Do Clinicians Always Need Consent to Stop Life-Sustaining Treatment?

Arizona Bioethics Network
June 19, 2014

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Brain death

PVS

Jahi McMath Case History

Jahi McMath
“An individual . . . . is dead . . . who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain.”

Cal. H&S Code 7180(a)

Argument 1
Not dead under CA law

“When an individual is pronounced [brain] dead . . ., there shall be independent confirmation by another physician.”

Cal. H&S Code 7181
Jahi is dead under California law

Argument 2
CA law preempted

Argument 3
CA law unconstitutional

No adjudication on the merits

TRO only
stopgap to preserve status quo pending hearing
Jahi McMath Lawsuits

Claim: CA should be like NJ

“Death . . . shall not be declared upon the basis of neurological criteria . . . when the licensed physician . . ., has reason to believe, . . . would violate the personal religious beliefs of the individual.”

<table>
<thead>
<tr>
<th>CA rejected NJ rule</th>
<th>Brain death</th>
<th>Accommodation</th>
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<tbody>
<tr>
<td></td>
<td>1982</td>
<td>2008</td>
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“hospital shall [provide] next of kin with a **reasonably brief period of accommodation** . . .”

Cal. H&S Code 1254.4

“No adjudication on the merits”

“Reasonably brief period . . . amount of time afforded to gather family or next of kin at the patient's bedside.”

“continue only previously ordered cardiopulmonary support. No other medical intervention is required.”

Jahi McMath Not unique

48 HOURS TO GO
More disputes
http://thaddeuspope.com/braindeath.html

Why conflicts over brain death?

Taphophobia
Linguistic confusion
Variability
Prognostic mistrust
Conceptual confusion
“Brain dead” implies not really “dead”
Variability
Heterogeneity

Irreversible cessation of all brain function including the brain stem

How is irreversible cessation measured?

Legal variation
# physicians
Qualifications
How tests performed

Prognostic mistrust

“acceptable medical standards”
“ordinary standards”
“usual & customary standards”

Brain death concept accepted across USA & world

Variability of brain death determination guidelines in leading US neurologic institutions.

Variability of brain death determination guidelines in leading US neurologic institutions.
They were declared brain dead. It was written in their chart as such. And here they are, sitting up talking to me.

Conceptual confusion

“brain death” = death?

“total brain failure” = death?
Heal wounds
Fight infections
Gestate fetus
Stress response

Legal status

“total brain failure” = death
Legally settled since 1980s

Remains settled (legally)

“durable worldwide consensus”

Consent not required to stop LSMT
Dead → Not a patient

Not a patient → No duty to treat

Custody of dead body → Other duties

Notification

Accommodation

Religious opt out

“Hospitals must establish written procedures for the reasonable accommodation of the individual's religious or moral objections . . . limits to the duration of the accommodation.”

10 N.Y.C.R.R. § 400.16
PVS

Functioning brainstem tissue
Maintain some autonomic functions: heart, lungs, kidneys and intestinal tract, certain reflex actions
Breathe, suck, spontaneous movements of eyes, arms, legs, respond to noxious stimuli with crying, exhibit facial expressions

PVS = Death?

"life expired when her biological existence ceased serving any of her own interests"

In re TACP Fla H.B. 1088 (1988)

"No consciousness
No thoughts, feelings, sensations, desires, emotions
No purposeful action, social interaction, memory"
You may stop LSMT for any reason
- with immunity
- if your HEC agrees

Tex. H&S 166.046

1. 48hr notice HEC
2. Written decision
3. 10 day transfer
RESOLUTION 1 - 2004

RESOLVED, that the Wisconsin Medical Society, concurrent with a recommendation of the American Medical Association, Medical Futility in End-of-Life Care policy (E-227), supports the passage of state legislation which establishes a legally sanctioned extra-judicial process for resolving disputes regarding futile care, modeled after the Texas Advanced Directives Act of 1993.

Subject: Futility of Care

Introduced by: Michael Katzoff, MD and the Medical Society of Milwaukee County
A health care provider is not subject to liability or professional discipline for failing to comply with a decision or a direction that violates the provider’s conscience...

Treat ‘til transfer

Miss. Code § 41-107-3

L.B. 564 (2013)


H.B. 279 (2013) (over veto)

Red

Consent and Capacity Board

Consent always
"If surrogate directs [LST] . . . provider that does not wish to provide . . . shall nonetheless comply . . . ."

“Health care . . . may not be . . . denied if . . . directed by . . . surrogate”

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<tr>
<th>SDM</th>
<th>Red Light</th>
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<tr>
<td>Agent / POA</td>
<td>Yes</td>
</tr>
<tr>
<td>Default surrogate</td>
<td>No; Maybe</td>
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<tr>
<td>Guardian</td>
<td>No; Maybe</td>
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Discrimination in Denial of Life Preserving Treatment Act

SB 172, HB 309 (2012)
“(...) come in ... and use the law to say stop”

Life & death stakes
Unclear facts
Unclear law

TRO

Yellow
“provider . . . may decline to comply . . . contrary to generally accepted health care standards . . .”

Cal. Prob. Code 4735

“provider . . . acting in good faith and in accordance with generally accepted health care standards . . . not subject to civil or criminal liability or to discipline. . .”

Cal. Prob. Code 4740

“generally accepted health care standards”

Safe harbor attributes

Clear
Precise
Concrete
Certain

Standard of Care
References


Pope TM, Medical Futility, in GUIDANCE FOR HEALTHCARE ETHICS COMMITTEES ch.13 (MD Hester & T Schonfeld eds., Cambridge University Press 2012).

Medical Futility Blog

Since July 2007, I have been blogging, almost daily, to medicalfutility.blogspot.com. This blog is focused on reporting and discussing legislative, judicial, regulatory, medical, and other developments concerning medical futility and end-of-life medical treatment conflict. The blog has received over 600,000 direct visits. Plus, it is distributed through RSS, email, Twitter, and re-publishers like Westlaw, Bioethics.net, Wellsphere, and Medpedia.

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<td>Pope TM, Philosopher’s Corner: Medical Futility, 15 MID-ATLANTIC ETHICS COMM. NEWSL, Fall 2007, at 6-7</td>
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