

Family Objections to
Death by Neurologic
Criteria (DNC):
Lawyer Perspective

1



@ThaddeusPope

Thaddeus Mason Pope, JD, PhD, HEC-C
ASBH Annual Meeting
Baltimore, Maryland
October 14, 2023

2

nothing
to disclose

3

2020 2022
2021 2023

4



5

UDDA →
RUDDA

6

certainty
clarity

7

but

8



9



10

SO ...

11

~~RUDDA~~

12

variability
uncertainty

13

but

14



15

6 objections
to BD

16

how to
respond

17

generally
accepted
rules

18

objection **1**

19

family
rejects
DDNC

20

not concept
not criteria

21

as **applied** to
this patient

22



23



24



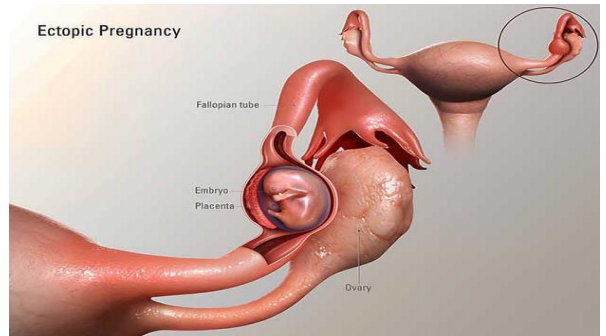
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wrong before
wrong now

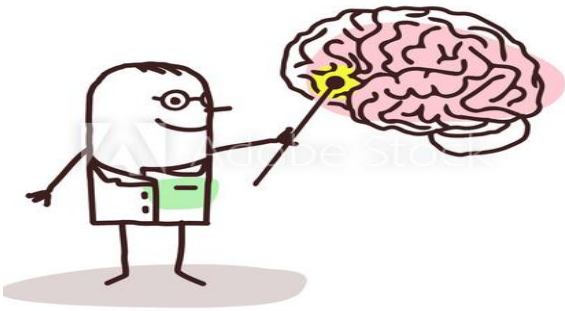
31



SUPERIOR COURT OF CALIFORNIA
OF CALIFORNIA
COUNTY OF ORANGE

injunction against
removing ventilator

32



33



34

SO ...

35



36

objection **2**

37

family wants
indefinite OST
after DDNC

38

want
religious
exemption

39

“if **heart** beats,
they are alive”

40



41

“death ... **shall not**
be declared ... violate
... **religious beliefs** ...”

42

may **not** withdraw
OST because BD

43

BD \neq death

44

2020s

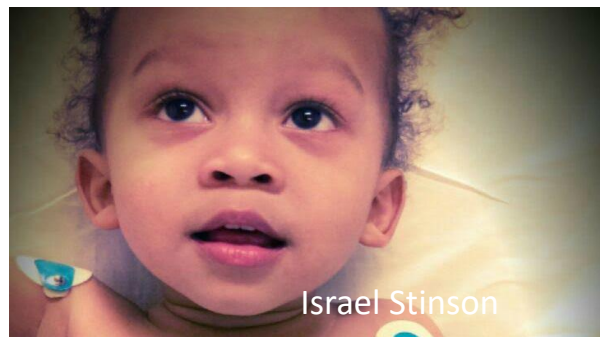
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46



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RUDDA

49



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no duty to continue
OST indefinitely
except in NJ

55

objection **3**

56

family wants
limited OST
after DDNC

57

accommodation

58



Cal. H&S Code 1254.4

59

what

60

“continue **only**
previously ordered
cardiopulmonary
support”

61

“**No** other medical
intervention is
required”

62

how
long

63

“reasonably
brief period”

64

“amount of time ...
to **gather** family ...
at the patient's
bedside”

65

delegation
deference

66

“hospital **shall adopt a policy** for providing ... with a reasonably brief period”

67

<24h

68



69

custom & practice
everywhere else

70

standard
of care

71

SO ...

72

TheUpshot

73

duty to continue OST reasonably brief time (~24h)

74

objection **4**

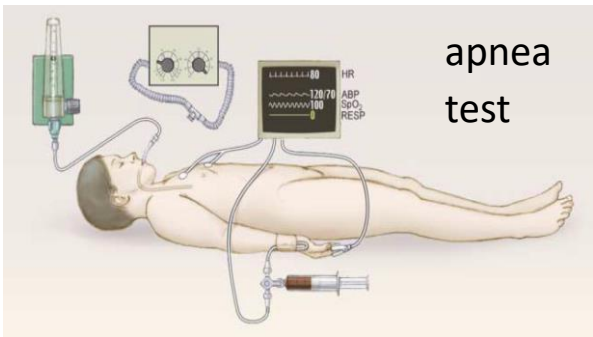
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family objects to BD **testing**

76

must clinicians get **consent** for BD tests?

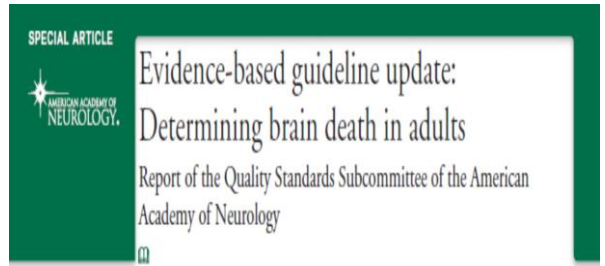
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78

final
confirmatory test

79



Eelco F.M. Wijdicks, MD, PhD
ABSTRACT
Objective: To provide an update of the 1995 American Academy of Neurology guideline with regard

80



Clinical Report—Guidelines for the Determination of Brain Death in Infants and Children: An Update of the 1987 Task Force Recommendations

Abstract | Thomas A. Nakagawa, MD, Stephen Ashwal, MD, Mudit

81

Published Ahead of Print on October 11, 2023 as 10.1212/WNL.0000000000207740

SPECIAL ARTICLE

Pediatric and Adult Brain Death/Death by Neurologic Criteria Consensus Guideline

Report of the AAN Guidelines Subcommittee, AAP, CNS, and SCCM

David M. Greer, MD, MA,* Matthew P. Kirschen, MD, PhD,* Ariane Lewis, MD,* Gary S. Gronseth, MD, Alexander Rae-Grant, MD, Stephen Ashwal, MD, Maya A. Babu, MD, MBA, David F. Bauer, MD, MPH, Lori Billingham, MD, MSc, Amanda Corey, MD, Sonia Partap, MD, MS, Michael A. Rubin, MD, MA, Lori Shutter, MD, Courtney Takahashi, MD, Robert C. Tasker, MBBS, MD, Panayiotis Nicolaou Varelas, MD, PhD, Eelco Wijdicks, MD, PhD, Amy Bennett, JD, Scott R. Wessels, MFS, ELS, and John J. Halperin, MD

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guidelines@aan.com

Neurology® 2023;101:1-21. doi:10.1212/WNL.0000000000207740

82

but

83

more family
refusals

84



85

before
2021

86

variability
uncertainty

87

but

88



89

Book | © 2022  Springer
Death Determination by
Neurologic Criteria
Areas of Consensus and Controversy

90

Home > Canadian Journal of Anesthesia/journal canadien d'anesthésie > Article

Consent for determination of death by neurologic criteria in Canada: an analysis of legal and ethical authorities, and consensus-based working group recommendations



Canadian Journal of Anesthesia
Anesthésie
d'anesthésie

91

2023 PA SUPER 35

IN THE INTEREST OF: M.A.P., A MINOR : IN THE SUPERIOR COURT OF PENNSYLVANIA

APPEAL OF: L.P., FATHER : No. 1753 MDA 2022

92



93

generally,
consent **not**
required

94

SO ...

95



96

notify family
of testing

97

but you do **not**
need consent

98

objection **5**

99

family claims DDNC
does **not follow**
“accepted medical
standards”

100

UDDA

101

when making
determinations of
irreversible cessation

102

“accordance with
**accepted medical
standards”**

103

but

104

which medical
standards are
accepted ?

105



106

variability

107

Research

Original Investigation

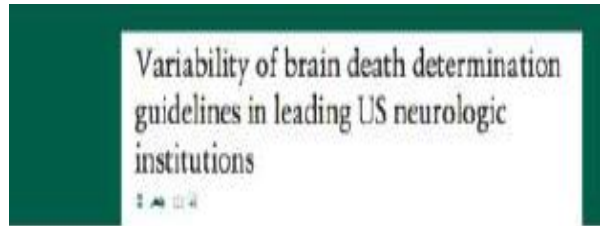
Variability of Brain Death Policies in the United States

David M. Greer, MD, MA; Hilary H. Wang, BA; Jennifer D. Robinson, APRN; Panayiotis N. Varelas, MD, PhD;
Galen V. Henderson, MD; Eelco F. M. Wijdicks, MD, PhD

108



Hilary H. Wang, MD **ABSTRACT**
109



David M. Gross, MD, MA
Francesco N. Vanlin, MD, PhD **ABSTRACT**
Background: In accordance with the Uniform Determination of Death Act, guidelines for brain death determination are developed at an institutional level, potentially leading to variability of practice. We evaluated the differences in brain death guidelines in major US hospitals with a
110

Neurology®

February 26, 2019; 92 (9) **ARTICLE**

Variability in reported physician practices for brain death determination

Sherri A. Braksick, Christopher P. Robinson, Gary S. Gronseth, Sara Hocker, Eelco F.M. Wijdicks, Alejandro A. Rabinstein

111



112



113



114

AAN guidelines **not**
“accepted medical
standards”

115



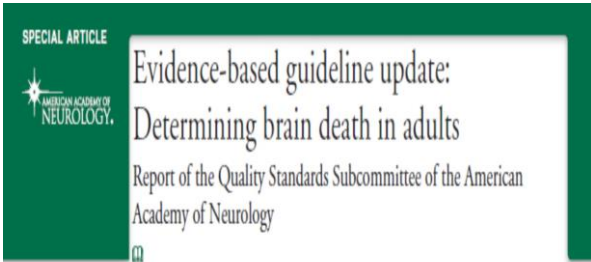
116

amended
NUDDA
A.B. 424 (2017)

117

determination of BD
“must be made in
accordance **with ...**”

118



Eelco F.M. Wijdicks,
MD, PhD

ABSTRACT
Objective: To provide an update of the 1995 American Academy of Neurology guideline with regard

119



Clinical Report—Guidelines for the Determination of
Brain Death in Infants and Children: An Update of the
1987 Task Force Recommendations

abstract

Thomas A. Nakagawa, MD, Stephen Ashwal, MD, Mudit

120



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122



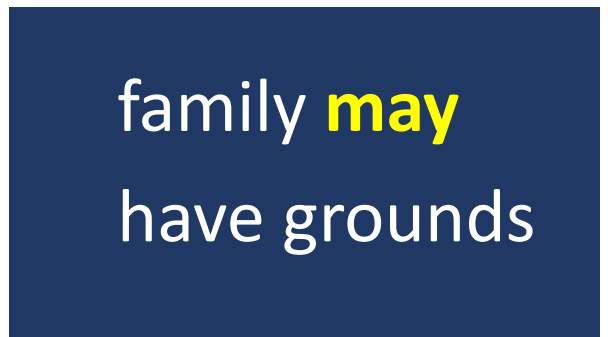
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124



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126

but **no** duty
unless TRO PI

127

clinician duties
after BD

128

limited

129

Annals of Internal Medicine

American College of Physicians Ethics Manual
Sixth Edition

Lois Snyder, JD, for the American College of Physicians Ethics, Professionalism, and Human Rights Committee*

“after ... brain dead ...
medical support should
be **discontinued**”

130



Views & Reviews

Really, most SINCERELY dead
Policy and procedure in the diagnosis of death by
neurologic criteria

D.M. Shaner, MD; R.D. Orr, MD; T. Drought, PhD, RN; R.B. Miller, MD; and M. Siegel, MD

“once death ... diagnosed
... **discontinue** support”

131

Guidelines for Physicians: Forgoing Life-Sustaining
Treatment for Adult Patients

Joint Committee on Biomedical Ethics
of the
Los Angeles County Medical Association
and
Los Angeles County Bar Association

Approved by the Los Angeles County Medical Association February 15, 2006
Approved by the Los Angeles County Bar Association March 22, 2006

“all medical
interventions
should be
withdrawn”

132

consent
not
required

133

dead → not a
patient

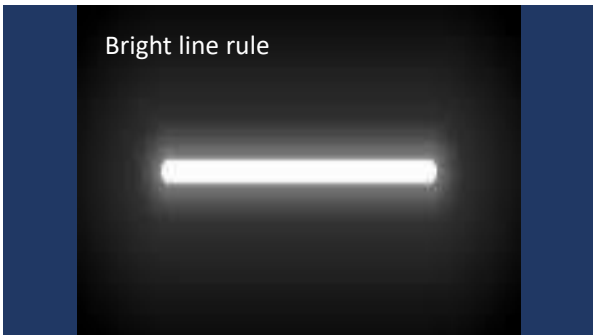
134

not a patient → **no** Tx
duty

135



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No **post**-BD
treatment rights

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objection **6**

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family contends
DDNC **violates**
UDDA

140



141

law | **medicine**

142

UDDA

143

irreversible cessation
all functions
entire brain

144

but

145



146

SPECIAL ARTICLE

Brain death, the determination of brain death, and member guidance for brain death accommodation requests

AAN position statement

James A. Russell, DO, MS, Leon G. Epstein, MD, David M. Greer, MD, MA, Matthew Kirschen, MD, PhD, Michael A. Rubin, MD, MA, and Ariane Lewis, MD, on behalf of the Brain Death Working Group

Neurology® 2019;92:1-5. doi:10.1212/WNL.00000000000006750

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james.a.russell@lahey.org

147

patient can satisfy BD guidelines

148

dead

149

yet...

150

“neuro-endocrine
function **may be
present**”

151



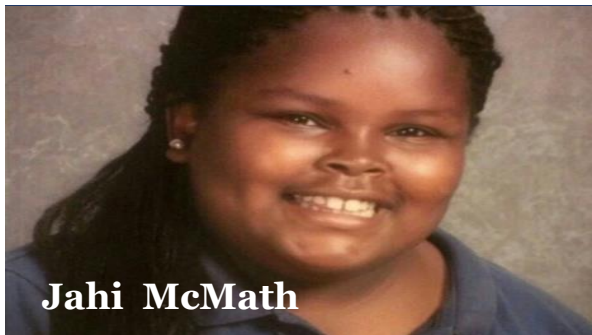
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may determine BD
despite function
hypothalamus

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“**not inconsistent**
with the whole brain
standard of death”

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155



156

WRONG

157

UDDA
requires

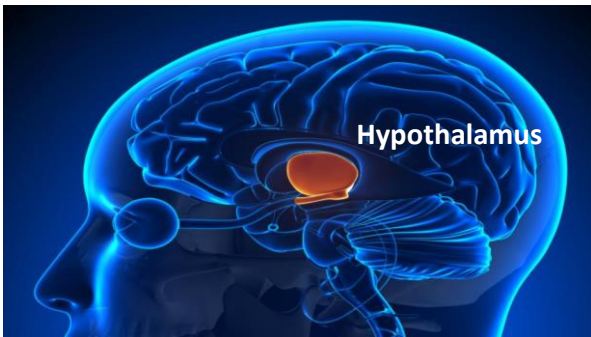
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irreversible
cessation of

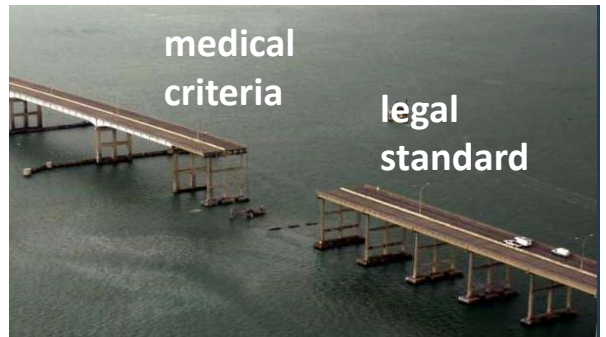
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all functions
of the
entire brain

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161



162

SO ...

163

 **TheUpshot**

164

family **may**
have grounds

165

but **no** duty
unless TRO PI

166

conclusion

167

3 points

168

1

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law sets only
minimum duties

170

institutions may offer
more accommodation
than legally required

171

2

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you don't need the patient to be **dead** to withdraw LST

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even if BD contested

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use your **NBT** policy

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3

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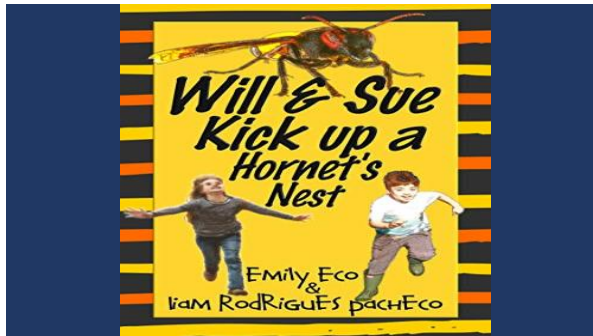
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186

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187

187