

**JEFFERSON CIRCUIT COURT
DIVISION NINE
JUDGE JUDITH E. McDONALD-BURKMAN**

NO. 14-CI-3541

IN THE INTEREST OF ISSAC LOPEZ, A MINOR

ORDER

*** **

Norton Healthcare, Inc. d/b/a Kosair Children's Hospital ("Kosair") has petitioned this Court for an Order allowing Kosair and its medical staff to withdraw all artificial support for a two month old baby, Issac Lopez. The mother of the infant sought and received a Temporary Restraining Order on July 2, 2014, and on July 3, 2014 the issue was presented to Division Eight of the Jefferson Circuit Court. After a hearing, that Court dissolved the Restraining Order and Kosair agreed to continue support for Issac until his family could have him evaluated by a physician of their choice and until this Court ruled upon the pending motion to withdraw artificial support. On July 8, 2014 the Court appointed a Guardian *ad litem* for Issac Lopez. On July 10, 2014 the parties presented to the Court on Kosair's emergency motion which advised that Issac's body was deteriorating and that many extraordinary measures were required to keep his body as stable as possible. The Court then inquired as to the mother's independent physician's evaluation, appointed the father legal counsel (as required by law due to his incarceration), and requested the parties appear on July 14, 2014 to address jurisdictional concerns and Kosair's motion.

On July 14, 2014, all interested parties were present with counsel. The issue of jurisdiction was argued and a challenge to Kosair's standing to initiate this action was

also raised. Both of these threshold issues must be resolved before the Court can rule on Kosair's motion. (The father elected to abstain from stating a position.)

The facts are largely undisputed. The medical proof is completely undisputed. On June 29, 2014 Issac was brought to Kosair, unresponsive. He presented with a skull fracture, subdural hematoma, oxygen deprivation to his brain, acute respiratory failure, cardiorespiratory arrest, hypoxic ischemic encephalopathy, cerebral edema, and rib fracture. He remained unresponsive to any stimuli and had no spontaneous respiratory ability. Dr. Mark McDonald performed a brain death examination the next morning (June 30, 2014) which confirmed Issac had no brain activity or brain stem function. The mother requested a second examination. On July 2, 2014 two brain death examinations were conducted, one by Dr. McDonald, and one by Dr. Karen Orman. Both confirmed total, complete, and irreversible brain death. On July 5, 2014 Dr. Karen Skjei examined Issac, concurred with the previous findings and assessments, and noted that there was no chance for recovery of brain function. On July 12, 2014 Dr. Anna Ehret, the mother's selected physician, examined Issac, confirmed all previous assessments and found that Issac was brain dead.

The Court has reviewed the legal record, statutory and case law, heard arguments of counsel, reviewed memorandum of counsel, reviewed Kosair's policy/procedure for brain death examinations, reviewed the entire medical record of Issac Lopez (filed under seal in the record), in particular the Declarations of Brain Death by Clinical Exams, and also heard testimony from Dr. Aaron Calhoun on July 14, 2014.

This Court is one of general jurisdiction and causes are properly presented here if not exclusively vested in some other court. KRS 23A.010. Neither this matter, nor any ancillary or derivative issue thereto has been filed in any other court. (Criminal charges against the father are pending in the Jefferson Circuit Court.) There are no Family Court proceedings regarding this child and/or his parents. There are no District Court proceedings regarding this child and/or his parents. The Court is unaware of any case or statute which places jurisdiction of cases involving medical intervention, such as here, in any other court. Jefferson Circuit Court has jurisdiction over this matter.

The second threshold issue is whether Kosair has standing to seek an Order allowing it to remove machines/devices/substances which *artificially* maintain respiration and circulation on a body *after a determination of brain death* has occurred. CR 17.01 requires actions be pursued by the real party in interest. That party must have a “present and substantial interest” in the subject matter. *City of Louisville v Stockyards Bank & Trust Co.*, 843 S.W.2d 327, 329 (Ky. 1992). Kosair has, since June 29, 2014, been providing care to Issac Lopez through its facilities, staff and physicians on a full time basis. The mother argues that her parental rights have not been terminated and therefore, she has sole authority to make medical treatment decisions. Issac’s Guardian *ad litem* holds the same position. They rely primarily on *D. K. v Cabinet for Health and Family Services*, 221 S.W.3d 382 (Ky. 2007). In that case, the child was in a coma or vegetative state, had brain stem function and had not met the statutory definition of death. The Cabinet had custody of D.K. and sought to extend its decision making authority to include removal of life support for D. K. That Court agreed with the mother and denied the Cabinet’s motion to allow it to have the child removed from life support since the

parental rights of the parents were still intact.

Issac's Guardian *ad litem* and the mother both posit that her parental rights have not been terminated and until they are, she has sole decision-making authority with respect to Isaac's medical care. They rely on the absence of termination proceedings under KRS Chapter 620 and 625. The legislative purpose of this set of laws is expressed in KRS 620.010 regarding the treatment of dependent, neglected and abused children:

Children have certain fundamental rights to adequate food, clothing and shelter; the right to be free from physical, sexual or emotional injury or exploitation; the right to develop physically, mentally, and emotionally to their potential; and the right to educational instruction and the right to a secure, stable family.

They also cite *Santosky v Kramer*, 455 U.S. 745 (1982) which recognizes the fundamental liberty interest of parents in the care, custody and management of their child, and *Tabor v Scobee*, 254 S.W.2d 474 (Ky. 1952) which recognizes a parent's right to make medical decisions for their child. They further claim that Isaac's constitutionally guaranteed "inalienable right to life" prevents this Court from granting Kosair's request.

The Court agrees that neither of the parents have had their rights terminated, that the mother does not wish to have artificial support removed from Isaac, and that Kentucky and federal law establish a parent's fundamental liberty interest for the care of their child, including the right to make medical decisions for that child. *Meyer v Nebraska*, 262 U.S. 390 (1923). It is, however, axiomatic that the child at issue in these cases/situations/discussions be viable, alive. Issac is not. Therefore, any suggestion that the parent's rights be terminated prior to considering Kosair's motion is unnecessary. With death, no parental decision making survives (save decisions regarding burial). The Court cannot ignore the unrefuted medical evidence, the significant effort by Kosair to

keep the baby's body stable, and the nature of Kosair's hospital (a Tertiary Care Center and Level One/Pediatric Trauma Center). As Kosair is in the position of caring for this little body, it has a substantial and present interest in the matter of Issac Lopez.

KRS 446.440 states as follows:

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.**

The medical findings, test results and opinions by four qualified physicians unequivocally demonstrate that Issac Lopez is legally dead, and has been since July 2, 2014 at 10:30 a.m. Both Drs. McDonald and Orman submitted affidavits relating to their performance of clinical examinations of Issac on June 30, 2014 and July 2, 2014. Both physicians confirmed the test results showed brain death and Issac was pronounced dead at 10:30 a.m. on July 2, 2014. Drs. Skjei and Ehret examined Issac and found him to be brain dead.

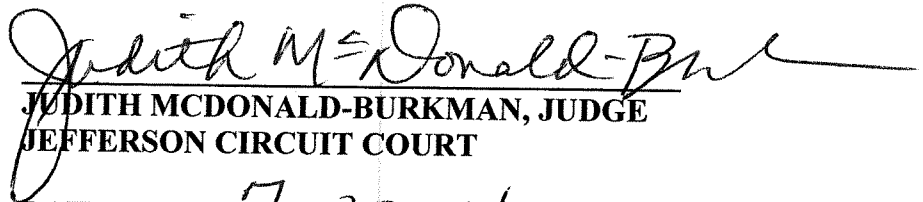
Dr. Aaron Calhoun testified on July 14, 2014 as to the care and condition of Issac's body as he was one of the attending physicians. He explained brain death, particularly with respect to Issac. There are no functioning brain cells – no neurologic function at all – the body cannot return to life. Continuing to keep the body artificially stable is futile.

As Kosair and these physicians point out, there are *no* treatment decisions for

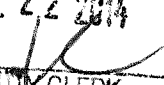
Issac's parents or anyone to make. His condition is irreversible. That will never change.

The Court finds that the criteria to determine Issac Lopez's death as set forth in KRS 446.400(2) have been met. The Kentucky Legislature has made a policy decision, based on scientific medical evidence, of when life ends. There is no authority to suggest the parent of a legally dead child can override the Legislature's definition of death. His death was determined in accordance with the usual and customary standards of medical practice. There is a total and irreversible cessation of all brain function, including the brain stem, as determined and verified by four (4) licensed physicians. Issac Lopez is legally dead. Norton Healthcare, Inc. d/b/a Kosair Children's Hospital and members of its medical staff henceforth shall have no legal obligation to artificially maintain respiration, circulation or to render any other medical interventions or treatment to Issac Lopez.

This is a final and appealable Order, there being no just cause for delay.


JUDITH MCDONALD-BURKMAN, JUDGE
JEFFERSON CIRCUIT COURT
DATE: 7-22-14

cc:
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Noelle Haegele, Esq.
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ENTERED IN COURT
DAVID L. NICHOLSON, CLERK
JUL 22 2014
BY 
CLERK