

NO. 14-CI-003541

CIRCUIT CLERK'S OFFICE JEFFERSON CIRCUIT COURT
JEFFERSON CIRCUIT COURT DIVISION NINE (9)
HON. JUDITH MCDONALD-BURKMAN
2014 JUL 18 P 1:55

IN THE INTEREST OF ISSAC LOPEZ, A MINOR:

**REPLY OF KCH CHILDREN'S HOSPITAL AND BRIEF IN FURTHER SUPPORT OF
ITS MOTION FOR ORDER ALLOWING WITHDRAWAL OF ARTIFICIAL SUPPORT**

* * * * *

Comes the Petitioner, Norton Hospitals, Inc., d/b/a Kosair Children's Hospital (hereinafter "KCH"), by counsel, and for its Reply in support of its Motion for an Order allowing the withdrawal of artificial support for a minor states as follows. KCH respectfully requests that the Court allow this Reply to exceed the five-page limit provided by Local Rule 401 in light of the Respondent's inconsistent arguments to date and the complexity of the issues.

INTRODUCTION

This is an Original Action filed by KCH to allow the withdrawal of artificial support for a deceased minor, Issac Lopez. Issac was declared dead on July 2, 2014, pursuant to KRS 446.400, which states:

- 446.400 Determination of death -- Minimal conditions to be met.
For all legal purposes, the occurrence of human death shall be determined in accordance with the usual and customary standards of medical practice, provided that death shall not be determined to have occurred unless the following minimal conditions have been met:
- (1) When respiration and circulation are not artificially maintained, there is an irreversible cessation of spontaneous respiration and circulation; or
 - (2) When respiration and circulation are artificially maintained, and there is a total and irreversible cessation of all brain function, including the brain stem and that such determination is made by two (2) licensed physicians.**

KRS 446.400 (emphasis added). There is no longer a factual dispute that the criteria to determine brain death pursuant to 446.400 (2) have been satisfied. This action is not about parental rights to make health care treatment decisions and the case law relied upon by the Respondent is inapplicable to the issues before this Court. **The sole issue before this Court is whether healthcare providers have a legal obligation to artificially maintain respiration and circulation after a determination of brain death has been made in accordance with KRS 446.400.** This is a sad and tragic situation and KCH recognizes that the family is reluctant to accept Isaac's death. However, there is no legitimate interest served by requiring healthcare providers to maintain his body.

FACTUAL HISTORY

Issac Lopez presented to the KCH ER on June 29, 2014. Issac was noted on arrival to be unresponsive to any stimuli with fixed and dilated pupils.¹ A CT scan of the head showed a left parietal skull fracture and a suspected associated subdural hematoma as well as a hypoxic-ischemic injury, which means Issac's brain had been deprived of oxygen.² Issac was admitted to the Pediatric Intensive Care Unit ("PICU") under the care of attending physician Dr. Mark McDonald. Dr. McDonald's initial exam revealed that Issac was clinically nonresponsive with fixed and dilated pupils, had no corneal or cough reflexes, and had no spontaneous respiratory effort despite a severely elevated carbon dioxide level.³

The following morning, Issac's clinical findings remained unchanged: he was unresponsive to any stimuli despite the absence of sedatives and narcotics; he had flaccid muscle tone; his pupils remained fixed and dilated; he had no corneal, cough, gag, oculovestibular, or

¹ Exhibit A, ED Provider Note, Dr. Michelle Stevenson.

² Exhibit B, Report, CT of the Head.

³ Exhibit C, 6/29/14 Pediatric Critical Care Medicine Consult/History and Physical, Dr. Mark McDonald .

oculocephalic reflexes; and he had no spontaneous respiratory effort. An exam performed by Dr. McDonald on that date at 8:47 a.m. confirmed that Issac was brain dead with no brain activity or brain stem function. Dr. McDonald discussed these findings at length with Ms. Garcia and other members of the family that day.⁴ Pursuant to the family's request, a second exam to confirm brain death was deferred for forty-eight hours to allow extended family members to arrive at KCH to provide support for Ms. Garcia.

Two repeat examinations to confirm brain death were conducted on July 2, 2014 by Dr. McDonald and Dr. Karen Orman, which again confirmed that Issac had suffered total and irreversible brain death.⁵ Dr. McDonald pronounced Issac's death at 10:30 a.m. and prepared a death summary (which is the document prepared at the end of hospitalization where there has been a death).⁶ The findings of the clinical brain death exams were again discussed extensively with Ms. Garcia and several of Mr. Rosales' family members. At that time, Ms. Garcia expressed that she wanted Issac to remain on the ventilator indefinitely and informed Dr. McDonald that she was consulting with an attorney. Mr. Leslie Bates, counsel for Ms. Garcia later approached Dr. McDonald. Dr. McDonald explained to Mr. Bates that Issac had been pronounced dead that day.⁷ On July 3, Dr. Karen Skjei, a pediatric neurologist, examined Issac and noted that Issac's neurologic exam was "consistent with the previous brain stem examination performed by the PICU staff and we agree with their assessment". Dr. Skjei noted that she discussed her findings with Ms. Garcia.⁸ A fifth exam confirming Issac's brain death was performed on July 12 by the family's independent expert, a pediatric neurologist with the

⁴ Exhibit D, 6/30/14 Declaration of Brain Death by Clinical Exam- Examiner 1, Dr. McDonald; 6/30/14 Progress Note, Sharon Osbourne, CSW.

⁵ Exhibit E, 7/2/14 Declaration of Brain Death by Clinical Exam- Examiner 1, Dr. McDonald; 7/2/14 Declaration of Brain Death by Clinical Exam- Examiner 2, Dr. Karen Orman.

⁶ Exhibit F, 7/2/14 Physician Death Summary, Dr. McDonald.

⁷ Exhibit F

⁸ Exhibit G, 7/3/14 University of Louisville Child Neurology Consultation/History and Physical, Dr. Karen Skjei.

University of Louisville, Dr. Anna Ehret, which confirmed all previous findings that Issac had suffered total and irreversible brain death.⁹

Since that time, due to the total and irreversible cessation of all brain and brain stem function, Issac's body has required escalating measures and work by physicians, nurses and other staff to sustain the appearance of life. These artificial measures include the administration of blood transfusions, the artificial replacement of hormones, intravenous epinephrine to keep his blood pressure within an acceptable range, intravenous vasopressin to regulate water in the body and maintain the constriction of blood vessels, albumin to regulate intravascular volume, and changes in the ventilator to address increased needs for oxygen and pressure to keep his airways open. Despite the now five separate exams, all of which have confirmed brain death, one of which was performed by an independent pediatric neurologist retained by her Counsel, Ms. Garcia continues to object to removing any artificial means of support provided to Issac's body.

PROCEDURAL HISTORY

On July 2, 2014, at 8:28 p.m., Ms. Garcia filed an Ex Parte Motion for a Temporary Restraining Order, acknowledged jurisdiction in Circuit Court was proper and the fact that the physicians caring for Issac had "made the determination that Issac Lopez had deceased as of 10:30 a.m. this day".¹⁰ The Motion stated that Ms. Garcia believed Isaac had "indicia of life" and requested that "[a]ll life-sustaining treatment necessarily employed in the treatment of Issac ... be restored and employed by Kosair Children's Hospital or those employees, physicians, nurses or any such persons charged with that responsibility" for a period of fourteen days.¹¹

⁹ Exhibit H, 7/12/14 University of Louisville Child Neurology Consultation/History and Physical, Dr. Anna Ehret.

¹⁰ Exhibit I, Ms. Garcia's Ex Parte Motion/Temporary Restraining Order.

¹¹ Exhibit I

Given Ms. Garcia's objections to removing support, KCH filed the instant Original Action asking the Court to allow the removal of artificial support, as Issac was legally dead.¹²

The Ex Parte Motion for a restraining Order was granted and a hearing set in Jefferson Circuit Court, Division Eight on July 3. Counsel for Ms. Garcia informed the Court during that hearing that the mother questioned the determination of brain death and sought time **to allow the family to seek a medical opinion from another physician selected by the family.** KCH informed the Court that the child had been declared brain dead by his physicians and was legally dead pursuant to KRS 446.400(2), however, the physicians and nurses at KCH would continue to provide the artificial means of support set forth in the Temporary Restraining Order to allow time for an Independent Medical Exam (IME) and resolution of the issue by the Court. In light of KCH's agreement to continue providing support pending resolution of the issues before this Court, Judge Chauvin dissolved the Temporary Restraining Order and directed the parties to Division Nine where the Original Action filed by KCH was to be heard. Judge McDonald Burkman met with all parties that day, advised them of her intention to appoint a Guardian Ad Litem for the child, and scheduled a status conference for July 14, 2014.

The parties were heard in Division Nine on July 10, 2014, on an Emergency Motion filed by KCH to advise the Court of the deteriorating status of Issac's body and ask the Court to "provide additional directives to the healthcare providers to guide Issac's ongoing care including withdrawal of all artificial life support."¹³ The Court was apprised that Issac's body was at that time being provided ventilation, hydration, breast milk for nutrition via nasogastric tube as well as being maintained with the continuous infusion of intravenous epinephrine to maintain his blood pressure, intravenous vasopressin to regulate water in the body and maintain the

¹² Exhibit J, KCH's Motion for Order Allowing Withdrawal of Life Support for a Minor.

¹³ Exhibit K, KCH's Motion for Emergency Hearing.

constriction of blood vessels, and the artificial replacement of intravenous hormones, all of which required constant monitoring of labs and vital signs and dosage titration in response to frequent changes in the body's clinical status. KCH sought guidance from the Court as to how far further measures should go, i.e., were the healthcare providers required to continue escalating extraordinary measures or to potentially perform CPR upon Issac's body.

During the hearing, counsel for Ms. Garcia represented once again that he **did not believe the diagnosis of brain death and wanted to have an independent medical examination ("IME") performed.** KCH's counsel advised that KCH remained willing to provide support with mechanical ventilation, hydration, and nutrition during the pendency of the IME and these Court Proceedings. The Court instructed Counsel for Ms. Garcia to obtain an IME prior to the hearing scheduled for July 14, and Counsel agreed to make every effort to have the IME accomplished. The Court instructed the parties to research whether jurisdiction of this matter was proper in the Circuit Court and advised KCH Counsel to provide notice to Mr. Rosales of the July 14 hearing.

In his written Response to KCH's Motion (filed and served on counsel just prior to the hearing), and during oral argument at the hearing on July 14, counsel for Ms. Garcia raised and argued a new theory. He advanced the single legal argument that KCH lacked standing to seek authorization to withdraw the medical support being given to Issac's body, as that would effectively "usurp" Ms. Garcia's parental rights without due process.

KCH explained that it was seeking an interpretation of its obligations pursuant to Kentucky's determination of death statute and presented the testimony of Aaron Calhoun, M.D, who explained the findings that supported the determination of brain death, the effect of brain death, and the measures required to maintain Issac's body. Believing that there was still a

disputed issue as to whether or not Issac met the criteria for brain death, KCH agreed during the hearing to continue artificial ventilation, hydration, and nutrition. The Court asked KCH to file a Reply responding to the arguments raised by Ms. Garcia's attorney that KCH lacks standing.

Following the completion of the hearing, Mr. Bates revealed for the first time that the independent medical exam he had insisted was necessary for the resolution of this matter had in fact been conducted on July 12. Mr. Bates purposefully and knowingly withheld this critical information from the Court and the parties during the course of the hearing, instead waiting until the post-hearing bench conference to disclose that the family had in fact obtained an independent opinion from a pediatric neurologist, Dr. Anna Ehret, and that her exam had confirmed brain death. **Dr. Ehret's findings are documented in Issac's medical records and confirm the previous findings of three other physicians that Issac had suffered total and irreversible brain death with no remaining brain or brain stem function.**¹⁴

This brief addresses both the issue of standing and provides additional support for KCH's original Motion. With the revelation that the medical opinion obtained by Ms. Garcia concurs with the other medical providers, the issue pending before this Court is what medical intervention MUST be rendered to a legally dead patient- the question KCH had posed initially.

ARGUMENT

I. KCH has standing to pursue this matter in Circuit Court.

"Every action shall be prosecuted in the name of the real party in interest". CR 17.01. Kentucky law defines the real party in interest "the party who will be entitled to the benefits of the action upon a successful termination thereof; one who is actually and substantially interested

¹⁴ Exhibit H

in the subject matter.” *Combs v. Richards*, 63 S.W.3d 193, 194-195 (Ky. App. 2001); *see also* *Brandon v. Combs*, 666 S.W.2d 755, 759 (Ky. App. 1984).

Under Kentucky law, standing requires a party to have a “present and substantial interest in the subject matter.” *Bailey v. Preserve Rural Roads of Madison County, Inc.*, 394 S.W.3d 350, 355 (Ky. 2011)(citing *City of Louisville v. Stock Yards Bank & Trust Co.*, 843 S.W.2d 327, 328-329 (Ky. 1992)). An inquiry as to a party’s entitlement to standing must be considered on a case-by case basis in light of the facts and circumstances of the specific facts at issue. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 202 (Ky. 1989).

A. KCH has a present and substantial interest in the subject matter at issue.

There is no question that KCH has a present and substantial interest in the interventions being provided to maintain Issac’s body and is therefore a real party in interest as defined under the Civil Rules. KCH operates the facility where Issac has remained since his admission on June 29, and its employees and medical staff are employing extraordinary measures to maintain Issac’s body. These measures have required KCH and the physicians to expend substantial resources during the two weeks following the medical finding that Issac was deceased under Kentucky law, including the need for exclusive management by a pediatric critical care attending physician and ongoing, often minute-to-minute, intensive care by registered nurses in the Pediatric Intensive Care Unit. KCH is a tertiary care center and Level I pediatric trauma center. Seriously injured and ill children from all over the region depend upon KCH to provide critical care services, and KCH has a significant interest in assuring the appropriate utilization of its critical care resources. Providing ongoing support to a child after the determination of brain death is not an appropriate use of a critical care bed and limits the capacity of KCH to provide services to other children.

B. A parent's right to direct the course of medical treatment necessarily ends upon the death of the child.

In the Response to KCH's Motion, Counsel for Ms. Garcia attempts to mischaracterize this matter as a contest between KCH and Isaac's parents over the right to make medical treatment decisions and relies upon *D.K. v. Com. Ex rel. Cabinet for Health and Family Services*, 221 S.W.3d 382 (Ky. 2007), to support the argument that unless her parental rights have been terminated as the result of due process proceedings brought by the state, Ms. Garcia has "unfettered authority to render decisions as to the care and treatment of her son" and thus KCH lacks standing to seek relief from this Court. KCH does not dispute, nor would it, that a parent has the right to make end-of-life care decisions for their child, but that is not the circumstance presented here.

Respondent's reliance upon *D.K v. Com.* is misplaced as the case has no applicability to the action herein. The dispositive distinguishing fact between this matter and the facts presented in *D.K.* is that *D.K.* was living in a vegetative state with brain stem function present whereas Isaac has suffered brain death, including cessation of all brain stem function, and for *all legal purposes* Isaac is deceased.

Once death has been determined in accordance with Kentucky law, there are no further treatment decisions to be made by the parents. Decisions about disposition after a patient is pronounced dead, such as organ donation and funeral arrangements, are not medical care decisions. Accordingly, there is no need to terminate the parental rights of Ms. Garcia or Mr. Rosales to decide the issue before this Court: are health care providers legally obligated to provide artificial support after brain death has been determined, or may such support be discontinued over the objections of the parent(s)?

C. Jurisdiction in the Circuit Court is appropriate.

The Kentucky Constitution grants our legislature express power to determine the original jurisdiction of the Circuit and District Courts. Ky. Const. §§ 112(5) and 113(6). The Circuit Court is a court of general jurisdiction and has original jurisdiction of all justiciable causes not exclusively vested in some other court. KRS 23A.010(1); Ky Const § 112(5). Our Supreme Court has additionally recognized that “[w]hen the legislature does not specifically assign jurisdiction of a particular matter to the District Court, jurisdiction rests in the Circuit Court.” *Hyatt v. Com.*, 72 S.W.3d 566, 577 (Ky. 2002).

Subject matter jurisdiction of the Circuit Court is proper here. This is an original action asking the Court to guide ongoing medical intervention for the body of a child who is not the subject of any proceedings by the state to remove custody from his parents. Therefore, this action is not properly within the jurisdiction of the Family Court. This action is identical to multiple previous original actions for medical intervention for pediatric patients, as well as to Ms. Garcia’s own ex parte Motion for a temporary restraining order to prevent removal of life support. There is no support for the proposition that jurisdiction is improper in this case. The legislature has provided no guidance that prohibits the Circuit Court from having jurisdiction in this matter or that mandates that the jurisdiction of this original action in another Court. Ms. Garcia’s response additionally acknowledges that this Court has jurisdiction.¹⁵ Therefore, as the legislature has not assigned jurisdiction of this subject matter to any particular Court, under the Kentucky Constitution and Kentucky statutory and case law, jurisdiction is proper in the Circuit Court.

II. KCH appropriately seeks a finding from this Court that no medical intervention is required once death has been established pursuant to KRS 446.400(2).

KRS 446.400 provides that “for all legal purposes” the occurrence of death “shall be determined in accordance with the usual and customary standards of medical practice” and that death shall not be determined to have occurred unless certain minimal conditions have been met. KRS 446.400. Those minimal conditions include “when respiration and circulation are artificially maintained,” two licensed physicians determine there is “a total and irreversible cessation of all brain function, including the brain stem.” KRS 446.400(2). The KCH “Determination of Brain Death Policy” incorporates the requirements of both KRS 446.400(2) and the current medical standards for determining brain death in children greater than 37 weeks gestational age.¹⁶

The multiple brain death examinations conducted on Issac on June 30, 2014 and July 2, 2014 are documented in Isaac’s medical records in a format that clearly establishes compliance with the requirements of Kentucky law, KCH policy, and the current medical literature.¹⁷ All three notes establish the same findings and document that on June 30 during the examination performed by Dr. McDonald; and on July 2 in examinations performed by Dr. McDonald and by Dr. Orman, Issac demonstrated:

- no muscle tone;
- no response to central painful stimuli;
- no papillary reflex to light;

¹⁵ Exhibit L, Ms . Garcia’s Response, par. 19.

¹⁶ Exhibit M, KCH “Determination of Brain Death” policy; “Guidelines for the determination of brain death in infants and children: An update of the 1987 Task Force recommendations”, Critical Care Medicine, 2011, Vol. 39, No. 9, 2139-2155.

¹⁷ Exhibit D, Exhibit G, Exhibit H

- no cough reflex;
- no gag reflex;
- no corneal reflex;
- no sucking or rooting reflex;
- no oculovestibular or oculocephalic reflexes; and
- no spontaneous respiratory effort in response to withdrawal of the ventilator for over sixteen minutes and the resulting increase of carbon dioxide levels.

Subsequent consultations by pediatric neurologists Dr. Karen Skjei (requested by Dr. McDonald on July 3) and Dr. Anna Ehret (requested by Ms. Garcia and Mr. Bates on July 12) both confirmed the previous findings of clinical brain death documented by the PICU attending medical staff. Dr. Ehret's July 12 note further documented that she obtained Issac's history from his mother and uncle, and at the time of her consultation "his uncle was speaking good English and expressed his understanding of our discussion."¹⁸ Issac's mother and uncle provided the same history that had been given in the ER on July 2 and then informed Dr. Ehret that "the case is pending in a court and they could only talk further after discussing with their lawyer."¹⁹ Dr. Ehret noted that she discussed her findings confirming Issac's brain death with Ms. Garcia "in her own language and [Ms. Garcia] expressed her understanding."²⁰

There has been no challenge to the medical findings and opinions of any physician who has performed a neurologic examination of Issac. There are no findings or opinions contrary to the determination that brain death has occurred.

KCH is properly before this Court seeking an opinion as to whether medical intervention must continue after brain death has been established. As KRS 446.400 is applicable here, and

¹⁸ Exhibit H

¹⁹ Exhibit H

the medical providers complied with its requirements in determining Issac's brain death, there is no remaining factual issue to be decided. Issac's death occurred on July 2, 2014, and there is no law that mandates continued treatment. The medical providers should be allowed to comply with the applicable medical standard of care and their medical ethical obligations, which require that the healthcare providers inform the family of Issac's brain death, allow the family adequate time to say goodbye to Issac, provide grief support through social work and chaplain services, and remove all artificial means prolonging the appearance of life in Issac's body.

III. Compelling KCH to continue providing medical interventions to Issac's body is against public policy.

This controversy raises serious public policy concerns for every hospital in Kentucky. KCH and its healthcare providers are allocating significant resources, including time, staff, equipment, blood, medications, and a critical care bed to provide medical care to a child's deceased body. These medical resources are limited and precious. If families were to be permitted to subvert the medical standard of care and require hospitals to indefinitely maintain support for patients determined to be brain dead, the ability to care for critically injured and ill patients would be threatened.

CONCLUSION

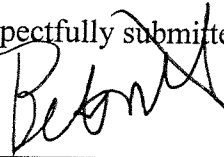
KCH and its medical staff do not desire to be in opposition to the family and instituted this action in the hope that a judicial determination would end the controversy over whether care must be continued. KCH postponed removal of support to allow Ms. Garcia an opportunity to confirm brain death with an independent medical exam. That exam was conducted on July 12, 2014, and there is no longer a factual dispute that Isaac's condition meets the criteria for brain death set forth in KRS 446.400(2). KCH recognizes that this is a heart-wrenching situation for

²⁰ Exhibit H

the family; Issac was a two-month-old infant who succumbed to brain death as a result of injuries he sustained prior to his arrival at KCH. While KCH sympathizes with Ms. Garcia and Isaac's family, there is no legitimate interest served by continuing to maintain Isaac's body.

Accordingly, for the reasons stated herein, KCH does hereby respectfully request entry of an Order finding that no legal obligation exists under Kentucky law requiring KCH or its medical staff to maintain artificial support of Issac's body.

Respectfully submitted,



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CERTIFICATE OF SERVICE

It is hereby certified that a copy here of was hand-delivered this 18 day of July, 2014, to the following:

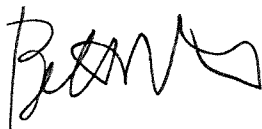
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Noelle Haegele

IN THE INTEREST OF ISSAC LOPEZ, A MINOR:

ORDER

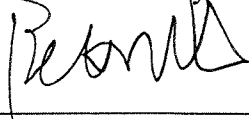
The Court, having considered the briefs filed by the parties and the evidence and testimony presented, finds that:

The criteria to determine death set forth in KRS 446.600 (2) have been satisfied and there is no obligation under Kentucky law for Kosair Children's Hospital or members of its medical staff to artificially maintain respiration or circulation, or to render any other medical interventions or treatment, to Issac Lopez.

Entered this _____ day of July, 2014.

Judge, Judith McDonald Burkman
Jefferson Circuit Court, Division Nine

Order tendered by:



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