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FILED
ALAMEDA COUNTY

APR 04 2016

CLERK OF THE SUPERIOR COURT

By *[Signature]* Deputy

8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

10 LATASHA NAILAH SPEARS
11 WINKFIELD; MARVIN WINKFIELD;
12 SANDRA CHATMAN; and JAH
McMATH, a minor, by and through her
13 Guardian Ad Litem, LATASHA NAILAH
SPEARS WINKFIELD,

14 Plaintiffs,

15 vs.

16 FREDERICK S. ROSEN, M.D.; UCSF
17 BENIOFF CHILDREN'S HOSPITAL
OAKLAND (formerly Children's Hospital &
18 Research Center of Oakland); MILTON
McMATH, a nominal defendant, and DOES
1 THROUGH 100,

19 Defendants.

No. RG15760730
ASSIGNED FOR ALL PURPOSES TO:
JUDGE ROBERT B. FREEDMAN
DEPARTMENT 20

DEFENDANT FREDERICK S. ROSEN,
M.D.'S OPPOSITION TO PLAINTIFFS'
MOTION TO BIFURCATE TRIAL

Date: April 15, 2016
Time: 11:00 a.m.
Dept: 20

Reservation No: 1721136

Complaint Filed: March 3, 2015

BY FAX

21 I

22 INTRODUCTION

23 Defendant Frederick S. Rosen, M.D., opposes plaintiffs' motion to bifurcate trial on the
24 following grounds:

- 25 • The motion to bifurcate is premature. The three recently added Doe defendants
26 should be afforded an opportunity to respond to the bifurcation motion.
- 27 • Standing is threshold issue. Jahi McMath does not have a "real interest" in the
28 controversy" (i.e., defendants' liability for her personal injuries) unless it is first
determined that she has standing to pursue a claim for personal injury damages.

Offices of
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Saratoga, CA 95070
861-6500

- 1 • Plaintiffs are not entitled to a full civil proceeding to adjudicate the issue of death. There is no merit to plaintiffs' claim that they are entitled to a lengthy trial that includes presentation of six experts; the December 2013 hearing lasted less than one day and the October 2014 proceeding was conducted solely on the papers.
- 2
- 3 • The interests of judicial economy and case management are not served by bifurcation.
- 4
- 5 • Bifurcation of liability prior to the determination will result in prejudice to defendants, particularly since plaintiffs have elected to try their case in the 'court of public opinion.'
- 6

7 II

8 PROCEDURAL POSTURE OF PLAINTIFFS' LITIGATION 9 SEEKING REVERSAL OF McMATH'S BRAIN DEATH

10 This court is well-versed in the multiple court actions filed by plaintiffs to seek reversal of
11 medical and legal determinations of irreversible brain death.^{1/} This case represents the sixth legal
12 action initiated by plaintiff Latasha Winkfield ("Winkfield") to request a judicial declaration that
13 Jahi McMath ("McMath") is not dead under California law.

14 On December 12, 2013, McMath was pronounced dead at CHO following two physicians'
15 conclusions that Jahi suffered irreversible brain death caused by lack of oxygen to her brain. On
16 December 20, 2013, Winkfield filed an ex parte application in Alameda Superior Court captioned
17 *Latasha Winkfield, et al. v. Children's Hospital Oakland, et al.*, Alameda Superior Court Case No.
18 RP13-707598 (the "Probate Action.") Following Judge Evelio Grillo's finding and judgment that
19 McMath is dead under California law, having met the criteria for brain death in December 2013,
20 Winkfield filed a series of legal actions to challenge, both directly and indirectly, the determination
21 of brain death.

22 On or about December 30, 2013, plaintiffs filed a Petition for Writ of Mandate in the action
23 styled *J.M., et al. v. The Superior Court of Alameda County*, (Ct. of Appeal, 1st App. Dist., Case No.
24 A140590) requesting an emergency stay of Judge Grillo's December 30, 2013 Order and an order
25 vacating and setting aside Judge Grillo's finding that McMath was dead having met the statutory
26 criteria for brain death. The Court of Appeal granted a temporary stay and effectively ordered CHO
27 to continue ventilator support for 24 hours so that the writ petition could be considered. The Court of

28 1. Please see the Exhibits appended to Dr. Rosen's Request for Judicial Notice filed in Support of Dr. Rosen's demurrer to the first amended complaint, filed November 23, 2015.

1 Appeal never had the opportunity to consider whether McMath satisfied the criteria for brain death
2 because McMath's body was removed from CHO and the Petition was deemed moot.

3 Also on or about December 30, 2013, Winkfield filed a Complaint for Declaratory Relief
4 and Request for Emergency Temporary Restraining Order and Injunctive Relief in the federal court
5 action entitled *Latasha Winkfield v. Childrens Hospital Oakland, et al.*, United States District Court,
6 Northern District (Oakland), Case No. 4:13-cv-05993-SBA. Winkfield asked the federal court to
7 compel CHO to provide McMath with nutritional feeding and care to maintain bodily functions. An
8 emergency mandatory settlement conference was held in front of a Magistrate Judge on January 3,
9 2014 at which point the parties reached an agreement to enable McMath's removal to an outside
10 facility.

11 Then, in October 2014, Winkfield undertook efforts to re-open the Probate Action before
12 Judge Grillo. Winkfield sought a hearing to provide "new" and "conclusive" evidence that McMath
13 is not brain dead. Winkfield filed a Petition for Writ of Error Corum Nobis to reverse the brain
14 death determination. Winkfield withdrew her Petition almost immediately after Judge Grillo issued
15 an Order that included a report by Dr. Paul Fisher. In his report dated October 6, 2014, Dr. Fisher
16 found that none of the "new evidence" submitted by plaintiffs "provide[s] evidence that McMath is
17 not brain dead." Judge Grillo had also denied plaintiffs' request for an evidentiary hearing and cross-
18 examination of Dr. Fisher.

19 The instant action, filed on March 3, 2015, requests reversal of McMath's brain death
20 determination as part of McMath's first cause of action for personal injuries. Plaintiffs are asking
21 this court to decide whether McMath is dead or alive under California law notwithstanding the
22 conclusions of three neurologists in December 2013, and Judge Grillo's finding, Order and Judgment
23 that McMath suffered irreversible death in December 2013. Dr. Rosen and CHO argued in their
24 successive demurrers to McMath's first cause of action for personal injuries that collateral estoppel
25 applies to Judge Grillo's final judgment to bar any further litigation on the issue of whether McMath
26 has suffered irreversible brain death. In short, defendants argued that brain death cannot be re-
27 examined or relitigated as a matter of law, and because a claim for personal injuries cannot be
28 maintained by a deceased person, it must be dismissed. On March 14, 2016, this court overruled

1 defendants' demurrers to the personal injury claim. (Order filed 3/16/16.) However, this court
2 granted in part defendants request for question certification under Code of Civil Procedure section
3 166.1 on the issue of whether a judgment finding that the individual satisfied the criteria for brain
4 death under Health and Safety Code section 7180 and 7181 is subject to preclusive effect in a
5 subsequent proceeding. (Request Re: Other Ex Parte Granted, filed 3/16/16.) This court expressed
6 that there are controlling questions of law involved in the court's ruling on the demurrers as to which
7 there are substantial grounds for difference of opinion and appellate resolution may materially
8 advance the conclusion of the litigation. Dr. Rosen and CHO intend to file a Petition for Writ of
9 Mandate with the appellate court seeking reversal of this court's order overruling defendants'
10 demurrers to the first cause of action for personal injuries. (Still Decl., Para 2.)

11 Recently, on December 23, 2015, plaintiffs filed a complaint in federal court, captioned
12 *Jahi McMath, et al v. State of California, et al.*, Northern District Case No. 3:15-cv-06042.^{2/} Though
13 plaintiffs allege that a number of their Constitutional rights have been violated, the primary factual
14 and legal question asked by the plaintiffs is whether McMath is dead. Plaintiffs are seeking a judicial
15 declaration from the federal court that McMath is alive in direct contravention to Judge Grillo's
16 finding and January 17, 2014 judgment that McMath met the accepted criteria for brain death. To
17 wit, plaintiffs allege:

18 Therefore, Plaintiffs seek declaratory relief from this Court in the form of a
19 judicial declaration that JAHl McMATH has exhibited by acceptable medical
20 standards clear signs of brain function subsequent to December 23, 2014, and that
21 she does not have irreversible cessation [of] all functions of the entire brain,
22 including the brain stem." (*Id.*, 57:2-6.)

23 On March 29, 2016, Dr. Rosen and CHO filed a joint motion to dismiss plaintiffs' federal complaint.
24 Dr. Rosen and CHO also joined the motions to dismiss filed by the named defendants in the federal
25 action, Alameda County and the State of California. (Still Decl., Para. 3)

26 Plaintiffs have set the stage for three potentially conflicting judgments by three different
27 courts on the issue of whether McMath is dead.

28 2. The federal complaint can be found in this court's file appended at Exhibit A to plaintiffs'
Request for Judicial Notice of Plaintiffs Filed in Support of Their Opposition to the Demurrers to
Plaintiffs' First Amended Complaint.

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III
ARGUMENT

A. Plaintiffs' Motion to Bifurcate is Premature

Plaintiffs' motion to bifurcate is premature: the three new Doe defendants have yet to file appearance in this action; Dr. Rosen and CHO filed their Answers only two weeks ago; discovery has just commenced; and the appellate court has been asked to consider whether the Order and Judgment in the Probate Action (that McMath is deceased) is entitled to collateral estoppel effect.

1. The three new defendants have yet to appear and this action and must be given an opportunity to challenge bifurcation

Plaintiffs recently served three new defendants, Robert Wesman, M.D., James Patrick Howard, M.D., and Alicia Herrera, M.D. The newly added defendants have not yet appeared in this action. On March 30, 2016, the undersigned wrote to plaintiffs' counsel, Bruce M. Brusavich, requesting the motion to bifurcate be taken off calendar or continued to a new date in order to give the Doe defendants an opportunity to respond to the motion to bifurcate trial. Mr. Brusavich did not respond to the request. Mr. Brusavich has not explained why the motion to bifurcate should be heard on an expedited basis. (Still Decl., Para. 4.) Dr. Wesman, Dr. Howard and Dr. Herrera should have the opportunity to properly evaluate and oppose plaintiffs' motion to bifurcate only after plaintiffs' complaint is at issue as to each of them.

2. Dr. Rosen and CHO filed their Answers to the First Amended Complaint two weeks ago; discovery has just commenced

On March 14, 2016, the court overruled Dr. Rosen and CHO's challenge to McMath's first cause of action for personal injuries. Dr. Rosen timely filed his Answer to plaintiffs' First Amended Complaint on March 29, 2016. Thereafter, on March 31, 2016, Dr. Rosen served written discovery on the plaintiffs, including form interrogatories, special interrogatories, requests for admission and requests for production of documents. Plaintiffs have yet to produce any of the evidence (e.g., examination reports, EEGs, apnea tests, cerebral blood flow studies, videos, etc.) that they claim demonstrates McMath no longer fulfills the criteria for brain death. (Still Decl., Para. 5.)

Dr. Rosen should have sufficient time to evaluate plaintiffs' alleged evidence prior to the courts consideration of a motion to bifurcate since the evidence could impact whether bifurcation is

1 appropriate.

2 **3. This court has sought guidance from the Court of Appeal**

3 On March 14, 2016, this court granted in part Dr. Rosen and CHO's request for Question
4 Certification under Code of Civil Procedure section 166.1, filed on January 27, 2016. In addition,
5 Dr. Rosen and CHO will be filing a Petition for Writ of Mandate challenging the court's March 14,
6 2016, Order ruling on defendants' demurrers and motion to strike seeking review of the court's order
7 that permits McMath to pursue her personal injury claim despite the medical and legal
8 determinations, findings, Orders and Judgment that she is deceased. (Still Decl., Para. 2.)

9 The question of bifurcation should be considered only after the appellate court has accepted
10 or denied the court's question certification and/or defendants' petition for writ of mandate.

11 **B. Standing is a Threshold Issue; McMath's Ability to Pursue Personal
12 Injury Damages Must be Settled Prior to a Trial on Plaintiffs' Claim that
13 Defendants are Liable for McMath's Personal Injuries**

14 Next, McMath cannot pursue defendants' liability for her personal injuries unless she first
15 establishes that she has standing to allege such a claim. "Standing is a threshold issue, because
16 without it no justiciable controversy exists." (*Iglesia Evangelica Latina, Inc. v. Southern Pacific
17 Latin American Dist. of the Assemblies of God* (2009) 173 Cal.App.4th 420, 445.) "Standing goes to
18 the existence of a cause of action" (*Apartment Assn. of Los Angeles County, Inc. v. City of Los
19 Angeles* (2006) 136 Cal.App.4th 119, 128.) Pursuant to Code of Civil Procedure section 367,
20 "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise
21 provided by statute."

22 "[S]tanding to invoke the judicial process requires an actual justiciable *controversy* as to
23 which the complainant has a real interest in the ultimate adjudication because he or she has either
24 suffered or is about to suffer an injury of sufficient magnitude reasonably to assure that all of the
25 relevant facts and issues will be adequately presented to the adjudicator. [Citations.] *To have
26 standing, a party must be beneficially interested in the controversy*; that is, he or she must have
27 'some special interest to be served or some particular right to be preserved or protected over and
28 above the interest held in common with the public at large.' [Citation.] The party must be able to
demonstrate that he or she has some such beneficial interest that is concrete and actual, and not

1 conjectural or hypothetical.” (*Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297,
2 314–315, italics added.) The existence of standing generally requires that the plaintiff be able to
3 allege injury, i.e., an invasion of his legally protected interests. (*Angelucci v. Century Supper Club*
4 (2007) 41 Cal.4th 160, 175.) It is axiomatic that a dead person cannot allege injury.

5 McMath cannot invoke the judicial process or be a party to a trial on defendants’ alleged
6 liability unless she first establishes that she has standing to pursue a liability for damages against Dr.
7 Rosen. If McMath does not have standing to pursue damages for her alleged personal injuries she
8 has no interest in the controversy. Since the question of McMath’s standing must be conclusively
9 resolved prior to a trial on defendants’ liability to McMath for any damages, plaintiffs motion to
10 bifurcate should be denied.

11 **C. Plaintiffs Are Not Entitled to a Multi-Week Trial on the Issue of Death**

12 Plaintiffs represent that they anticipate the issue of brain death will “consume months of
13 discovery” followed by “weeks of trial” consisting of “testimony from a host of treating physicians
14 and medical and ethical experts to establish “life” or “brain death.” (Plaintiffs’ P&As, 2:16-20.)

15 As Judge Grillo ruled in December 2013, the law does not require any hearing on the issue
16 of whether McMath satisfied the criteria for death under Health and Safety Code sections 7180 and
17 7181. These provisions do not contemplate any type of legal proceeding to establish or confirm the
18 fact of death, let alone any proceeding in which the parties would be permitted to engage in
19 comprehensive discovery. The court in *Dority v. Superior Court* (1983) 145 Cal.App.3d 273, 278,
20 recognized there is no “authority mandating that a court must make a determination brain death has
21 occurred. The Uniform Determination of Death Act leaves the decision of whether a person has
22 died in the hands of medical professional, requiring “only that the determination be made in
23 accordance with accepted medical standards.” (*Ibid.*)

24 Judge Grillo's rulings in the Probate Action were consistent with these principles. There,
25 he decided McMath's death had been declared in accordance with the legal standards set forth by the
26 statutes, having been confirmed independently by Dr. Fisher, and was made in accord with accepted
27 medical standards. The December 24, 2013 hearing took no more than one day. In October 2014,
28 Judge Grillo ruled that he would consider plaintiffs’ “new” evidence solely on the papers. It is

1 noteworthy that Winkfield did not appeal Judge Grillo's decisions regarding the nature of the
2 hearing.

3 In summary, there is no merit to plaintiffs' representation that plaintiffs' are entitled to
4 "weeks of trial" on the question of whether McMath is dead or alive.

5 **D. The Interests of Judicial Economy Dictate That McMath's Right to Pursue**
6 **Personal Injury Damages Be Resolved Prior to a Trial on Defendants' Liability**

7 Plaintiffs represent in their moving papers that, in the event liability is heard prior to the
8 question of McMath's standing to pursue damages for personal injuries, the trial on defendants'
9 liability will last only 7-10 days. This is a wild miscalculation. Indeed, plaintiffs acknowledge, and
10 more accurately represent, in their CMC Statement filed on March 22, 2016, that trial is expected to
11 last 45 days (more than two months). Dr. Rosen agrees. There are five named defendants. Each of
12 the defendants will have separate experts on standard of care and causation. In addition, there are
13 dozens of percipient witnesses.

14 Conversely, the interests of judicial economy are served if the question of McMath's
15 standing is resolved prior to liability. If McMath is dead and not a plaintiff, plaintiffs are left with a
16 single cause of action for wrongful death against Dr. Rosen, a claim governed by the MICRA
17 limitation on general damages. This is a far cry from the damages sought for McMath's personal
18 injuries.

19 There is no chance of any discussions on the questions of liability or damages until the
20 parties know for certain whether McMath has a right to pursue liability and damages.

21 Furthermore, a trial on plaintiffs' wrongful death claim would be much shorter than the 45
22 days that plaintiffs are projecting in the event McMath is a plaintiff.

23 The interests of judicial economy will be served to have the standing question conclusively
24 resolved prior to trial on liability and plaintiffs' damages. If McMath is not a plaintiff, this case
25 becomes solely a wrongful death case as to Dr. Rosen.

26 ///

27 ///

28 ///

1 **E. Trial of Liability Prior to Resolving the Issue of Jahi McMath's Standing to**
2 **Pursue Personal Injury Damages Would Greatly Prejudice the Defendants**

3 The motion to bifurcate should be denied on the grounds that bifurcation would not serve
4 the ends of justice. Defendants will suffer prejudice if liability is tried prior to resolving the question
5 of whether McMath can be a plaintiff in this action.

6 Winkfield and her counsel are trying this case in the 'court of public opinion.' Plaintiffs'
7 attorney in the underlying Probate Action and concurrent federal action, Chris Dolan, Esq., has
8 convened press conferences to present the "evidence" that he claims shows McMath is not brain
9 dead. On October 3, 2014, Mr. Dolan had a news conference where he presented alleged images of
10 McMath's brain and videos McMath. (Still Decl., Ex. B.) These videos can be found on the internet.

11 On October 9, 2014, following receipt of Dr. Paul Fisher's October 6, 2014 report, Mr.
12 Dolan represented that the hearing was "postponed" because their "team of international brain
13 experts" needed more time to review Dr. Fisher's letter. In a written statement, Mr. Dolan
14 represented to the public that he asked to reschedule the hearing in order to "address any concerns
15 that Dr. Fisher has in an effort to demonstrate that, with an open and transparent dialogue between
16 health care professionals, only one conclusion can remain: that Jahi McMath is not brain dead."
17 (Still Decl., Ex. C.)

18 More recently, on December 24, 2015, Mr. Dolan held a new conference at his law offices
19 to announce plaintiffs had filed an action federal court. Winkfield and Ms. Chatham represented that
20 McMath was "alive" and "just doing awesome." Mr. Dolan advised the press and public that the
21 federal "complaint is designed to restore McMath's life – to give her the most basic dignity and
22 freedom and not a corpse." (Still Decl., Ex. D.)

23 This case will continue to interest the public. Indeed, this court's rulings have been
24 reported by the local and national press. Plaintiffs may be motivated to try liability prior to
25 resolution of McMath's standing in the hope of gaining sympathy with the public. Perhaps plaintiffs
26 believe that if they can argue negligence first, it will somehow enhance McMath's ability to pursue
27 her personal injury claim. Plaintiffs recognize that if McMath is not a plaintiff, plaintiffs' case
28 against Dr. Rosen is a MICRA limited wrongful death action.

1 Dr. Rosen, along with the rest of the defendants will be prejudiced by having liability tried
2 prior to resolution of the question of whether McMath has standing in this litigation. The ends of
3 justice will not be served. Therefore, the motion should be denied. (C.C.P. sections 598 and
4 1048(b).) In contrast, plaintiffs fail to identify how they will be prejudiced by having the standing
5 issue resolved prior to trial on liability. They have not met their burden justifying bifurcation. (Ibid.)

6 IV

7 CONCLUSION

8 The interests of judicial economy, that all parties have the opportunity to be heard, case
9 efficiency, case management, and avoiding prejudice will not be furthered by trying liability prior to
10 the question of whether McMath can pursue her claim for personal injuries. Dr. Rosen respectfully
11 requests plaintiffs' motion to bifurcate trial be denied.

12
13 Dated: April 4, 2016

HINSHAW, MARSH, STILL & HINSHAW

14
15
16 By: 

THOMAS E. STILL
JENNIFER STILL
Attorneys for Defendant
FREDERICK S. ROSEN, MD.

PROOF OF SERVICE
(C.C.P. §§ 1013a, 2015.5)

I, the undersigned, say:

I am now and at all times herein mentioned have been over the age of 18 years, a resident of the State of California and employed in Santa Clara County, California, and not a party to the within action or cause; my business address is 12901 Saratoga Avenue, Saratoga, California 95070.

I am readily familiar with this firm's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, mailing via Federal Express, hand delivery via messenger service, and transmission by facsimile machine. I served a copy of each of the documents listed below by placing said copies for processing as indicated herein.

DEFENDANT FREDERICK S. ROSEN, M.D.'S OPPOSITION TO PLAINTIFFS' MOTION TO BIFURCATE TRIAL

XX If MAILED VIA U.S. MAIL, said copies were placed in envelopes which were then sealed and, with postage fully prepaid thereon, on this date placed for collection and mailing at my place of business following ordinary business practices. Said envelopes will be deposited with the U.S. Postal Service at Saratoga, California on this date in the ordinary course of business; and there is delivery service by U.S. Postal Service at the place so addressed.

_____ If MAILED VIA FEDERAL EXPRESS, said copies were placed in Federal Express envelopes which were then sealed and, with Federal Express charges to be paid by this firm, on this same date placed for collection and mailing at my place of business following ordinary business practices. Said envelopes will be deposited with the Federal Express Corp. on this date following ordinary business practices; and there is delivery service by Federal Express at the place so addressed.

_____ If HAND DELIVERED, said copies were provided to _____ a delivery service, whose employee, following ordinary business practices, did hand deliver the copies provided to the person or firm indicated herein.

_____ If VIA FACSIMILE TRANSMISSION, said copies were placed for transmission by this firm's facsimile machine, transmitting from (408) 257-6645 at Saratoga, California, and were transmitted following ordinary business practices; and there is a facsimile machine receiving via the number designated herein, and the transmission was reported as complete and without error. The record of the transmission was properly issued by the transmitting fax machine.

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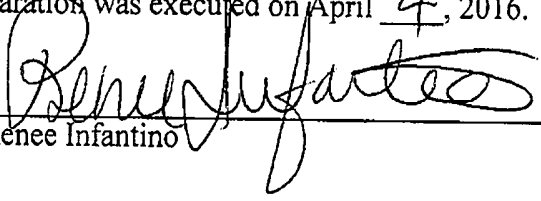
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San Marino, CA 91108

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on April 4, 2016.



Renee Infantino

Court: Alameda County Superior Court
Action No: RG 15760730
Case Name: Spears (McMath) v. Rosen, M.D., et al.



1 THOMAS E. STILL, ESQ. - State Bar No. 127065
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Attorneys for Defendant FREDERICK S. ROSEN, M.D.

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ALAMEDA COUNTY

APR 04 2016
CLERK OF THE SUPERIOR COURT
By *Jennifer Still*
Deputy

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17 BENIOFF CHILDREN'S HOSPITAL
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18 Research Center of Oakland); MILTON
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1 THROUGH 100,

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ASSIGNED FOR ALL PURPOSES TO:
JUDGE ROBERT B. FREEDMAN
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DECLARATION OF JENNIFER STILL,
ESQ, IN SUPPORT OF DEFENDANT
FREDERICK S. ROSEN, M.D.'s,
OPPOSITION TO PLAINTIFFS'
MOTION TO BIFURCATE TRIAL

Date: April 15, 2016
Time: 11:00 a.m.
Dept: 20

Reservation No. 1721136

BY FAX

Complaint Filed: March 3, 2015

22 I, Jennifer Still, hereby declare:

23 1. I am an attorney at law duly licensed to practice before the courts of the State of
24 California. I am an associate with the law offices of Hinshaw, Marsh, Still & Hinshaw, LLP
25 attorneys for defendant Frederick S. Rosen, M.D.

26 2. Dr. Rosen and UCSF Benioff Children's Hospital of Oakland "(CHO)" intend to
27 file a Petition for Writ of Mandate with the appellate court seeking reversal of this court's order
28 overruling defendants' demurrers to the first cause of action for personal injuries.

Offices of
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& HINSHAW, LLP
1 Saratoga Avenue
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1 3. On March 29, 2016, Dr. Rosen and CHO filed a joint motion to dismiss plaintiffs'
2 federal complaint. Dr. Rosen and CHO also joined the motions to dismiss filed by the named
3 defendants in the federal action, Alameda County and the State of California.

4 4. On March 30, 2016, I emailed plaintiffs' counsel, Bruce M. Brusavic and his
5 assistant (and copied to counsel for CHO and the newly named defendants), to request the instant
6 motion to bifurcate trial be taken off calendar or continued to a new date in order to give the new
7 defendants an opportunity to respond to the motion to bifurcate. Mr. Brusavich did not respond to
8 my email. Mr. Brusavich has failed to explain why plaintiffs' motion to bifurcate trial should be
9 heard on an expedited basis. A copy of my email is appended hereto at Exhibit A.

10 5. Dr. Rosen filed his Answer on March 29, 2016. Written discovery has just
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15 claim demonstrates Jahi McMath no longer fulfills the criteria for brain death.

16 6. Plaintiffs' counsel in the underlying probate case and concurrent federal action,
17 Christopher Dolan, Esq., has convened numerous press conferences for the purpose of garnering
18 sympathy for his clients and to present the "evidence" that he claims shows Jahi McMath is not brain
19 dead. On October 3, 2014, Mr. Dolan had a news conference where he presented alleged images of
20 Jahi's brain and videos of Jahi McMath. A copy of a newspaper article on this press conference is
21 appended hereto at Exhibit B. The videos of Jahi can readily be found on the internet.

22 7. On October 9, 2014, following receipt of Dr. Paul Fisher's October 6, 2014 report,
23 Mr. Dolan represented that the hearing was "postponed" because their "team of international brain
24 experts" needed more time to review Dr. Fisher's letter. In a written statement, Mr. Dolan
25 represented to the public that he asked to reschedule the hearing in order to "address any concerns
26 that Dr. Fisher has in an effort to demonstrate that, with an open and transparent dialogue between
27 health care professionals, only one conclusion can remain: that Jahi McMath is not brain dead." A
28 copy of a newspaper article on this event is appended hereto at Exhibit C. Rather than address Dr.

1 Fisher's concerns, Mrs. Winkfield elected to file the instant action.

2 8. On December 24, 2015, Mr. Dolan held a new conference at his law offices to
3 announce plaintiffs had filed an action federal court. Mrs. Winkfield and Ms. Chatham represented
4 that Jahi McMath was "alive" and "just doing awesome." Mr. Dolan advised the press and public
5 that the federal "complaint is designed to restore Jahi McMath's life – to give her the most basic
6 dignity and freedom and not a corpse." A copy of a newspaper article on this press conference is
7 appended hereto at Exhibit D.

8 I declare under penalty of perjury under the laws of the State of California that all of the
9 foregoing is true and correct, and as to those matters stated on my information and belief, I believe
10 them to be true, and if called upon to testify to the matters herein I can competently testify thereto.

11 Executed on April 4, 2016, at Saratoga, California.

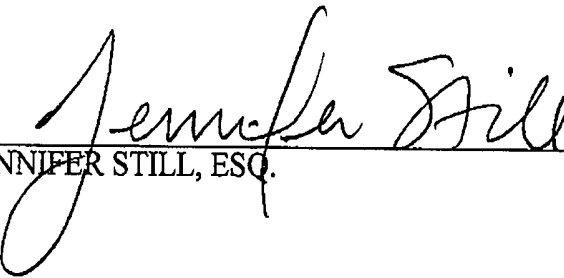
12
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14 
15 JENNIFER STILL, ESQ.
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EXHIBIT A

Jennifer Still

From: "Jennifer Still" <jstill@hinshaw-law.com>
To: <ab@agnewbrusavich.com>; <dunn@agnewbrusavich.com>
Cc: <jfinkel@glattys.com>; <pgalloway@glattys.com>; <smurray@dndmlawyers.com>;
<achang@ecbappeal.com>; <robert.hodges@mcnamaralaw.com>; <tjd@szs.com>
Sent: Wednesday, March 30, 2016 3:06 PM
Subject: Motion to Bifurcate

Dear Mr. Brusavich,

I'm writing to request that you agree to take plaintiffs' Motion To Bifurcate off calendar or continue it until such time as the recently served defendants (Dr. John Howard, Dr. Alicia Herrera and Dr. Robert Wesman) have appeared in this action. The motion is premature. The newly named defendants should be given an opportunity to oppose the motion. Please let me know whether this is something that you are willing to do.

Thank you,

Jennifer

Jennifer Still, Esq.
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4/4/2016

EXHIBIT B

Videos show Mom coaxing, Jahi McMath moving

By Matier & Ross Updated 5:41 pm, Friday, October 3, 2014

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IMAGE 2 OF 14

Attorney Chris Dolan holds a news conference where he showed evidence that he says demonstrates that Jahi McMath is not brain dead in San Francisco on Thursday, Oct. 3, 2014.

To bolster his claim that **Jahi McMath** should be declared “alive again,” the attorney for the Oakland teenager’s family displayed video clips Thursday that he says show the girl responding to her mother’s requests to move her feet and hands.

“Jahi suffered a serious brain injury — no doubt about it,” attorney **Chris Dolan** said. “But we question how accurate the brain-dead assessment is.”

Doctors at UCSF Benioff Children's Hospital Oakland declared 13-year-old girl brain dead in December after she went into cardiac arrest following routine surgery to deal with sleep apnea. Her family has fought the hospital every step of the way and says she is still alive.

Dolan said the goal was to "get the mantle of death off of her" so that Jahi can return to California from New Jersey, where she is being cared for by her mother, stepfather and sister at a private home.

In one video clip, which the attorney said was shot within the past few days, Jahi's mother, **Nailah Winkfield**, is seen coaxing her daughter to move her foot and toes.

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Jahi McMath's family wants her declared 'alive again'

Family says brain-dead Jahi McMath showing signs of

life



"Come on Jahi, you can do it," Winkfield says and after several seconds pass, the girl jerks her foot.

In another clip, the mother urges Jahi to move her hand, which is holding a foam padded cup. The girl lifts the cup a few inches then drops it.

In both videos, Jahi is hooked up to a ventilator and feeding tube.

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Dolan also showed still photos of Jahi in a cherubic state with her hair neatly pulled up in a bun and her skin appearing smooth and healthy.

The attorney said he would use the videos to support his filing this week in Alameda County Superior Court seeking to have a judge overturn his finding that there was "clear and convincing evidence" that doctors had properly declared Jahi brain dead.

He showed off the videos to reporters in his Market Street office, in a presentation that featured two large TV screens and a phone hookup with the head of a brain research foundation in New Jersey who took part in tests on Jahi at Rutgers University medical school.

If Dolan can persuade the court to overturn the judge's death finding — as well as a subsequent ruling from the Alameda County coroner — she could be returned to her home in California, with the costs to care for her shifted to the state and possibly UCSF Benioff Children's Hospital Oakland.

Jahi can't get health care in California now because of the declaration of brain death, Dolan said. "We can't do anything now because under California law she is brain dead."

If nothing else, the photos and video call into question assertions by hospital representatives last year that Jahi's body would soon deteriorate.

In a court filing by the hospital in December, a critical care pediatrician at Children's warned that "dramatic signs of the body's deterioration will continue to manifest over time."

Dolan, on a speaker phone with **Philip DeFina**, chairman and CEO of the International Brain Research Foundation in New Jersey, said researchers had conducted brain imaging and other tests on Jahi at Rutgers University with the assistance of medical school neurologist **Charles Prestigiacomo** and found she had measurable brain activity.

"If the brain is dead, there is no electrical activity," DeFina said.

Stanford bioethics Professor **David Magnus**, who has not seen the video showing Jahi's

movements or DeFina's findings, disputed the validity of any that wasn't an independent clinical exam conducted by a qualified neurologist.

"I haven't seen any signs or evidence that they have had such an evaluation," he said. "The rest is smoke and mirrors."

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Magnus added, "Patients (found brain dead) don't recover — it's irreversible. That would be groundbreaking, and a dramatic finding that would be problematic for the entire neurological community."

DeFina said he wasn't questioning the findings of Children's examining doctors, but rather the adequacy of the test for brain death that was developed in the 1960s and is still the standard

San Francisco Chronicle columnists Phillip Matier and Andrew Ross typically appear Sundays, Mondays and Wednesdays. Matier can be seen on the KPIX-TV morning and evening news. He can also be heard on KCBS radio Monday through Friday at 7:50 a.m. and 5:50 p.m. Got a tip? Call (415) 777-8815, or e-mail matierandross@sfchronicle.com
Twitter: @matierandross

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EXHIBIT C

Jahi McMath hearing postponed after doctor's determination

By Marisa Lagos Updated 8:43 am, Thursday, October 9, 2014

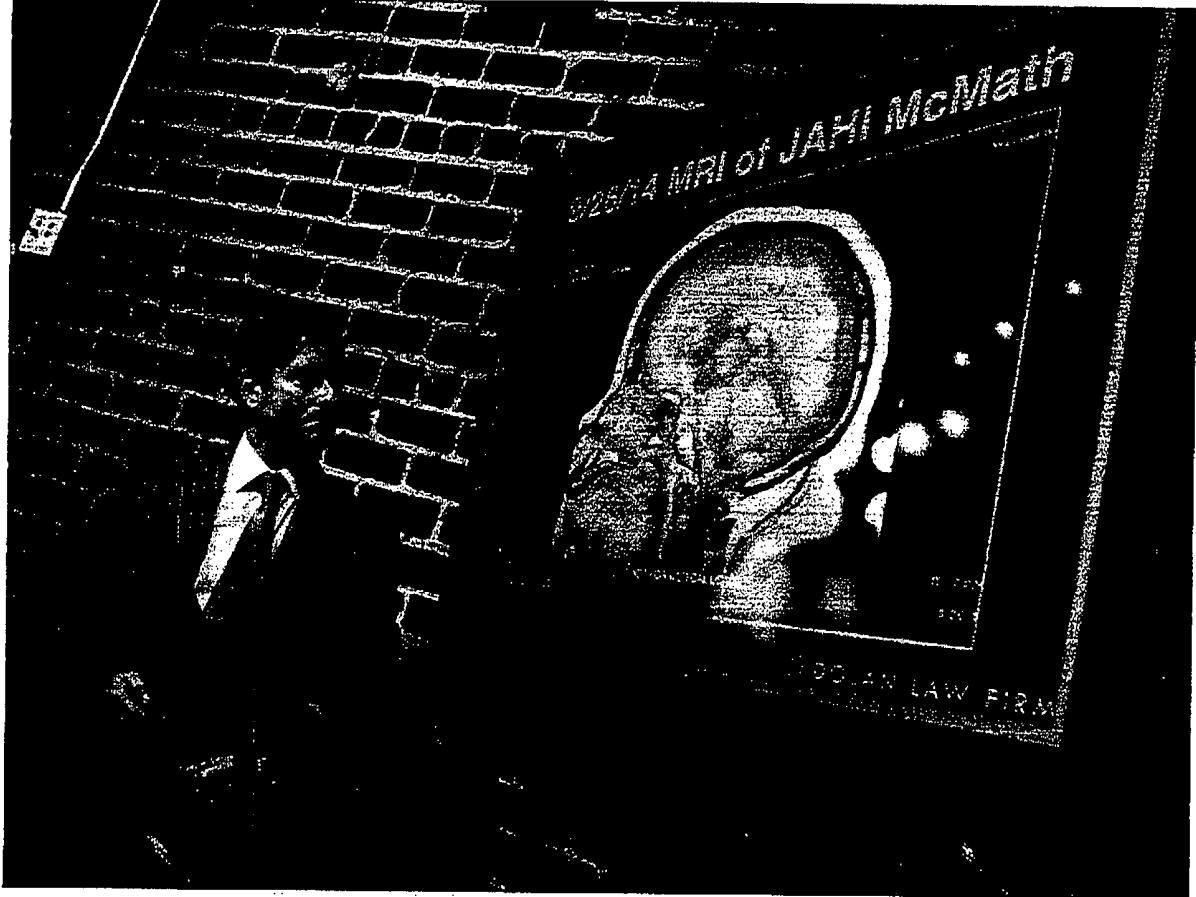


IMAGE 1 OF 10

Attorney Chris Dolan looks at an MRI of Jahi McMath at a news conference where he showed video that he says demonstrates that McMath is not brain dead in San Francisco on Thursday, Oct. 3, 2014.

A Thursday court hearing to decide whether Jahi McMath will be declared “alive again” was postponed after her family said their “team of international brain death experts” needs more time to review a letter from the court-appointed doctor reaffirming his belief that the 13-year-old Oakland girl is brain dead.

Jahi was declared brain dead after suffering what doctors said were terminal complications from surgery for sleep apnea at UCSF Benioff Children’s Hospital Oakland in December.

Her family rejected the determination, and challenged it in Alameda County Superior

court, where they lo... But last week, family attorney Christopher Dolan released video that he said shows Jahi moving her feet and hands at her mother's request. The video, he said — along with sworn declarations from five doctors who specialize in brain death and injury and who believe Jahi is not brain dead — all bolster the family's request that the court overturn its initial ruling that Jahi is brain dead.

The doctor who initially examined Jahi, however, said nothing in the video or the sworn declarations changed his mind.

Video: Jahi McMath Family Says Video Proves Teen Is Alive

Stanford University's Paul Graham Fisher, a pediatric neurologist who last year examined Jahi as a court-appointed independent

expert, wrote in a letter to Judge Evelio Grillo that the doctors used standards and tests that are irrelevant.

"Overall, none of the current materials presented in the declarations refute my (Dec. 23) examination and consultation finding ... or those of several prior attending physicians who completed the same exams, that Jahi McMath met all criteria for brain death," he wrote. "None of the declarations provide evidence that Jahi McMath is not brain dead."

Fisher noted that he is not being paid for his opinion, has no connection to Children's Hospital and continues "to extend my sympathies to the family and friends of Jahi McMath."

Dolan, who claims Fisher has a conflict of interest and legal bias, said in a written statement that he asked to reschedule Thursday's hearing in order to "address any concerns that Dr. Fisher has in an effort to demonstrate that, with an open and transparent dialogue between health care professionals, only one conclusion can remain: that Jahi McMath is not brain dead."

He asked the court to let "all of the doctors" sit down and review the evidence together.

RELATED STORIES



Videos show Mom coaxing, Jahi McMath moving



Jahi McMath's family wants her declared 'alive again'



Family says brain-dead Jahi McMath showing signs of life



Positive review for hospital in Jahi McMath case



Lawyer: Jahi McMath gets feeding tube, 'improving'



Jahi McMath receiving nutrients, family says

"I can understand what a difficult place Dr. Fisher finds himself in as he is the doctor who originally diagnosed Jahi as brain dead," Dolan said. "We are not seeking to fault Dr. Fisher's original exam. Experts say that Jahi's brain swelling would have given the impression of brain death at that time. What we do want to do is to bring all the evidence forward to be looked at critically, and not defensively, as this is an important medical and legal debate which goes far beyond Jahi."

If the court were to reverse its finding Jahi could return from New Jersey, where she is being cared for by her family, and her costs for care could be shifted to the state of California or possibly to Children's Hospital.

Marisa Lagos is a San Francisco Chronicle staff writer. E-mail: mlagos@sfchronicle.com Twitter: @mlagos

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EXHIBIT D

Jahi McMath's family takes brain-death lawsuit to federal court

By Jenna Lyons Updated 2:27 pm, Thursday, December 24, 2015

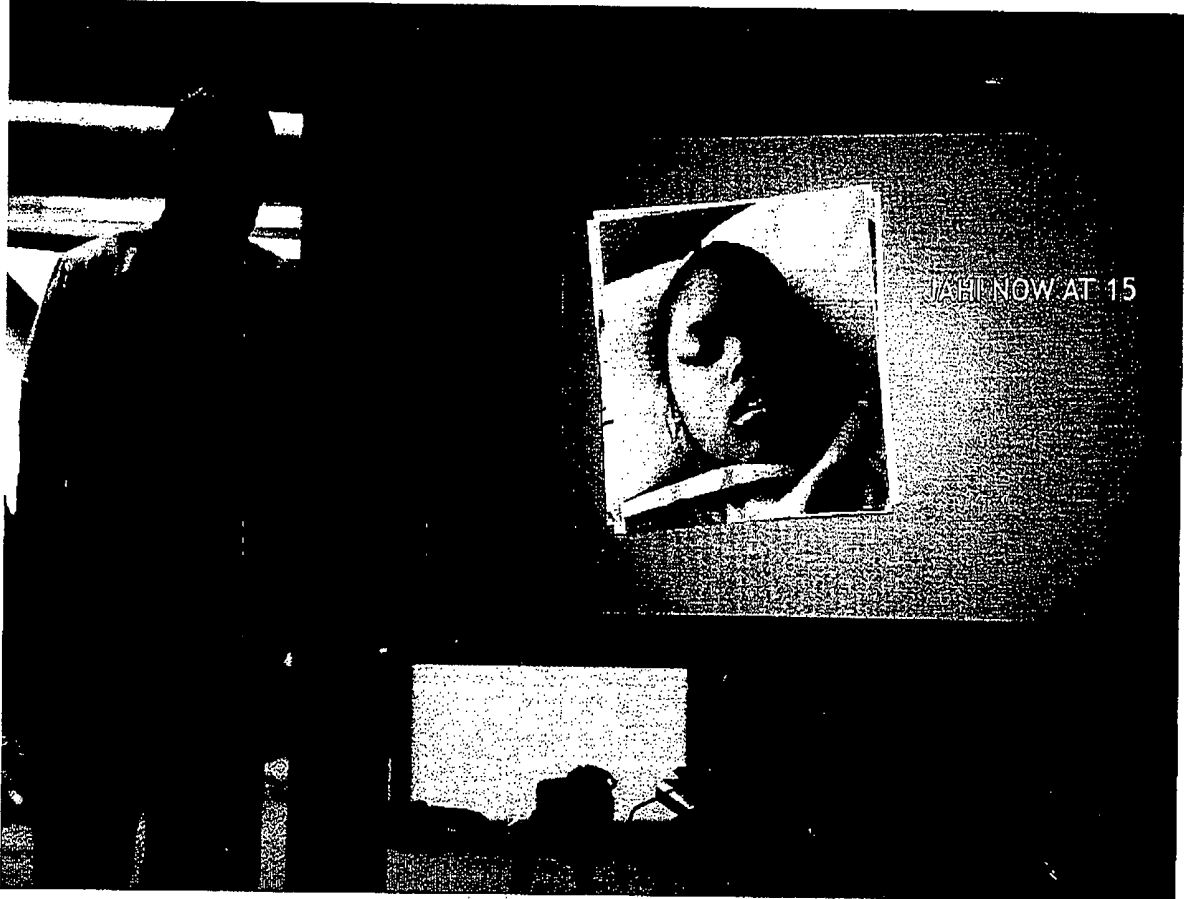


IMAGE 1 OF 40

Timothy Whisenton stands next to a video screen displaying a recent photo of his niece Jahi McMath at a news conference Wednesday in San Francisco.

The family of Oakland teen Jahi McMath has filed a federal lawsuit to get her death certificate revoked after an unsuccessful attempt to do so at the state level, attorneys for the family said.

In the suit, Jahi's current physician claims the 15-year-old has shown brain activity several times in her presence in the past few months.

At a news conference at the law offices of Christopher Dolan in San Francisco, Jahi's mother, Nailah Winkfield, addressed the media in an online video from New Jersey, insisting her daughter is alive.

"There's no way in the world I'd be holding onto a dead person," she said. "I want her to have the same rights any other disabled child has. I definitely believe that God will heal her. I'll pull a trigger on myself before I pull a plug on her."

Surgery goes wrong

UCSF Benioff Children's Hospital officials declared Jahi legally dead in December 2013 following surgery to treat sleep apnea that went wrong.

Jahi, 13 at the time, had her tonsils, adenoids and excess throat tissue removed in a surgery performed by Dr. Frederick Rosen.

She initially appeared fine afterward, until blood began to pour out of her mouth and nose. Then she went into cardiac arrest.

Although the Alameda County coroner issued a death certificate, Dolan, who represents the family, said it was not properly filled out or signed by any attending physician.

Dr. Muntu Davis' name is printed on it, but Dolan said he was not present at the time it was issued.

On Dec. 24, 2013, Judge Evelio Grillo declared there was "clear and convincing evidence that Jahi had suffered brain death."

Winkfield appealed the decision but could only negotiate to have Jahi back in her car after the hospital refused to keep her.

With the latest lawsuit, the family wants a declaration from a federal judge to force the Alameda County coroner's office to rescind the death certificate, which will allow Winkfield and Jahi to come back to California for treatment.

Jahi is in an undisclosed location in New Jersey, where she is considered alive, thank to a religious exemption the state allows for those labeled as brain dead.

Winkfield has been forced to use Jahi's insurance to provide for her medical care but was forced to sell her house and deplete her mother's savings throughout the entire costly process, although legal services remained free.

Grandmother's visit

Sandra Chatman, Jahi's grandmother, visited them in New Jersey weeks prior to the Wednesday announcement and joined Dolan at the law offices, where she said Jahi was progressing.

"I ask her to give me a thumbs-up, and she does it," Chatman said. "She's just doing awesome. I couldn't be more proud of Jahi."

Dr. Heidi Flori, director of UCSF Benioff's pediatric intensive care unit, dismissed the motions as spinal and muscular reflexes.

But Dr. Alieta Eck, Jahi's current doctor, has made a declaration in the suit claiming that after months of caring for Jahi, she believes the teen is alive.

"While Jahi McMath has suffered a serious, and significant brain injury, and exhibits the presentation of one who has suffered serious brain trauma, and exhibits signs and characteristics of serious brain damage, Jahi McMath is not dead," Eck stated. "She exhibits signs of brain function."

Jahi has entered puberty, developing breasts and underarm hair and starting her period. Puberty can only happen when the hypothalamus, which is part of the brain, releases hormones. Jahi's hypothalamus is still working, Eck said, which means she still has some brain function.

Constitutional grounds

The complaint, filed Wednesday, claimed a number of Jahi's constitutional rights have been violated, including rights outlined in the Fourteenth Amendment, which provides that no "State (shall) deprive any person of life, liberty, or property without due process of law."

"This complaint is designed to restore Jahi McMath's life to give her the most basic dignity and freedom to be called a human being and not a corpse," Dolan said.

*Jenna Lyons is a San Francisco Chronicle staff writer. E-mail:
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13 **BIFURCATE TRIAL**

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15

16 I certify (or declare) under penalty of perjury under the laws of the State of California that the
foregoing is true and correct and that this Declaration was executed on April 4, 2016.

17

18


Renee Infantino

19

20

21

22

23

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25

26

27 Court: Alameda County Superior Court

Action No: RG 15760730

28 Case Name: Spears (McMath) v. Rosen, M.D., et al.