Brain Death

Potential and Problems in the Evolving Legal Framework

Thaddeus Mason Pope, JD, PhD, HEC-C

Neurocritical Care Society • Oct. 29, 2021

1

Why amend the UDDA?

2

Ariane Lewis

NCS 2021

Concurrent 4

3

Why amend the UDDA?

4

UDDA

5

Law on brain death in all U.S. jurisdictions

6

2 ways

to determine death

7

"irreversible cessation of **circulatory & respiratory** functions"

8

or

9

"irreversible cessation of all functions of the entire **brain**"

10

1980

11

BUT

12

Uniform Law Commission

13

Moving to **amend** UDDA

14

2020 – 2021

Study Committee

15

July 2021

recommendation approved

16

Drafting

committee working now

17

1st reading July 2022

18

2nd reading July 2023

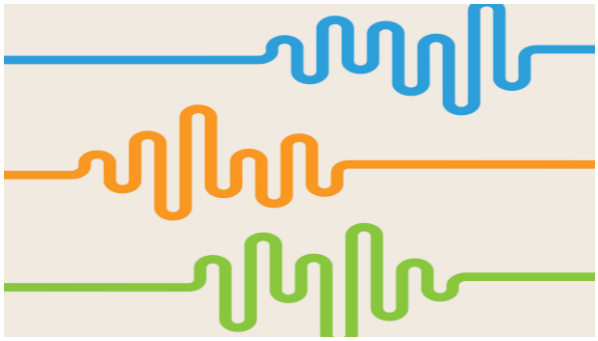
19

States start adopting

20

Why?

21



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State 1 ≠ State 2

23

Hospital 1 ≠ Hospital 2

24

MD 1
≠
MD 2

25

Law
≠
Practice

26

27

Why?

28

Uniformity
Clarity
Certainty

29

Roadmap

next 10 minutes

30

4 problems

31

Problem 1

32

33

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

34

UDDA

35

irreversible cessation
all functions
entire brain

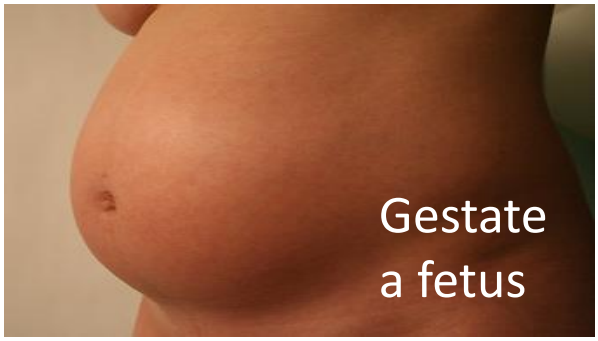
36

BUT

37

Brain dead people **do** stuff

38



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Clinicians only assess cessation

some functions

part of brain

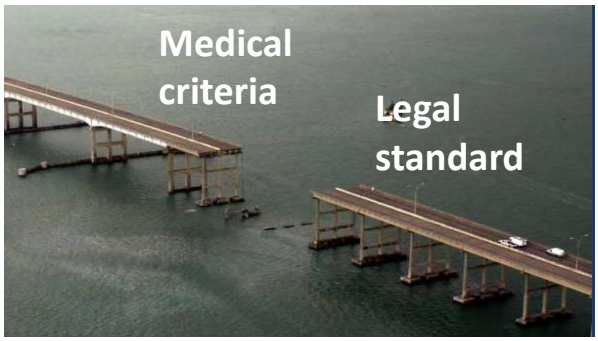
41

UDDA requires

all functions

entire brain

42



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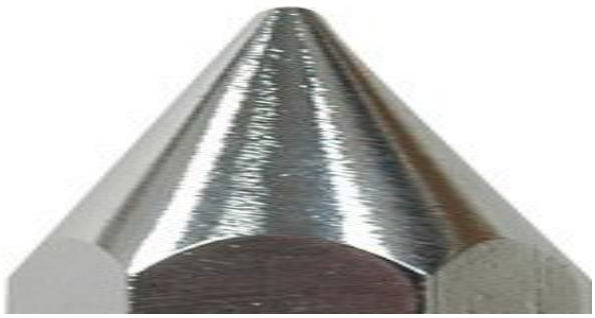
Medically dead

≠

Legally dead

44



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Most authoritative criteria

AMERICAN ACADEMY OF NEUROLOGY

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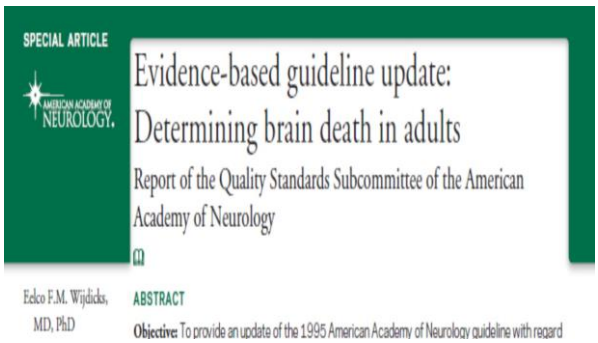
SPECIAL ARTICLE

Evidence-based guideline update: Determining brain death in adults

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

Eelco F.M. Wijdicks, MD, PhD

ABSTRACT

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

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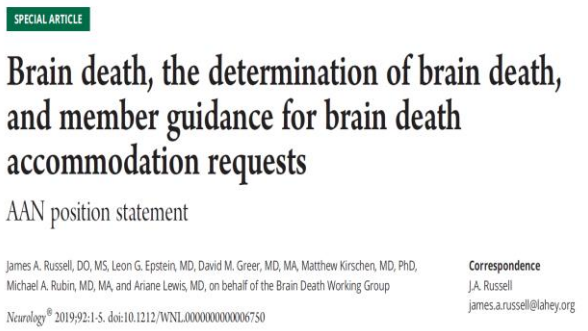

SPECIAL ARTICLE

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.0000000000006750

Correspondence
J.A. Russell
james.a.russell@lahey.org

48

Patient can **satisfy** BD guidelines

49

Dead

50

Yet…

51

"neuro-endocrine function **may be present**"

52

53

May determine BD **despite** function hypothalamus

54

"**not inconsistent** with the whole brain standard of death"

55

56

UDDA

requires

57

57

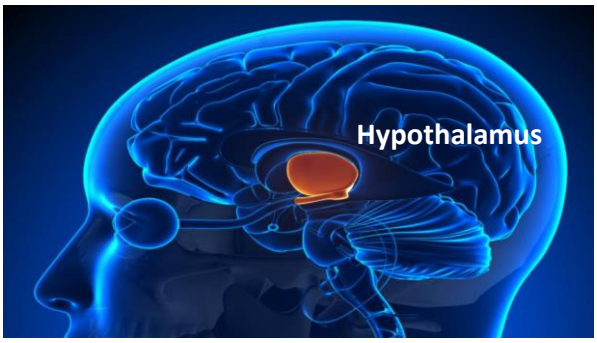
irreversible cessation of

58

58

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

59



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Journal of Intensive Care Medicine
1-18
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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[1],
Mohamed Y. Rady, BChir, MB (Cantab), MA, MD (Cantab)[2],
Joseph L. Verheijde, PhD, MBA, PT[3], and Richard J. Butterfield, MA[4]

61

200 clinicians
Mayo Clinic

62

"positive result . . . AAN protocol demonstrates loss of all functions of the entire brain"

63

disagreed

64

65

That's problem **1**

66

Mismatch

legal criteria to medical standards

67

Problem 2

68

Which guidelines should clinicians use to determine BD?

69

UDDA

70

When making determinations of irreversible cessation

71

"accordance with **accepted medical standards**"

72

BUT

73

Which medical standards are accepted **?**

74

75

variability

76

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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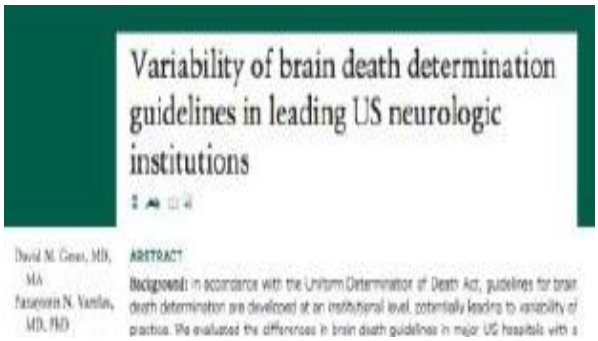
Improving uniformity in brain death determination policies over time

OPEN

Hilary H. Wang, MD

ABSTRACT

78


Variability of brain death determination guidelines in leading US neurologic institutions

David M. Greer, MD, MA
Panayiotis N. Varelas, 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

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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

80

Number of physicians

Qualifications

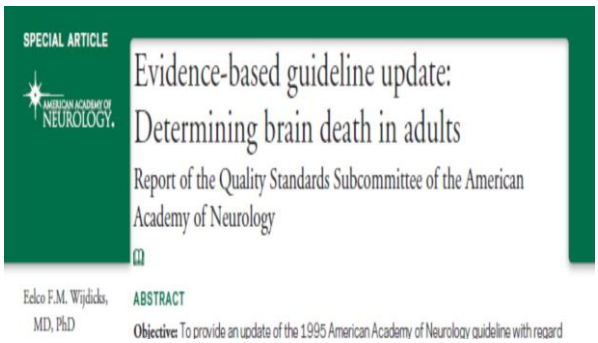
How tests administered

81

Nevada

A.B. 424 (2017)

82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AMERICAN ACADEMY OF NEUROLOGY.

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American Academy of Pediatrics

DEDICATED TO THE HEALTH OF ALL CHILDREN™

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, Mudit

84

85

That's problem **2**

86

Which

medical standards are accepted

87

Problem 3

88

Want **religious** exemption

89

"If **heart** is beating, then she is alive."

90

91

"death … **shall not** be declared … violate … **religious beliefs** . . . ."

92

Religious objection → No death by BD

93

Pt may **satisfy** BD criteria

94

BUT

95

May not **declare** death

96

Until
death by
CP criteria

97

98

99

100

101

Rejected
everywhere
outside NJ

102

still

asked for

103

104

105

106

107

108

109

110

Will see **more** of these cases

111

LIFE LEGAL DEFENSE FOUNDATION

112

That's problem **3**

113

offer religious exemption

114

Problem 4

115

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

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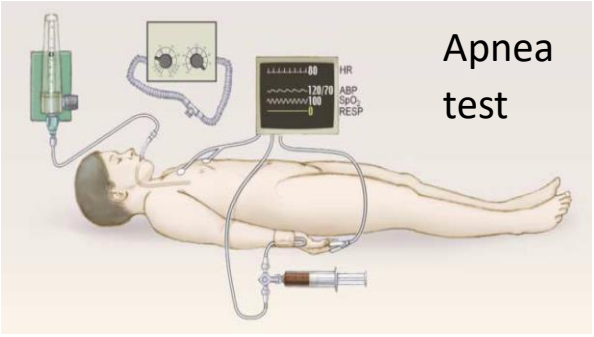

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Final

confirmatory test

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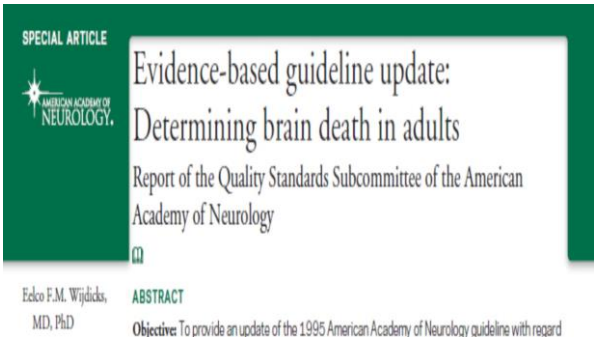
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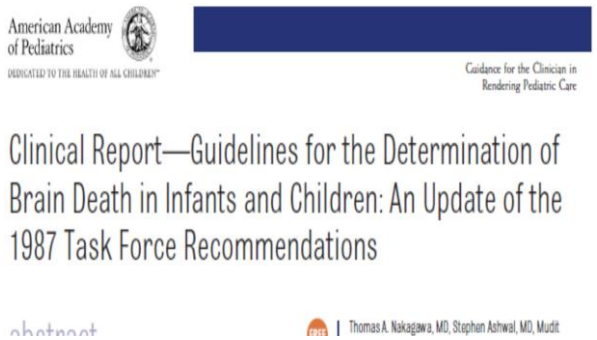
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abstract

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120

BUT

121

More family

refusals

122

123

Parental

refusals

124

125

No apnea test

↓

No BD

126

No BD

Treatment duties continue until CP

127

Opt out

BD

128

Practically, same as NJ religious **exemption**

129

NJ

Determine YES

Declare NO

130

Here

Determine NO

Declare NO

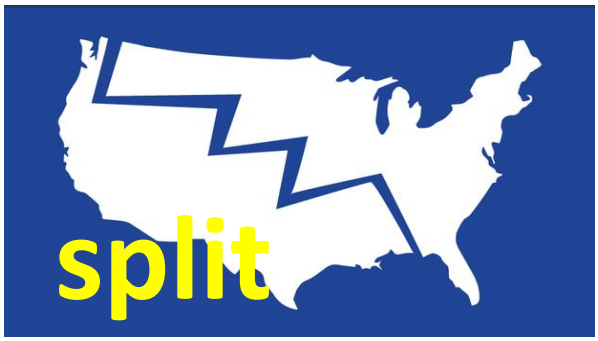
131

Must clinicians **honor** the refusal?

132

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

133



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Yes

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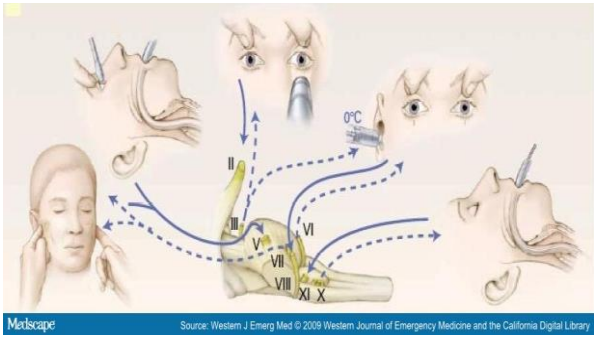

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Mom: "no"

140

MONTANA NINTH JUDICIAL DISTRICT COURT, PONDERA COUNTY

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

FILED
SEP 26 2016
BY
CLERK OF DISTRICT COURT
PONDERA COUNTY, MONTANA
DEPUTY

a minor.

Cause No. DG-16-08

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

141

"no"

142

"request … permitting … testing … **is denied**"

143

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

144

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

145

MT said **"yes"**

146

KS also **"yes"**

147

148

CA also **"yes"**

149

150

Plausible

151

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

152

No

153

154

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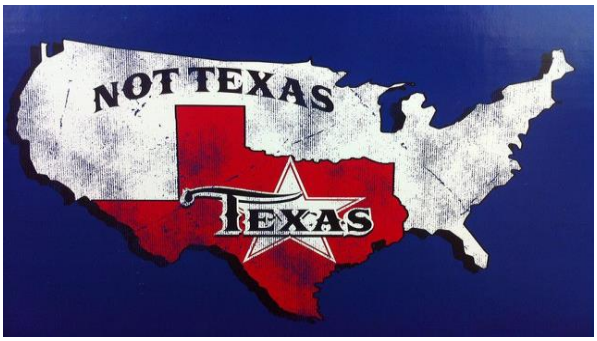

158

Conflict continues

159

That's problem **4**

160

Consent for BD testing

161

Conclusion

162

RUDDA

163

Reduce

variability

Increase

certainty & trust

164

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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**. 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 re-publishers like WestlawNext and Bioethics.net.

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