Brain Death
Legal Status Amid Growing Uncertainty

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Alive or dead?

Need to know

“Determining whether a patient is alive or dead is the most fundamental aspect of providing medical care.”

BUT
Determination of Death by Neurologic Criteria in the United States
The Case for Revising the Uniform Determination of Death Act

Richard Bonnie
Ariane Lewis
3 UDDA

4 problems Proposed amendments

UDDA 1981
There are 2 ways to determine death:

- "irreversible cessation of circulatory & respiratory functions"
- or
“irreversible cessation of all functions of the entire brain”

We’ll focus on this 2nd newer prong

= Brain death

All 56 US jurisdictions

Why?

Before 1981
Brain death = Death

BUT

Variability

1970s

Uniformity

Fast forward to

2019
problems

Variability
Uncertainty
Which is what UDDA was designed to eliminate

1st

Medical criteria
Legal standard

Most authoritative criteria

Evidence-based guideline update:
Determining brain death in adults
Report of the Quality Standards Subcommittee of the American Academy of Neurology
2010
Brain death, the determination of brain death, and member guidance for brain death accommodation requests

AAN position statement

March 2019

Patient can satisfy guidelines

Brain dead

Yet...

“neuro-endocrine function may be present”

Okay to declare dead despite functions of pituitary gland & hypothalamus
BUT

UDDA

Requires irreversible cessation of "all functions" of the "entire brain"
Violating DDRs

5/27/2019

10

2nd

UDDA

Determination of “irreversible cessation of all functions of the entire brain”

“must be made in accordance with accepted medical standards”

most thought those were
BUT

Supreme Court of Nevada

Variability of Brain Death Policies in the United States

David M. Green, MD, MA, Hilary H. Wang, BA, Jennifer D. Robinson, AFRN, Parayelis N. Vaneis, MD, PhD;
Galen V. Henderson, MD, Edelco F. M. Wijdicks, MD, PhD

Variability of brain death determination guidelines in leading US neurologic institutions

David M. Green, MD
Variability

State 1 ≠ State 2

Hospital 1 ≠ Hospital 2

MD 1 ≠ MD 2
Number of physicians

Qualifications
- Neurology
- Critical care
- Any MD

How tests administered

3rd

Must clinicians get consent for BD tests?
Billings, Montana

6-year-old “Drowned” July 22, 2016

Mom: “no”

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
“no”

“request ... permitting ... testing ... is denied”

“mother has sole authority to make medical decisions ... including ... brain ... examinations”

Must clinicians get consent for BD tests?

Yes

MT KS CA

No

NV VA GA NY
Want religious exemption

“[D]eath . . . shall not be declared . . . neurological criteria . . . violate . . . personal religious beliefs . . .”

Religious objection No death by BD
Pt may **satisfy** BD criteria

**BUT**

May **not** declare death

**Until** death by CP criteria

Rejected everywhere outside NJ

**Lawsuits** / **Bills**
Israel Stinson

"Plaintiffs . . . firm religious beliefs . . . heart is beating . . . is alive."

"removal of CP support . . . unconstitutional . . . interferes . . . freedom of religion . . . first amendment"
exemption

Reasonable temporary accommodation

CBO vaccine etc.

Proposed amendments

Life Death

Life Death
1. Med-Leg “gap”
2. Accepted criteria
3. Consent required
4. Religious exempt

RUDDA

Med-Leg “gap”

“irreversible cessation of all functions of the entire brain, including the brainstem, with the exception of hormonal function.”

Accepted criteria
“in accordance with the applicable guidelines published June 8, 2010, by the American Academy of Neurology”

Consent requirement

“Reasonable efforts should be made to notify a patient’s next-of-kin . . . but consent is not required for determination of death.”

Religious exemption

clear legal guidance

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References

Materials from this presentation are available at

http://thaddeuspope.com/braindeath

Medical Futility Blog
Since July 2007, I have been blogging, almost daily, to medicalfutility.blogspot.com. This blog focuses on reporting and discussing legislative, judicial, regulatory, medical, and other developments concerning medical futility and end-of-life medical treatment conflicts. The blog has received nearly 4 million direct visits. Plus, it is distributed through RSS, email, Twitter, and re-publishers like WestlawNext and Bioethics.net.


Brain Death: Legal Duties to Accommodate Religious Objections, 147 CHEST e69 (2015).


Pregnant and Dead in Texas: A Bad Law, Badly Interpreted, LOS ANGELES TIMES (Jan. 16. 2014) (with Art Caplan).


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