spaulding*, 2010 MT 151, ¶ 17.

27. Under the doctrine of "parens patriae", a court may override the fundamental liberty

interest of a parent in making medical decisions on behalf of her minor child, but only if there is a sufficiently compelling state interest in protecting the life of the child. *Snyder v. Spaulding*, 2010 MT 151, ¶ 17. The doctrine of parens patriae does not apply in this situation. The guardian is fighting to protect the life of her child and there is no reason for the state to step in to protect A.C.'s life. It is the hospital and its personnel who are attempting to administer medical procedures that could lead to the termination of A.C.'s life. It is not their decision to make, nor is a decision to administer a brain death examination in A.C.'s best interests.

28. This Court is not willing to create in the medical profession sole and exclusive authority to make a decision whether to conduct a brain death examination. If such an important public policy is to be made, it is the role of the legislature, and not this Court, to do so. Mont. Const., Art. III, § 1.

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the Court enters the following:

ORDER

IT IS HEREBY ORDERED that:

I. SVH's request for a judicial declaration permitting SVH to conduct testing on A.C. to determine his brain activity over the guardian's objections is denied.

II. A.C.'s guardian and mother has the sole authority to make medical decisions on A.C.'s behalf, including the decision as to whether any future brain functionality examinations should be administered.

DATED this 23 day of September, 2016.

CERTIFICATE OF SERVICE
I hereby certify that I served a true and correct copy of the foregoing to
J Fehr, K Juras this 26th
day of September 20 16
Laurie Evans Clerk of Court
By _____ Deputy

ROBERT G. OLSON, District Court Judge