



1

Brain Death
Must clinicians obtain consent to perform testing for determination of death by neurological criteria?

2



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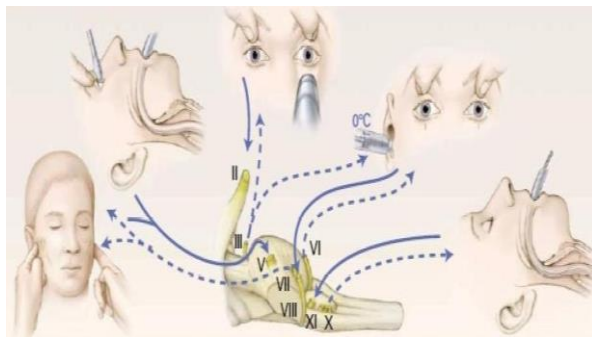
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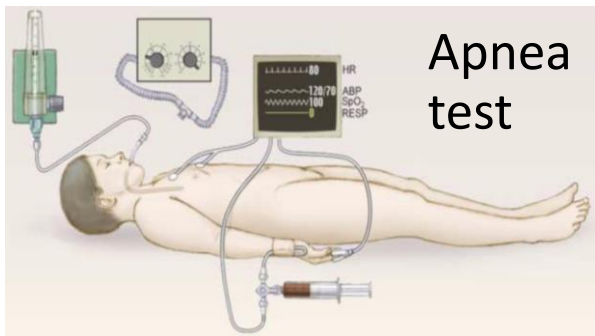
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High Court
Family Division

June 6-7, 2022

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Must clinicians get **consent** to test for brain death?

13

General rule

14

No Dx or Tx without consent

15



Mary Schloendorff

battery

1914

16

exception

17



18

implied
consent

19

Thesis

20

another
exception

21

Clinicians do **not**
need consent to
test for brain death

22

Roadmap

23

3 parts

24

Problem

25

Proposed solution

26

Grounds

27

Problem

28



29



30



31



32



33



34



35



36

Opt-out
BD

37

No apnea test



No BD

38

Pt may
satisfy
BD criteria

39

BUT

40

Cannot test
to confirm

41

No BD



Treatment duties
continue until CP

42



43



44



45



46



47



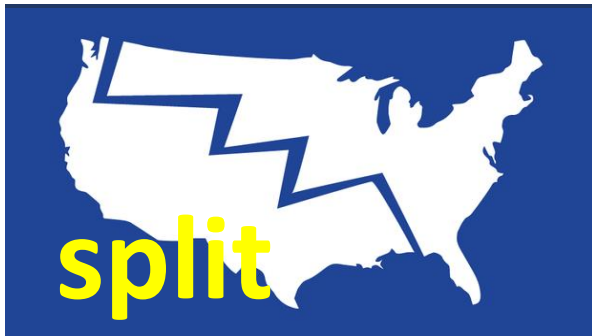
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Must clinicians
honor the
refusal?

49

Do clinicians
need **consent**
for apnea test?

50



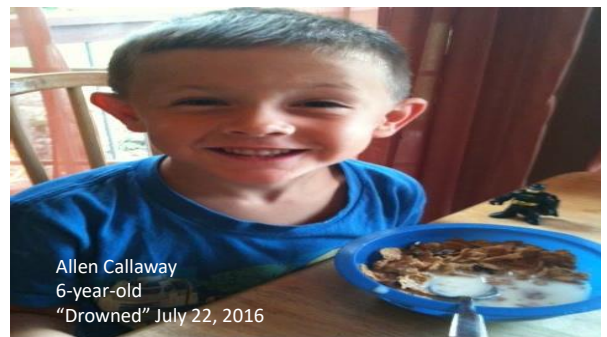
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Yes

52



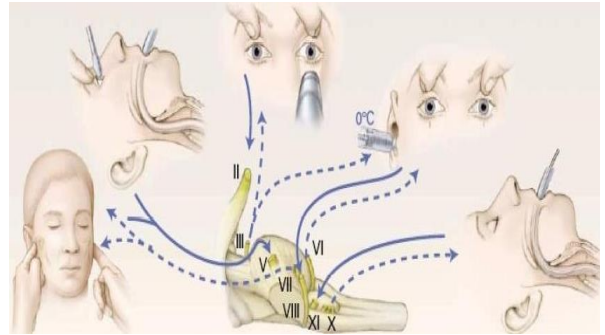
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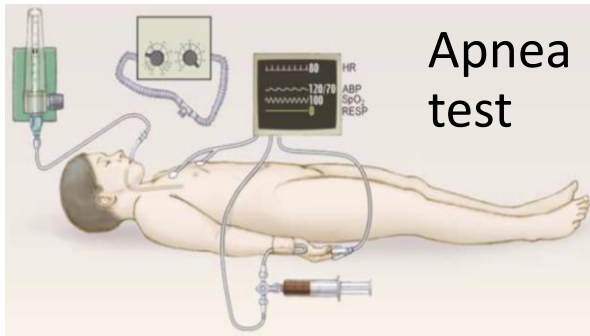
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MONTANA NINTH JUDICIAL DISTRICT COURT, PONDERA COUNTY

IN THE MATTER OF THE
GUARDIANSHIP OF A.C.,

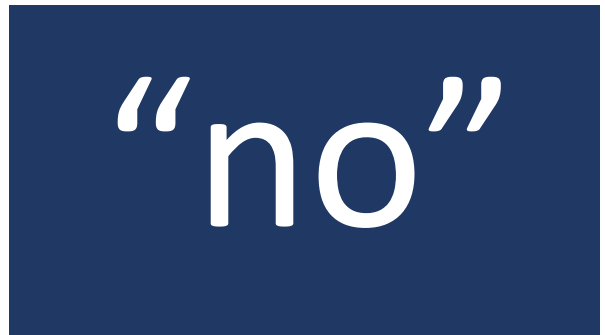
FILED
SEP 26 2016
BY: [Signature]
CLERK OF DISTRICT COURT
PONDERA COUNTY, MONTANA

a minor.

Cause No. DG-16-08

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

59



60

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

61

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

62



63

Do clinicians
 need **consent**
 for apnea test?

64

MT said
 “**yes**”

65

KS also
 “**yes**”

66



Brett Shively
2yo "drown"
Wichita, 2006

67

CA also
"yes"

68



Alex Pierce - drowned

69

plausible

70

Normally, may **not**
do things to patient
without **consent**

71



72



No consent = medical battery

73



74



75



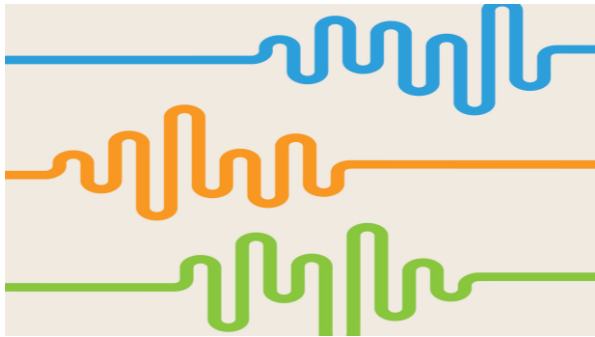
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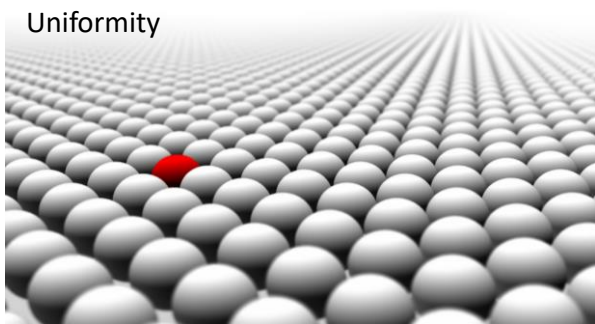
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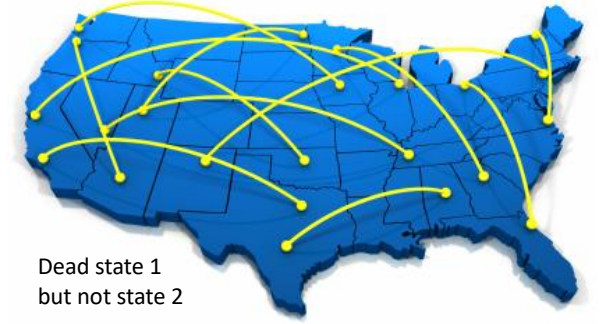
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Dead state 1
but not state 2

82



83



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85



86

Working to
amend UDDA

87

UDDA

88

Law on death
in all U.S.
jurisdictions

89

1981

90

Determination of Death by Neurologic Criteria in the United States: The Case for Revising the Uniform Determination of Death Act

Ariane Lewis, Richard J. Bonnie, Thaddeus Pope, Leon G. Epstein, David M. Greer, Matthew P. Kirschen, Michael Rubin, and James A. Russell

CURRENT TOPICS IN HEALTH LAW: 2019 ASLME HEALTH LAW PROFESSORS CONFERENCE • WINTER 2019

The Journal of Law, Medicine & Ethics, 47 S4 (2019): 9-24. © 2019 The Author(s)

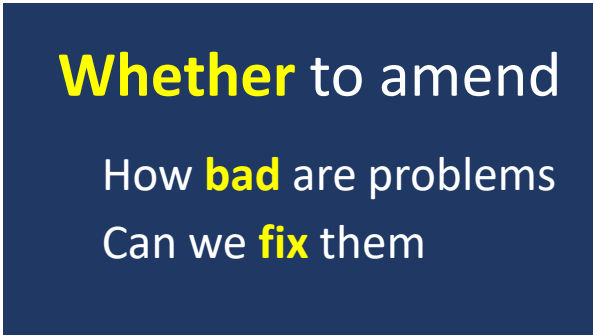
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Drafting
Committee

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How to amend

What solutions
What language

98

2021 – 2024

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1st reading
July 2023

100

2nd reading
July 2024

101

ULC approval
July 2024

102

50 states
enact it

103

UDDA

104

Must clinicians get
consent to test for
brain death?

105



106

DRAFT

107

Notify
no need consent

108



109



110



111

Notify
no need consent

112

Arguments

113

Yes consent

114

Iatrogenic risks
Respect for person
Preservation of trust

115

BUT

116

“Consent
need **not**
be obtained”

117



118



119



120



121



122



123



124



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126



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Consent is
not required

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“assessment ...
to determine the
general nature of ...
person’s condition”

129

“**preliminary
examination**
... diagnosis”

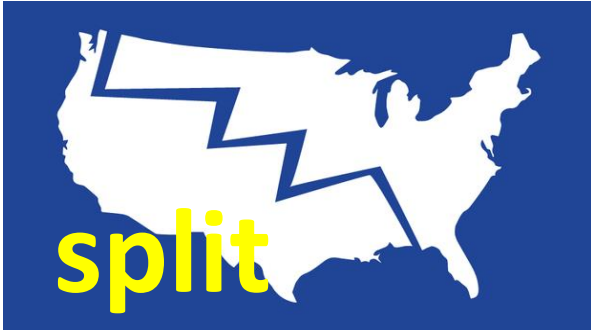
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Determining if alive
or dead concerns
general nature of
person’s condition

131

2 cases

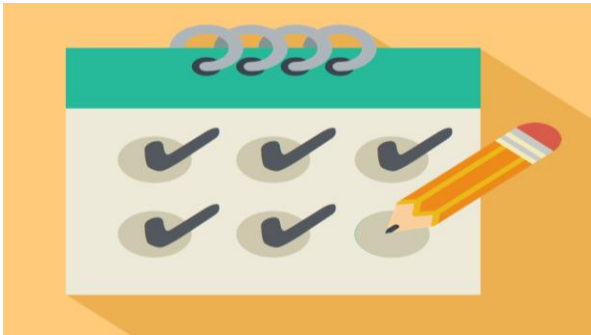
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134



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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,

Correspondence

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“moral authority ...
to perform ... **without**
obligation to obtain
informed consent.”

139

“professional
responsibility”

140

JAMA | Special Communication

Determination of Brain Death/Death by Neurologic Criteria
The World Brain Death Project

David M. Greer, MD, MA; Sam D. Shemie, MD; Ariane Lewis, MD; Sylvia Torrance, BSc; Panayiotis Varelas, MD; Fernando D. Goldenberg, MD;

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4 practice

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RESEARCH ARTICLE

Variability in Pediatric Brain Death
Determination Protocols in the United States

Conall Francoeur, MD, Matthew J. Weiss, MD, Jennifer M. MacDonald, MD, PhD, Craig Press, MD, PhD,
David M. Greer, MD, MA, Robert A. Berg, MD, Alexis A. Topjian, MD, MSCE, Wynne Morrison, MD, MBE, and
Matthew P. Kirschen, MD, PhD

Correspondence
Dr. Kirschen
kirschenm@chop.edu

Neurology® 2021;97:e310-e319. doi:10.1212/WNL.00000000000012225

100 hospitals

143

0 require consent
>1/3 say consent
not required

144



Ariane Lewis, MD
 Nellie Adams, BA
 Panayiotis Vardas, MD, PhD
 David Geer, MD, MA

ABSTRACT
Objective: We sought to evaluate how neurologists approach situations in which families request prolonged organ support after declaration of death by neurologic criteria (DNC).
Methods: We surveyed 938 members of the American Academy of Neurology (AAN) who treat critically ill patients, including 50% who practice in states with accommodation exceptions

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Clinicians do **not**
need consent to
test for brain death

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Thaddeus Mason Pope, JD, PhD, HEC-C
Mitchell Hamline School of Law
875 Summit Avenue
Saint Paul, Minnesota 55105
T 651-695-7661
C 310-270-3618
E Thaddeus.Pope@mitchellhamline.edu
W www.thaddeuspope.com
B medicalfutility.blogspot.com

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Materials from this
presentation are available

<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 **5 million** direct visits. Plus, it is distributed through RSS, Twitter, and re-publishers like WestlawNext.

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Forthcoming

156

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Thaddeus Mason Pope, JD, PhD, HEC-C

Mitchell Hamline School of Law
875 Summit Avenue
Saint Paul, Minnesota 55105

T 651-695-7661

C 310-270-3618

E Thaddeus.Pope@mitchellhamline.edu

W www.thaddeuspope.com

B medicalfutility.blogspot.com

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