

IN THE INTEREST OF ISSAC LOPEZ, A MINOR

RESPONSE

This matter comes before the Court on a Petition filed by Norton Healthcare, Inc., d/b/a Kosair Children's Hospital (hereinafter "Kosair"), requesting that it be allowed to withdraw life support for the minor child, Issac Lopez. Issac Lopez was admitted to the Pediatric Intensive Care unit on June 29, 2014.

On July 2, 2014, the infant child was pronounced "brain dead." Testimony was heard on July 14, 2014 from Dr. Aaron Calhoun that a clinical exam was performed by Dr. Mark McDonald, and a subsequent one performed by Dr. Karen Orman. He testified that pursuant to the law the examinations by both of these physicians were to be conducted twelve (12) hours apart. The child's medical records and the Notice of Filing by the Petitioner indicate this was not the case. The examinations by these physicians were conducted simultaneously, with Dr. McDonald having done his on July 2, 2014 at 10:40 a.m. and Dr. Orman having performed her examination on July 2, 2014 at 10:45 a.m. Both physicians declared Issac Lopez brain dead on July 2, 2014 and KODA was present at the time this occurred. Kosair filed this Petition on July 2, 2014 at 8:34 p.m., a little less than ten (10) hours after their pronouncement.

The infant child's birth parents are Iveth Yaneth Garcia and Juan Alejandro Lopez Rosales (who is now incarcerated with charges pending against him for the alleged assault of the infant child). Neither parents' rights have been terminated. There has been no action filed in Family Court by the Commonwealth under KRS 620.010 to have the child declared neglected, dependent or abused. The custody of

the child continues to remain with the parents. There have been no guardianship proceedings filed with the Probate Court pursuant to KRS 387.025, wherein anyone has requested to be appointed the guardian of the infant child so as to be able to make decisions concerning his health, education and general welfare.

Presently, the mother has indicated she does not wish her child to be removed from support. The Petition filed herein by the Hospital confirms that they have been advised of such by her. The child's father at this point has made no comment with regards to his desires concerning his son remaining on life support.

The issue currently before the Court is whether it has jurisdiction to hear this proceeding; and/or, whether it has standing to order the relief sought by Kosair herein. The scrivener herein has been appointed the Guardian Ad Litem for the minor child. This report is being filed solely in response to the issues of jurisdiction and standing.

It is your Guardian's belief that the case law in the Commonwealth of Kentucky indicates that without the parents' rights being terminated this Court does not have the right to order the withdrawal of support for this child. The case in point which has similar facts as in this case is D.K. Movant vs. Commonwealth of Kentucky through the Cabinet for Health and Family Services, et al., 221 SW 3rd 382 (KY 2007). In that case, the Commonwealth had filed an action in Family Court alleging a 3 ½ year old infant child had been neglected or abused when he had been injured by his mother's boyfriend and as a result was in a hospital in a "persistent vegetative state." The Cabinet had been granted temporary custody of the child and had petitioned the Court requesting that it be permitted to discontinue life sustaining treatment. The child's treating doctor and an expert consultant had both testified that the infant child had

“no chance of a meaningful recovery and the continued use of life support is not medically necessary.” (D.K. @ 383)

The Court ultimately held that the Cabinet did not have the authority to remove the life support of the child when the parental rights of the infant’s parents had not been terminated. Citing the case of In Re: Interest of Tabitha R., 252 Neb. 687, 564 N.W. 2d 598 (Neb., 1997), D.K. noted the Nebraska Court determined and articulated that the best interests of the child dictated that life support be discontinued and that she not be resuscitated... Id @ 691, 564 NW 2d 598. Nonetheless, it held that the best interests of the child were secondary to the overriding and paramount right of the parents to a due process adjudication of termination” (D.K. @ 384). The D.K. Court noted, “there is no precedence other than decisions of sister states dictating in essence that the child may not expire and rest in peace until-and if-the rights of a parent are formally adjudicated.” (Id @ 385) As a result, the Court refused to grant the Cabinet’s request, and directed the case be remanded to the Family Court for an adjudication of termination of the rights of the infant’s parents. Judge Moore dissented in part and concurred in part with D.K. He intimated that ultimately the issue of removal of life support should be addressed by legislation, and presently that has not occurred. Judge Moore noted “while it may be distasteful to those more intimately involved or the viewing public, this child-parent relationship is protected by the United States Constitution, until the Family Court adjudicates otherwise.” (Id @ 388) Judge Moore also made reference to Santosky v. Kramer, 455 U.S. 745, 769-70, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) which recognizes the fundamental liberty interest of parents in the care, custody and management of their child.

Kentucky case law establishes it is the parents’ right to make medical decisions for their child. Tabor, et al. v. Scobee, 254 SW 2d 474 (Ky, 1952) involved a case of

first impression as to whether a surgeon could operate on a child without waiting for authority from a parent or person standing in loco parentis. Tabor held, "Where a minor is the patient, the rule is stated as follows in 70 C.J.S. Physician and Surgeons § 48(2):

"In case of an emergency a surgeon may operate on a child without waiting for authority from the parents or person standing in loco parentis where it appears impracticable to secure it, but in the absence of an emergency an operation performed on a child without the consent of the parents or person standing in loco parentis is a legal wrong."

Tabor @ 478.

It stands to reason that a decision to remove a child from life support, without a termination of parental rights, is to be left up to the parents.

Our Kentucky Constitution guarantees an individual's right to life (Ky Constitution § 1); and our U.S. Constitution guarantees "the inalienable right to life." Our Courts have recognized "the right to terminate medical treatment is not a power belonging to the judiciary to grant or withhold." Degrella by and through Parrent v. Elston, Ky, 858 SW 2d 698, 709 (1993). Taking this case to its logical conclusion, it is not our Courts function to terminate medical treatment for a minor child when there is a parent whose parental rights remain in force who has explicitly made her directions known.

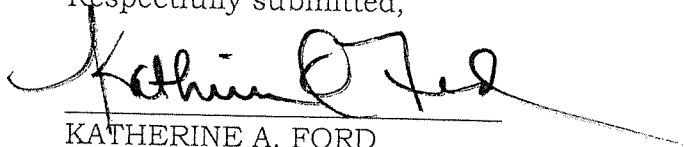
Kosair's counsel has directed the Court to KRS 446.400, which statute makes a determination of death. However, they have not shown that this statute grants the Court to direct the removal of life support, nor that the statute allows anyone to usurp a parent's right to make directions as to their child's care.

Your Guardian has not been able to find the specific legislative purpose for this statute. However, it appears it is used in conjunction with the Uniform Simultaneous Death statute when trying to ascertain for inheritance purposes or the passing of

jointly held property, who died first when joint titleholders die simultaneously. The statute may also be used in conjunction with the State's requirement that Kentucky Organ Donation be contacted to inquire into organ donations. Kosair's counsel wishes to assert this statute means Issac is no longer a living human being, but our laws indicate otherwise. There has been no death certificate issued by the Commonwealth, and from what your Guardian gleams from the child's medical records, one cannot be requested until there has been a cardiac death. Further, the Commonwealth Attorney's Office has charged Issac's father with assault, not murder herein. Thus, there is a conflict in our laws as to what actually constitutes "death."

Your Guardian believes at this time without the termination of the parents' rights that the determination of the removal of life support for Issac should be left with his parents. At this time point, since the pressing issue before this Court is standing, and there has been no formal testimony given by all parties herein relative to the removal of life support, your Guardian hereby refrains from making any recommendation as to what the best interests are of Issac with regards to the removal of his life support.

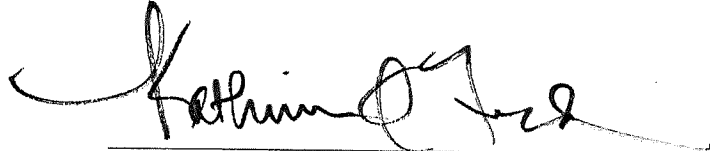
Respectfully submitted,



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CERTIFICATE

It is hereby certified that a copy of the foregoing was mailed this 18th day of July, 2014, to Leslie C. Bates, Esq., Law Office of Leslie C. Bates, PLLC, The Heyburn Building, 332 W. Broadway, Suite 1602, Louisville, Kentucky 40202, Beth McMasters, Esq. and Noelle Haegele, Esq., McMasters Keith Butler, Inc., 730 W. Main Street, Suite 500, Louisville, Kentucky 40202, Susan D. Phillips, Esq., Phillips, Parker, Orberson and Arnett, 716 W. Main Street, Suite 300, Louisville, Kentucky 40202 and Juan Alejandro Lopez Rosales, c/o Justin Brown, Esq., 436 S. 7th Street, Suite 100, Louisville, Kentucky 40202.

A handwritten signature in black ink, appearing to read "Katherine A. Ford", written over a horizontal line.

KATHERINE A. FORD

KAF168/LopezIssac Response:tld