

Brain Death

Legal Status Amid
Growing Uncertainty

Thaddeus Mason Pope
42nd ASLME Annual Health
Law Professors Conference
Chicago, IL • June 6, 2019

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2

Need to know

3



“Determining whether a patient is alive
or dead is the **most fundamental aspect**
of providing medical care.”

4

BUT

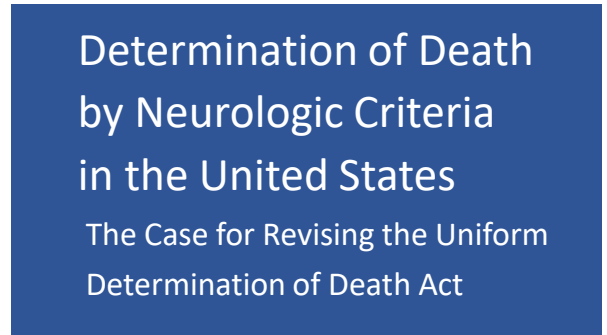
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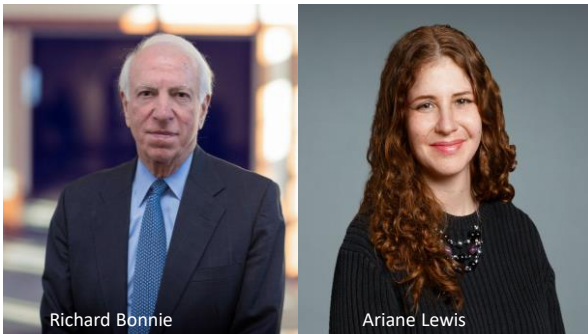
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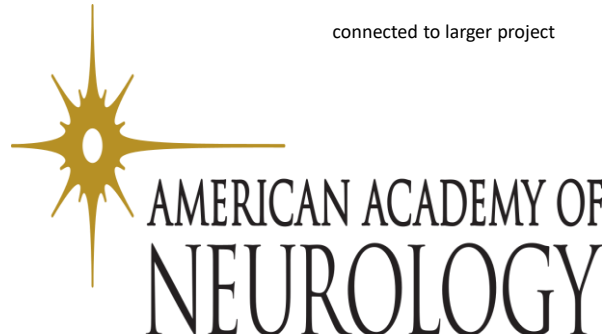
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3

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UDDA

14

4 problems

15

Proposed
amendments

16

UDDA

17

1981

18

44 words

19

Important

20

Life

Death

21

There are

2 ways

to determine death

22

“irreversible cessation of
circulatory & respiratory
functions”

23

or

24

“irreversible cessation
of all functions of
the entire **brain**”

25

We'll focus on this

2nd newer
prong

26

Brain death
=
Death

27

All 56 US
jurisdictions

28

Why?

29

Before
1981

30

Brain death
=
Death

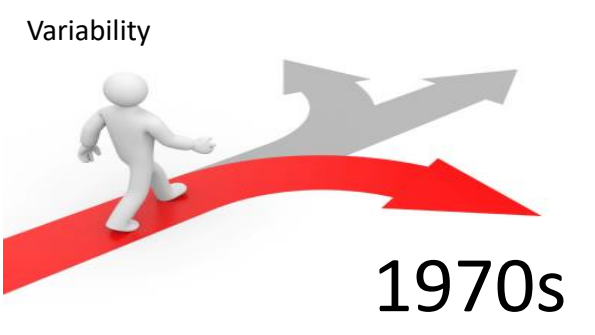
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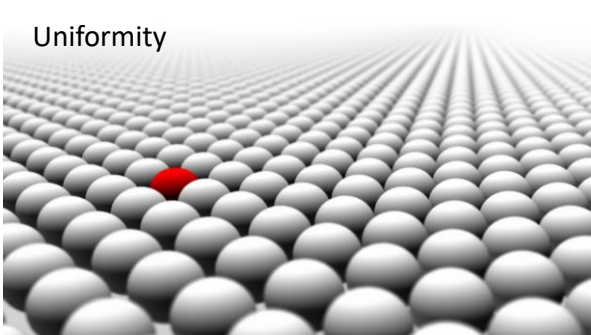
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BUT

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Fast forward to
2019

36

4 problems

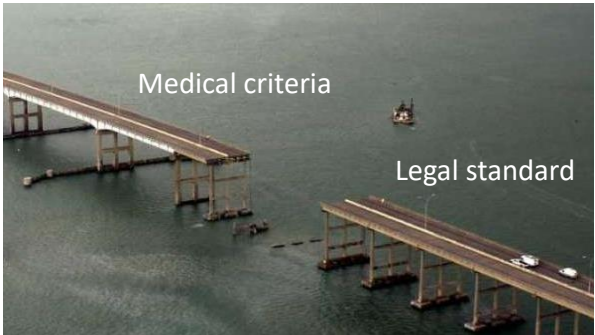
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Variability
Uncertainty
Which is what UDDA was designed to eliminate

38

1st

39

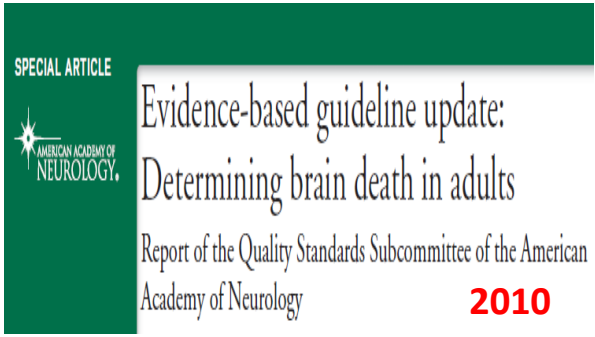


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Most authoritative criteria

41



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SPECIAL ARTICLE

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

AAN position statement

March 2019

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.0000000000006750

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Patient can
satisfy
guidelines

44

Brain
dead

45

Yet...

46

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

47

Okay to declare dead
despite functions of
pituitary gland &
hypothalamus

48

BUT

49

UDDA

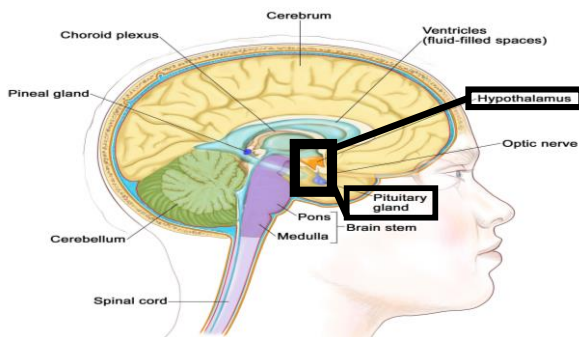
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Requires
irreversible
cessation of

51

“**all** functions”
of the
“**entire** brain”

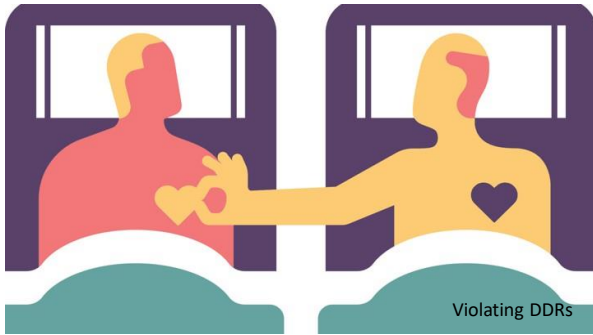
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2nd

56

UDDA

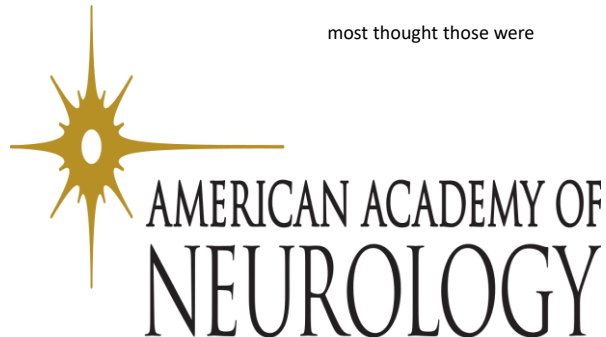
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Determination of
 “irreversible cessation
 of all functions of the
 entire brain”

58

“must be made in
 accordance with
**accepted medical
 standards**”

59



60

BUT

61



Supreme Court of Nevada

62

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

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Improving uniformity in brain death determination policies over time

OPEN

Hilary H. Wang, MD ABSTRACT

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Variability of brain death determination guidelines in leading US neurologic institutions



David M. Greer, MD, ABSTRACT

65

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

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Variability

67

State 1
≠
State 2

68

Hospital 1
≠
Hospital 2

69



70



71

MD 1
≠
MD 2

72

Number of
physicians

73

Qualifications

Neurology
Critical care
Any MD

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How tests
administered

75

3rd

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

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78



Billings, Montana

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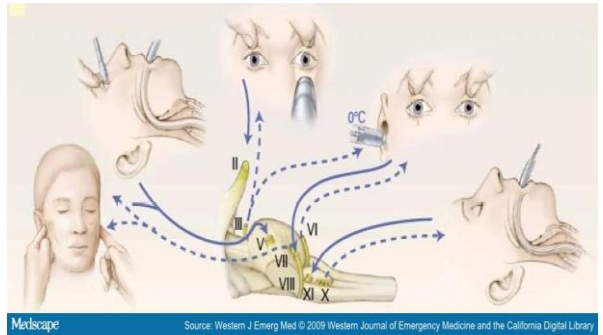


6-year-old
"Drowned" July 22, 2016

80

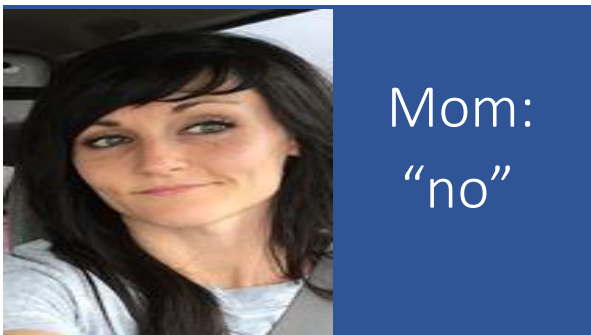


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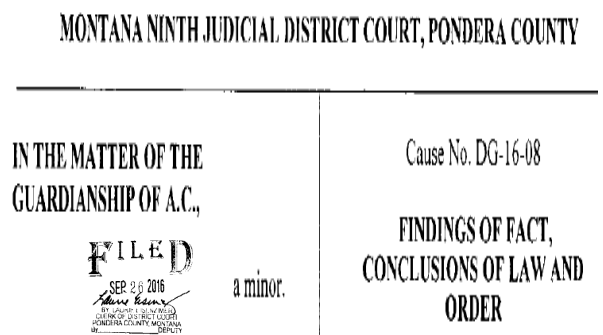


Source: Western J Emerg Med © 2009 Western Journal of Emergency Medicine and the California Digital Library

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83



84

“no”

85

“request ...
 permitting ... testing
 ... **is denied**”

86

“**mother has sole authority**
 to make medical decisions
 . . . including . . . brain . . .
 examinations”

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

88

Yes

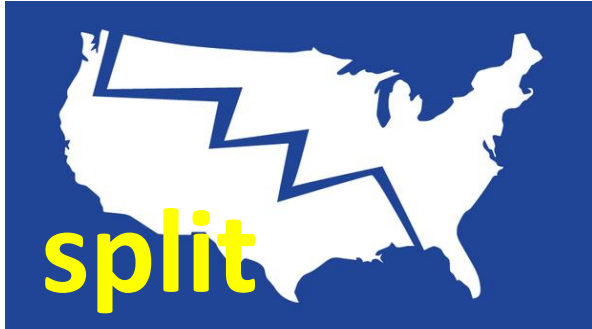
MT KS CA

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No

NV VA GA NY

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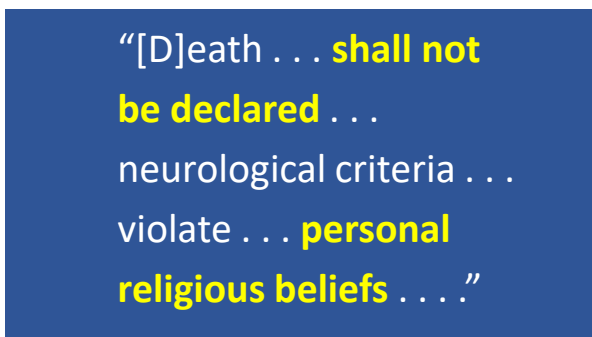
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Pt may
satisfy
BD criteria

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BUT

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May **not**
declare
death

99

Until
death by
CP criteria

100

Rejected
everywhere
outside NJ

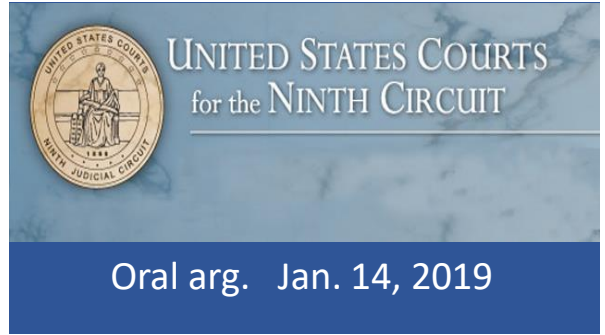
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Lawsuits
/
Bills

102



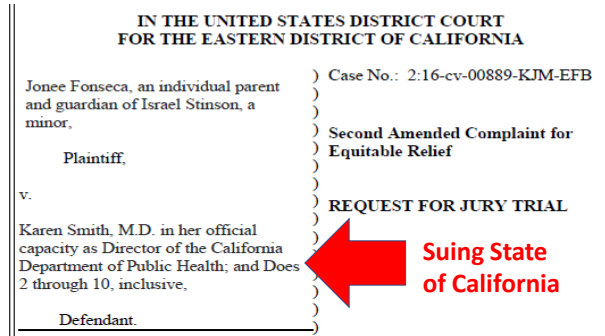
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“Plaintiffs . . . firm **religious beliefs** . . . heart is beating . . . is alive.”

107

“removal of CP support . . . **unconstitutional** . . . interferes . . . freedom of religion . . . first amendment”

108

exemption

109

Reasonable
temporary
accommodation

IL NY CA

110

CBO

vaccine etc.

111

Proposed
amendments

112

Life

Death

113

Life

Death

114

1. Med-Leg “gap”
2. Accepted criteria
3. Consent required
4. Religious exempt

115



116

RUDDA

117

Med-Leg
“gap”

118

“irreversible cessation of all functions of the entire brain, including the brainstem,
with the exception of hormonal function.”

119

Accepted
criteria

120

“in accordance with the applicable guidelines **published June 8, 2010, by the American Academy of Neurology**”

121

Consent
requirement

122

“Reasonable efforts should be made to notify a patient’s next-of-kin . . . but **consent is not required** for determination of death.”

123

Religious
exemption

124

clear legal
guidance

125

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References

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Materials from this presentation are available at

<http://thaddeuspope.com/braindeath>

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Medical Futility Blog

Since July 2007, I have been blogging, almost daily, to medicalfutility.blogspot.com. This blog focuses on reporting and discussing legislative, judicial, regulatory, medical, and other developments concerning medical futility and end-of-life medical treatment conflicts. The blog has received nearly **4 million** direct visits. Plus, it is distributed through RSS, email, Twitter, and republishers like WestlawNext and Bioethics.net.

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