

**Legal Issues with Brain  
Death Determination**

Critical Care Grand Rounds  
Institute for Critical Care Medicine  
Mount Sinai Health System  
May 12, 2022

1

**Thank you**

for inviting an "outsider"

2

**Nothing  
to disclose**

3

**@ThaddeusPope**



4

**Active  
court case**

5



6



**Beverly  
Whitehead**

7

**62yo**

3 children  
7 grandchildren



8



9



10



11



12



13



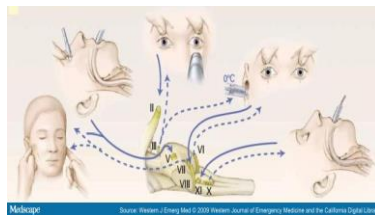
14



15



16



17

**Kaleida Health**

WRIGHT, SEVERLY A  
 MR. [REDACTED] PT. [REDACTED]  
 DOB [REDACTED] AGE 62 SEX-F  
 A13- PAGE BRUN  
 PCP- DR. J. T. RYAN  
 PC- MED ADM DT- 03/26/22  
 BUFFALO GENERAL HOSPITAL

**CHECKLIST FOR DETERMINATION OF BRAIN DEATH FOR ADULTS (v.1)**

Yes No **Prerequisites** (each must be checked)

- 1. Coma, Irreversible and cause known
- 2. Appropriate waiting period has been followed (>4 days) if patient was previously induced into hypothermia, additional vigilance recommended?
- 3. Neuroimaging is compatible with the diagnosis, if applicable
- 4. CNI depressant drug effect absent if indicated, toxicology screen; if barbiturates given, serum level less than 10 mcg/mL (\_\_\_\_ serum level)
- 5. No evidence of residual paralytics (electrical stimulation if paralytics used)
- 6. Absence of severe acid-base, electrolyte, endocrine abnormality

18

*NOTING: THIS TEST IS SIGNED THE MORNING OF 04/02/22*  
Documentation of Brain Death

A physician shall certify a patient as brain dead when the patient fulfills the criteria described in these guidelines. Before a patient can become an organ donor, a second physician certification is required.

Certification of Physician:

Date and Time of Death: April 30, 2022 2:40 PM

Print name of physician performing examination: EMY A CAMPBELL, MD

Signature: *Emy A Campbell* Date: 3/31/2022 8:00 AM

19



20



21

**Result of the Apnea Test:**

Baseline ABG: 3.48/24/136

End of Test ABG: 3.10/25/104

I observed the patient throughout the apnea test and my assessment is:

1. Confirms brain death  
 2. Does not confirm brain death  
 3. Results are indeterminate. Reason: \_\_\_\_\_

Print name of physician performing apnea test: Jamie Nadler

Signature: *Jamie Nadler* Date: 4/2/22

22

BD determined  
**twice**

23

March 30, 2022  
*and*  
 April 2, 2022

24

**BUT**

25

May 2022						
S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

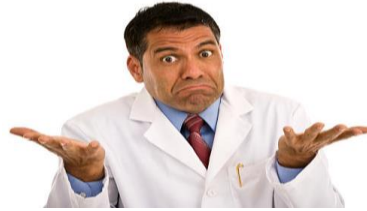
26



27

41 days

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Why

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HON. DENNIS E. WARD, J.S.C.  
 PRESENT: HON. DENNIS E. WARD, J.S.C.,  
 Presiding Justice

STATE OF NEW YORK : COUNTY OF ERIE  
 SUPREME COURT

ERIC WHITEHEAD as Guardian of  
 BEVERLY WHITEHEAD,  
 Plaintiff,  
 v.  
 BUFFALO GENERAL HOSPITAL,

ORDER TO SHOW CAUSE

Index No: 2021-00987

31

ORDERED, that pending further order of this Court, Buffalo General Hospital, its agents,  
 employees, doctors, nurses, and staff, upon receipt of this Order to Show Cause and its supporting  
 papers, are restrained from withdrawing life support from Beverly Whitehead, and it is further

32

Why

33



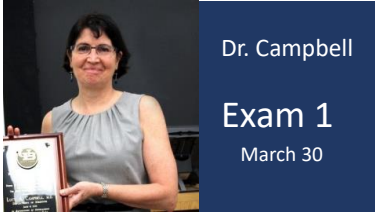
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35

4<sup>th</sup> opinion

36

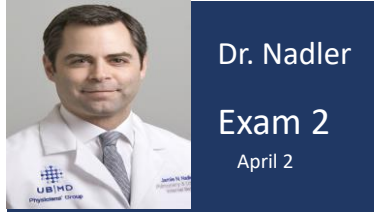


Dr. Campbell

Exam 1

March 30

37

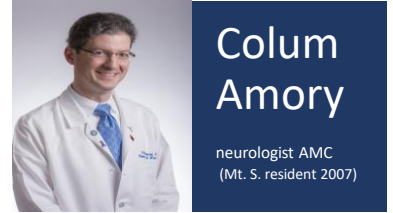


Dr. Nadler

Exam 2

April 2

38



Colum Amory

neurologist AMC  
(Mt. S. resident 2007)

39



April 22, 2022

10. Based upon the examinations and evaluations documented in Ms. Whitehead's medical records, it is my opinion, to a reasonable degree of medical certainty, that Ms. Whitehead is brain dead.

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Start with Whitehead case  
New York  
Right now

55

**not** unique

56

**Other** BD conflicts  
recently escalated  
to **NY** courts

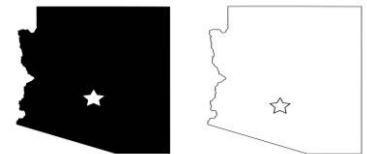
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58



59



Phoenix, AZ

60

**More**  
conflict

61

**More**  
uncertainty

62

**More**  
variability

63

Frame

64

UDDA

65

Law on brain death in all U.S. jurisdictions

66

> 2 years working to amend UDDA

67

Why amend the UDDA?

68

Roadmap

69

5 parts

70

UDDA

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4 types of controversy

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1968

82

Only **1 way** to determine death

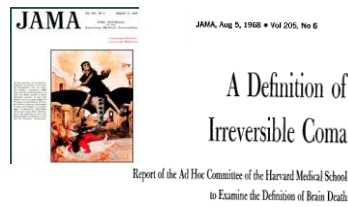
83

irreversible cessation of **circulatory & respiratory** functions

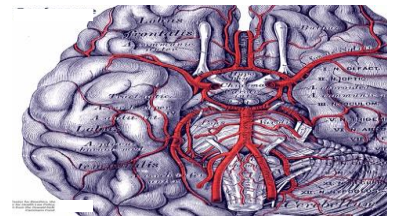
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BUT

85



86



87

“**No** statutory change in law ... necessary”

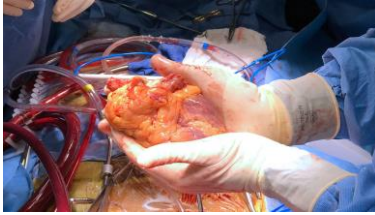
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Wrong

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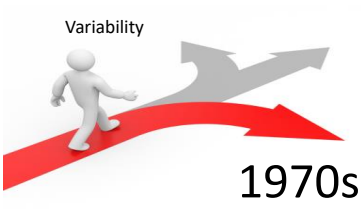
## Legislation Proposed to Recognize Brain Death

LOS ANGELES (PTS) — Proposed legislation recognizing so-called brain death will be drafted here, according to Dept. Dist. Atty. John W. Miner. He said it will not define brain death. The Los Angeles County district attorney's vital organ transplant committee decided

92



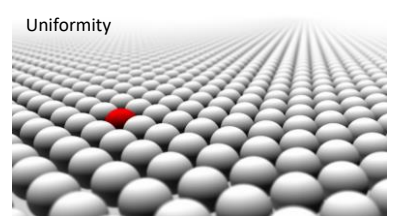
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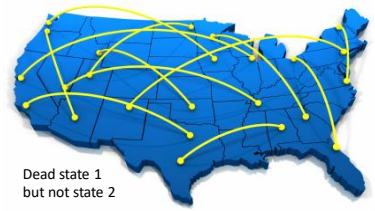
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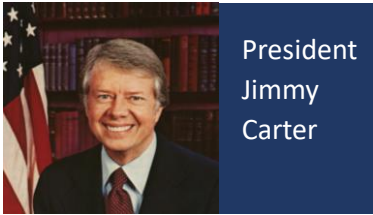
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“status as alive or dead should not depend on the **capricious** question of immediate **locale**”

98

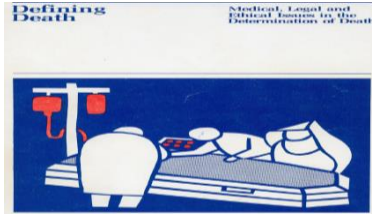


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President  
Jimmy  
Carter

100



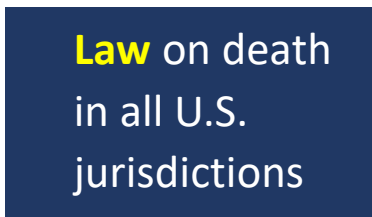
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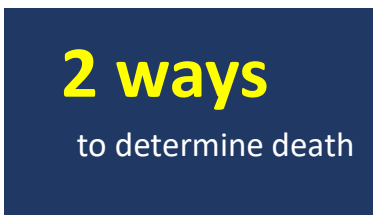
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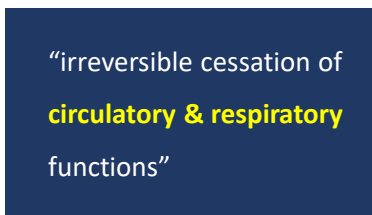
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105



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107



108

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

109

circulatory criteria  
**or**  
neurologic criteria

110

**U**DDA

111

Eliminate  
1970s variability

112

1980

113

>40 years

114

**BUT**

115



116



117



118

Evidence

119

Organ support after death by neurologic criteria  
Results of a survey of US neurologists (200)

120

50% report families request organ support after BD

121



122



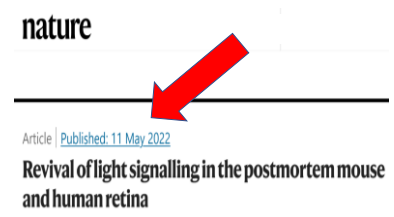
123

“reject this diagnosis”  
“deviate from standard procedures”

124

no surprise

125



126

“raises the question of whether **brain death**, as it is currently defined, is **truly irreversible**”

127

**More**  
conflict

128

Many cases  
to **court**

129



130

So...

131



Uniform Law Commission

132

Working to  
**amend** UDDA

133

**Study**  
Committee

134

**Whether** to amend  
How bad are problems  
Can we fix them

135

2020 – 2021

136

Yes  
Amend

137

**July 2021**

recommendation  
approved

138

**Drafting**  
Committee

139

**How** to amend

What solutions  
What language

140

2021 – 2024

141

1<sup>st</sup> reading  
July 2023

142

2<sup>nd</sup> reading  
July 2024

143

ULC approval  
July 2024

144

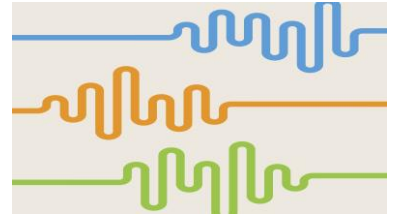


50 states  
enact it

145

Why?

146



147

State 1  
≠  
State 2

148

Hospital 1  
≠  
Hospital 2

149

Kaleida Health  
CHECKLIST FOR DETERMINATION OF  
BRAIN DEATH FOR ADULTS (v.1)

WHITEHEAD, BEVERLY A  
DOB: [REDACTED] PT: [REDACTED]  
AGE: 61  
PCN: SHERATA, NADY  
PC: [REDACTED] MED: 1 ADM DT: 03/20/22  
BUFFALO GENERAL HOSPITAL

Yes No Prerequisites (each must be checked)

1. Coma, Irreversible and cause known
2. Appropriate waiting period has been followed (>4 days) *>4 days*  
hypothermia, additional vigilance recommended
3. Neuroimaging is compatible with the diagnosis, if applicable
4. CNS depressant drug effect absent (if indicated, toxicology screen; if barbiturates given, serum level less than 10 mcg/ml) (\_\_\_\_ serum level)
5. No evidence of residual paralytics (electrical stimulation if paralytics used)
6. Absence of severe acid-base, electrolyte, endocrine abnormality

150

MD 1  
≠  
MD 2

151

Law  
≠  
Practice

152

Why?

153

Uniformity  
Clarity  
Certainty

154

**4** types of  
controversy  
motivating  
amendment

155

**Problem 1**

156

**Mismatch**



157

**Law** | **Medicine**

158

Clinicians do **not**  
assess what  
**UDDA** requires

159

**UDDA**

160

irreversible cessation  
**all** functions  
**entire** brain

161

**BUT**

162

Brain dead  
people  
**do** stuff

163



164



165



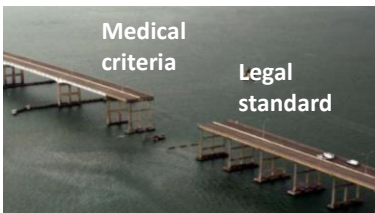
166

Clinicians only assess  
cessation  
**some** functions  
**part** of brain

167

UDDA requires  
**all** functions  
**entire** brain

168



169

Medically dead  
**≠**  
Legally dead

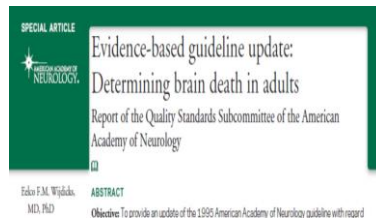
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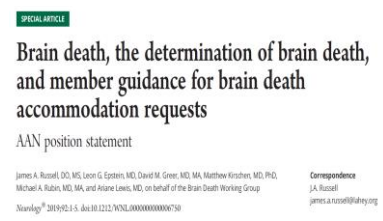
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172



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174

Patient can  
**satisfy** BD  
guidelines

175

Dead

176

Yet...

177

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

178



179

May determine BD  
**despite** function  
hypothalamus

180

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

181



182

**UDDA**

requires

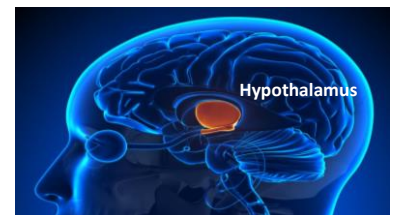
183

irreversible  
cessation of

184

**all** functions  
*of the*  
**entire** brain

185



186

**A Framework for Revisiting Brain Death:  
Evaluating Awareness and Attitudes  
Toward the Neuroscientific and Ethical  
Debate Around the American Academy of  
Neurology Brain Death Criteria**

Krishanu Chatterjee, BA<sup>1</sup>,  
Mohamed Y. Rady, BChir, MB (Cantab), MA, MD (Cantab)<sup>2</sup>,  
Joseph L. Verheijde, PhD, MBA, PT<sup>3</sup>, and Richard J. Butterfield, MA<sup>4</sup>

Journal of Intensive Care Medicine  
3:00  
© The Author(s) 2022  
Creative Commons Attribution-NonCommercial 4.0 International license  
DOI: 10.1177/0885066622108457  
jicm.sagepub.com/home/jicm



187

**200 clinicians**  
**Mayo Clinic**

188

1. Use AAN protocol
2. Get positive result
3. Does that demonstrate loss of “all functions of the entire brain”?

189



190



191

Medical criteria  
do not require  
cessation of  
**all** functions

192

Require cessation  
of **critical** functions

193



194

**BUT**

195

**Lack** authority  
to do that

196

**Analogy**

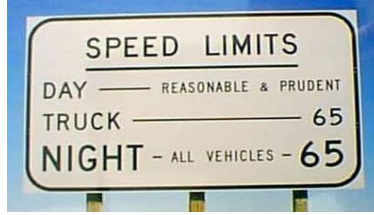
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UDDA gives standards

202

Medical profession only **applies** them

203

1. All functions
2. Entire brain
3. Cessation
4. Irreversible

204

Legal challenges

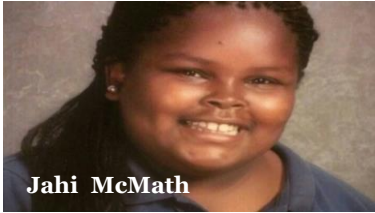
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206

Brain death is **also** under attack

207



208

Original attack

209

Jahi does not satisfy BD criteria

210

Later challenge

211

AAN & AAP Guidelines themselves

212

Legal filing document with case number 15760730 and date DEC 22 2017

213

Plaintiffs request the opportunity to present evidence and expert testimony that the AAN and AAP Guidelines fail to meet the requirements of California's UDDA that an individual is brain dead only after suffering "an irreversible cessation of all functions of the person's entire brain, including her brain stem".

214

"incalculable disruption ... if this court decides the Guidelines do not meet ... UDDA ... criteria"

215

Legal filing document with case number 15760730 and date DEC -5 PM 2:05

216





217



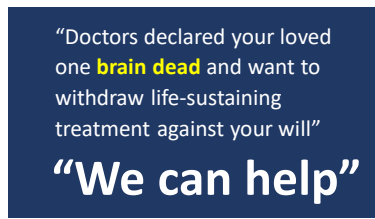
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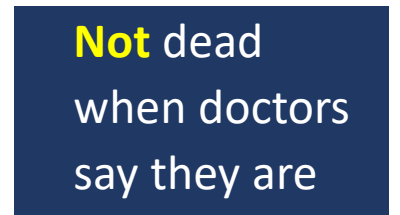
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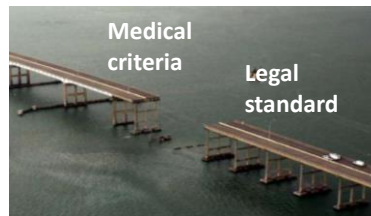
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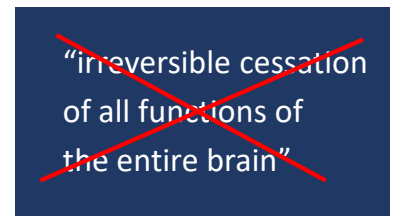
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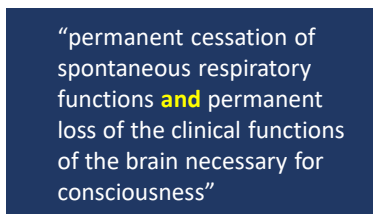
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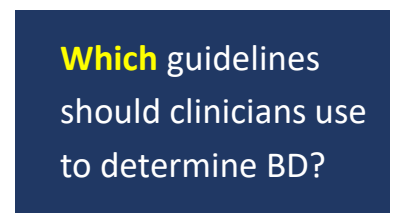
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UDDA

235

When making determinations of irreversible cessation

236

“accordance with **accepted medical standards**”

237

BUT

238

**Which** medical standards are accepted ?

239



240

variability

241

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; Paraskei N. Varelas, MD, PhD; Galen V. Henderson, MD; Ector F. M. Wijckick, MD, PhD

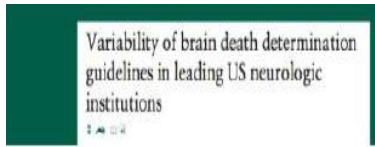
242

Improving uniformity in brain death determination policies over time

OPEN

Hilary H. Wang, MD ABSTRACT

243



David M. Green, MD, MA, Neurologist, Massachusetts General Hospital, Boston, MA; and  
Narasimhan N. Venkatasubramanian, MD, PhD, Neurologist, Johns Hopkins University School of Medicine, Baltimore, MD

244

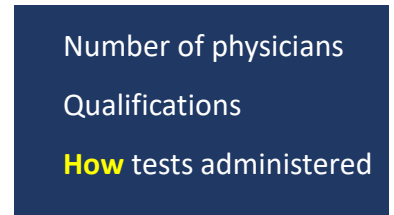
# Neurology

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

245



246



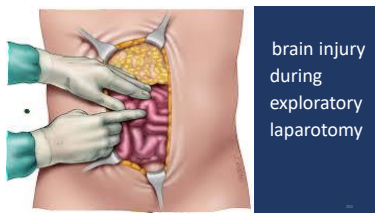
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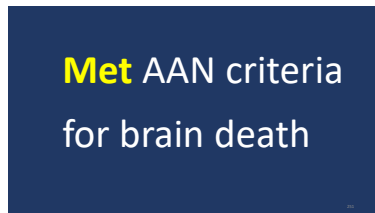
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251



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253

Dad  
loses

254

**Trial court**  
AAN criteria met  
→ Aden is dead

255



256

Dad  
**wins**

257



Supreme Court of Nevada

258

**Irrelevant** if Aden  
meets AAN criteria  
**NOT** the  
“right” criteria

259

Unclear they are  
“**accepted**” medical  
standards”  
as UDDA requires

260



261

Fix

262



263

Nevada  
A.B. 424 (2017)

Determination of BD  
“must be made in  
accordance with ...”

264

SPECIAL ARTICLE  
EVIDENCE-BASED NEUROLOGY

Evidence-based guideline update:  
Determining brain death in adults  
Report of the Quality Standards Subcommittee of the American  
Academy of Neurology

Edou F.M. Wijdicks,  
MD, PhD

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

265

American Academy  
of Pediatrics  
PUBLISHED BY THE BOARD OF GOVERNORS

Guidance for the Clinician in  
Rendering Pediatric Care

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

Thomas A. Nakagawa, MD, Stephen Arthwell, MD, Mudd

266

H.B. 1896  
(2021)

OKLAHOMA

267



268

“A determination of death ...  
shall be made in accordance  
with **currently accepted  
national medical standards.**”

269

defined

270

“standards issued by a nationally recognized source of medical practice guidelines”

271

“**including**, but not limited to ... by the **AAN, SCCM, AAP, CNS** ... and/or those recognized by the [Board of Medicine]”

272



273

Follow Nevada approach  
Point **specific** guidelines

**DRAFT**

274

That's  
problem **2**

275

**Which**  
medical standards  
are accepted

276

**Problem 3**

277

Want  
**religious**  
exemption

278

“If **heart** is beating,  
then she is alive.”

279



280



281

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

282

Religious objection → No death by BD

283

Pt may **satisfy** BD criteria

284

**BUT**

285

May not **declare** death

286

**Until** death by CP criteria

287



288





289



290



291

Rejected  
**everywhere**  
outside NJ

292

still  
**asked** for

293



294



295



296



297

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

Jonee Fonseca, an individual parent  
and guardian of Israel Stinson, a  
minor,  
Plaintiff,  
v.  
Karen Smith, M.D. in her official  
capacity as Director of the California  
Department of Public Health, and Doc  
2 through 10, inclusive,  
Defendant.

Case No.: 2:16-cv-00889-KJM-EFB  
Second Amended Complaint for  
Equitable Relief  
REQUEST FOR JURY TRIAL

**Suing state  
of California**

298

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

299

“remove CP support ...  
**unconstitutional** ...  
interferes ...  
**freedom of religion**”

300



301



302



303



304



305

Will see **more**  
of these cases

306



307



308



309

“A health-care facility shall adopt a policy for providing the patient’s family with a **reasonably brief period of accommodation** ...”

310

“Reasonably Brief Period of Accommodation means an **amount of time** afforded to gather at the patient’s bedside.”

311

“During this reasonably brief period of accommodation, a health-care facility is **only required** to continue previously ordered support for circulation and/or respiration. No other medical intervention is required.”

312

**DRAFT**

313



314

10 N.Y.C.R.R.  
400.16

315

Hospitals must have policy for **reasonable accommodation** of moral & religious objections

316



317

Default rule

318

Dead → No duty treat

319

New York

320

Dead → **Temp** duty "treat"

321

New Jersey

322

**Not** Dead → Indefinite duty treat

323



324

Yes	Accommodation
No	Exemption

325

That's  
problem **3**

326

offer  
religious  
exemption

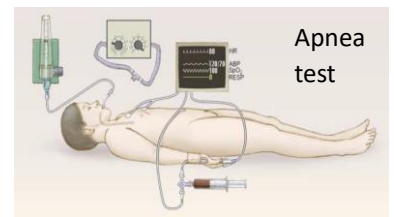
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**Problem 4**

328

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

329



330

**Final**  
confirmatory test

331

SPECIAL ARTICLE

**Evidence-based guideline update:  
Determining brain death in adults**

Report of the Quality Standards Subcommittee of the American Academy of Neurology

Edlin FM, Wijdicks MD, PhD

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

332

American Academy of Pediatrics  
PEDIATRICS BY THE QUALITY OF OUR CARE

Guidance for the Clinician in Rendering Pediatric Care

**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, Mott

333

**BUT**

334

More family  
**refusals**

335



336



337

**Parental**  
refusals

338



339

No apnea test  
↓  
No BD

340

No BD  
↓  
Treatment duties  
continue until CP

341

**Opt out**  
BD

342

Practically, same as NJ religious **exemption**

343

<sup>NJ</sup> Determine **YES**  
Declare **NO**

344

<sup>Here</sup> Determine **NO**  
Declare **NO**

345

Must clinicians **honor** the refusal?

346

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

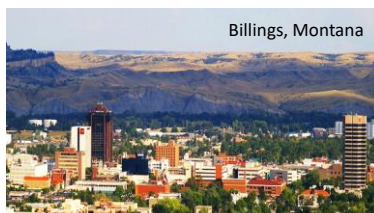
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348

**Yes**

349



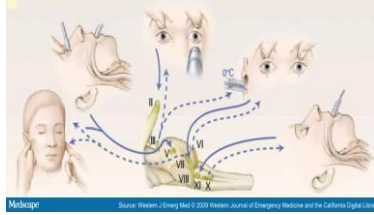
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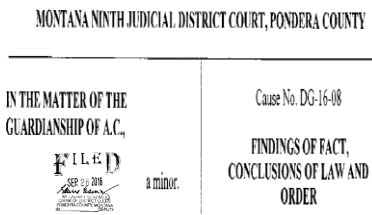
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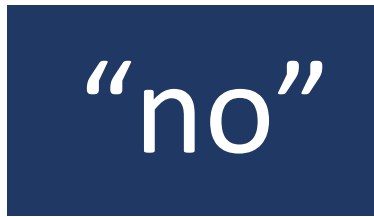
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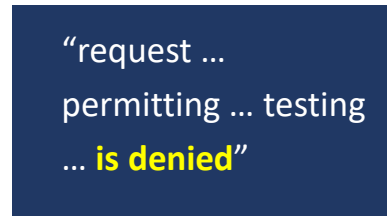
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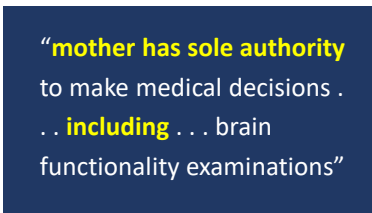
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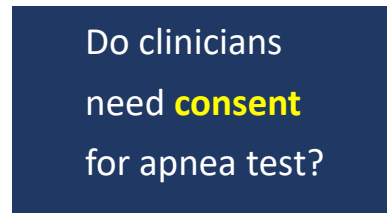
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358



359



360



MT said  
“yes”

361

KS also  
“yes”

362



363

CA also  
“yes”

364



365

Plausible

366

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

367



368

No

369



370



371



372



373

Prevailing custom  
Standard of care  
  
Consent is **not** required

374

JAMA | Special Communication  
*Determination of Brain Death/Death by Neurologic Criteria*  
*The World Brain Death Project*  
  
David M. Green, MD, MA, Sam D. Shemie, MD, Ariane Lewis, MD, Sylvia Tortorella, BS, Parajyoti Khande, MD, Fernando D. Goldenberg, MD

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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. Green, MD, MA, Matthew Kirschen, MD, PhD, Correspondence

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

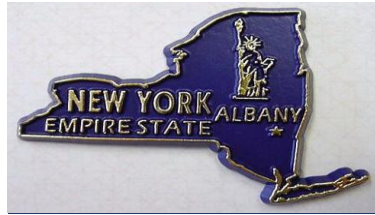
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“professional  
responsibility”

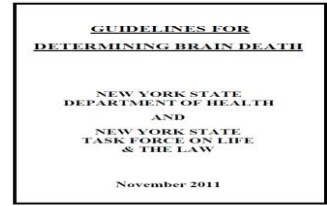
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380



381

“Consent need **not** be obtained”

382

**BUT**

383

“reasonable efforts to **notify** the NOK”

384

Policy:  
“requests for **reasonable accommodation** based on religious or moral objections”

385



386



387

“Before a physician initiates the determination of death ... reasonable efforts shall be made to **notify a patient’s family** that such a determination will soon begin.”

388

“If ... information ... that ... determination of death ... would violate the religious, moral, or ethical principles of the patient or the patient’s family ... make **reasonable efforts to accommodate** those concerns”

389



390

**DRAFT**

391

That’s  
problem **4**

392

**Consent** for  
BD testing

393

**Conclusion**

394



395

**Old case**

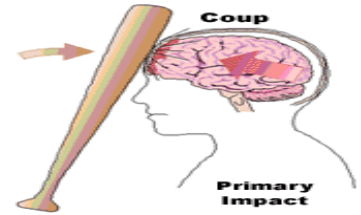
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399



400



401

But we've got to **verify** it legally, to see if she is morally, ethically, spiritually, physically, positively, absolutely, undeniably and reliably Dead

402



403

She's not only **merely** dead, She's really most **sincerely** dead.

404

**Need**  
Certainty  
Clarity

405

Life Death

406

Life Death

407

**RUDDA**

408

**Reduce**  
variability  
**Increase**  
certainty & trust

409

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**References**

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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](http://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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