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LATASHA WINKFIELD

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

UNLIMITED CIVIL JURISDICTION

LATASHA WINKFIELD, the Mother of Jahi McMath, a minor

Plaintiff,

v.

CHILDREN'S HOSPITAL OAKLAND, Dr. David Durand, M.D. and DOES 1 through 100, inclusive

Defendants.

Case No.: RP13-707598

MEMORANDUM REGARDING COURT'S JURISDICTION TO HEAR PETITION FOR DETERMINATION THAT JAHI MCMATH IS NOT BRAIN DEAD

I. INTRODUCTION

Jahi McMath, through her guardian and mother Nailah (Latasha) Winkfield, hereby petitions this court to hold a hearing to permit her to provide new, conclusive evidence, that Jahi McMath is not "brain dead" as she has brain function. On December 24, 2013, the Court concluded that there was clear and convincing evidence that Jahi had suffered brain death, as defined under Health and Safety Code 7180 and 7181, and declared her dead. The questions now become does the Court still retain jurisdiction over this matter and, more specifically, to decide whether Jahi McMath is, currently, brain

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dead as defined by those same code sections. Petitioner submits that the Court does, indeed, have jurisdiction and that the interests of justice, which are literally those of life or death, demand that this court exercise that jurisdiction to prevent perpetuation of a grave injustice: continuing to declare that Jahi McMath is dead when she is not.

II. ARGUMENT

A.Court Retains Jurisdiction

In *Dority v Superior Court, San Bernidino* (1983) 145 Cal.App.3d 273, a 19 day old infant suffered a medical condition that led to his health deteriorating to the point he was placed on a ventilator. Later, a cerebral blood flow (CBF) study and an electroencephalograph (EEG) were done showing electrocerebral silence and an absence of blood flow to the brain. The infant's physicians determined that brain death had occurred and recommended removal of life support, i.e., a respirator. The hospital anticipated that even with respiratory support the child's bodily functions could only be maintained for several weeks. The child's organs continued to function beyond expectations and the parents chose to withhold consent to remove life support. The hospital, desirous of removing said support, petitioned the court for the appointment of a temporary guardian, the Director of the Department of Public Social Services.[1] The court appointed the guardian and, after taking unrefuted medical testimony that the child was brain dead pursuant to the statutory definition, the court declared the child dead and ordered the temporary guardian to provide consent to the healthcare providers to remove the ventilator. The parents and counsel for the minor child petitioned the court for a writ of prohibition against removing the life-support device. Before the court could act on the petition, the infant's bodily functions ceased and the life-support device was removed.

The court, in addressing whether the petition was rendered moot by the child's demise held that "[i]n light of the important questions raised by this case, this Court has the discretion to render an opinion where the issues are of continuing public interest and are likely to recur in other cases."

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[1] In Dority the parents were suspected to be a cause of the child's brain death and were determined not to be suitable to act in the best interests of the child.

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(Dority at 276.) The court further held that "[t]he novel medical, legal and ethical issues presented in this case are no doubt capable of repetition and therefore should not be ignored by relying on the mootness doctrine. This requires us to set forth a framework in which both the medical and legal professions can deal with similar situations." (*Id.*) *Dority* recognized "the difficulty of anticipating the factual circumstances under which a decision to remove life-support devices may be made, [and] determined that it would be "unwise" to deny courts the authority to make such a determination when circumstances warranted." (*Dority* at 275.)

In addressing the question of a Court's jurisdiction over the review of the determination of brain death, *Dority* states "[t]he jurisdiction of the court can be invoked upon a sufficient showing that [1] it is reasonably probable that a mistake has been made in the diagnosis of brain death or [2] where the diagnosis was not made in accord with accepted medical standards." (*Dority* at 280.) *Dority* is silent on what showing is necessary to establish "reasonable probability of a mistake."

B. Reasonable Possibility of Mistake in Diagnosis

Like Dority, Jahi McMath's case was, and remains, a matter of international importance raising significant issues of public concern. Therefore, just as the Court in *Dority* continued to have jurisdiction following the complete death of the baby (both circulatory and brain death), even greater rational exists for this court to continue to exercise its jurisdiction here where Jahi's circulatory system and, indeed all of her organs, continue to function and world class experts in neurology and brain death will provide evidence that Jahi *no longer* meets the definition of brain death as she has neuralgic function.

As stated by *Dority, when it is reasonably possible that a mistake has been in the diagnosis of brain death,* the court has jurisdiction to hear the matter. Here Petitioner has irrefutable evidence, that Jahi is no longer brain dead. Petitioner does not believe it necessary to challenge Dr. Fischer's diagnosis of the caseation of brain activity, at that time. The Petitioner challenges the determination that it was *irreversible* and believes such a proclamation was mistaken. Clearly Jahi's condition was not "irreversible." This is not a failing of Dr. Fischer, there simply is no case, other than Jahi McMath, where a pediatric patient has been diagnosed as brain dead but has continued to receive

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medical treatment and survived this long.

Petitioner, is in possession of current evidence, including MRI evidence of the integrity of the brain structure, electrical activity in her brain as demonstrated by EEG, the onset of menarche (her entering into puberty as evidenced by the beginning of menstruation) and her response to audible commands, given by both her mother and an examining physician, demonstrating that Jahi McMath's brain death was not "irreversible." Petitioner's experts will testify that Jahi may have, at the time of Dr. Fischer's examination, demonstrated evidence of brain death due to the swelling of her brain following the traumatic events that led to her suffering a loss of oxygen to her brain but, now that the swelling has receded, and she has had time to receive proper post incident medical care, she has demonstrable brain function.

III. DUE PROCESS

This Court, in it's Order of December 26. 2013, offered the following analysis concerning Jahi's due process rights;

> Regarding due process, the Court has considered the following general principles as stated in *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal. 4th 371, 390-391:
> Under the California Constitution, the extent to which procedural due process is available depends on a weighing of private and governmental interests involved. The required procedural safeguards are those that will, without unduly burdening the government, maximize the accuracy of the resulting decision and respect the dignity of the individual subjected to the decision making process. Specifically, determination of the dictates of due process generally requires consideration of four factors: [1] the private interest that will be affected by the individual action; [2] the risk of an erroneous deprivation of this interest through the procedures used and the probable value, if any, of additional or substitute safeguards; [3] the dignitary interest of informing individuals of the nature, grounds and consequences of the action and of enabling them to present their side of the story before a responsible governmental official; and [4] the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.
>
> The first three considerations, the private interest, the risk involved, and the dignitary interest of the proceeding, all suggest that the due process rights of the party affected by a physician's determination of death are substantial. The fourth factor, the government interest in the form of administrative burden, is addressed by the focused nature of the inquiry under Health and Safety Code sections 7180 and 7181.

Jahi's right to due process requires that this court provide a forum for this matter to be heard and for her determination of death to be reversed. The administrative burden here is no greater than it was to determine her brain death.

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IV. THE COURT HAS JURISDICTION PURSUANT TO CCP § 128

California Code of Civil Procedure, Section 128, declares that the Court has inherent power "to amend and control its process and orders so as to make them conform to law and justice." (CCP § 128(8).)

> Courts have the inherent power to create new forms of procedure in particular pending cases. "The . . . power arises from necessity where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function." (Witkin, Cal. Procedure (2d ed.) Courts, s 123, p. 392.) This right is codified in Code of Civil Procedure section 187 which provides that when jurisdiction is conferred on a court by the Constitution or by statute ". . . all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code." (See also Code Civ.Proc., s 128(8).) As the Supreme Court said in People v. Jordan, 65 Cal. 644 at p. 646,"in the absence of any rules of practice enacted by the legislative authority, it is competent for the courts of this State to establish an entire Code of procedure in civil cases, and an entire system of procedure in criminal cases, ..." (See also Citizens Utilities Co. v. Superior Court, 59 Cal.2d 805,(1963), recognizing the inherent power of courts to adopt "any suitable method of practice . . . if the procedure is not specified by statute or by rules adopted by the Judicial Council.") (At p. 813).

(James v. Superior Court (1978) 77 Cal.App.3d 169, 175.)

The instant petition is truly a case of first impression not only in California but, based on an extensive search of all Federal authorities, nationally. There simply has been no case in which brain death was determined and the patient managed to remove themselves, before cardiovascular death, from the facility which had received permission from the court to discontinue life support. This Court has the inherent power to adopt the requested process, as, in the absence of the court exercising its inherent power Jahi McMath would continue to be declared legally brain dead when she isn't. Health and Safety Code Section 7181 specifically limits the legal determination of brain death to circumstances where there is "***irreversible cessation of all functions of the entire brain, including the brain stem.***" This Court, having made such determination, must consider the change in circumstances presented by Plaintiff's evidence which shows that Jahi's condition is now one in which Jahi now has brain function. Should the court refuse to do so Jahi would be barred from regaining her rightful place in our society as a living person.

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V. CONCLUSION

In the interests of justice, and Jahi McMath's dignity and right to be considered a living human being, rather than, as she has been portrayed, a corpse, this Court must grant petitioner Nailah Winkfield's petition for hearing/reconsideration of this court's determination of her being brain dead pursuant to California Health and Safety Code Section 7181.

DATED: September 30, 2014

THE DOLAN LAW FIRM

By: _____

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

LATASHA WINKFIELD, the mother of Jahi McMath, a minor,

Plaintiff,

v.

CHILDREN'S HOSPITAL & RESEARCH CENTER AT OAKLAND, et al.,

Defendant.

Case No. RP 13-707598

UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND'S BRIEF IN SUPPORT OF FINALITY OF THIS COURT'S JUDGMENT

Dept: 31

INTRODUCTION

This Court entered final Judgment in this case on January 17, 2014. That Judgment confirmed this Court's prior determination that clear and convincing evidence established the tragic fact that Jahi McMath was deceased. This final Judgment and the underlying determination of death were both well-supported in fact and law. Judgment was rendered by this Court only after extensive hearings in which the parties presented both evidence and legal argument and after the Court heard from its own appointed independent neurologist-expert who had examined Ms. McMath. California appellate proceedings and federal collateral proceedings challenging this Court's determinations were abandoned. The Alameda County Coroner issued a death certificate.

Respectfully, this Court's final Judgment is not subject to reversal, review, reconsideration, re-opening or collateral attack. That would be true even if an interested party

brought some form of properly noticed trial court or appellate court motion or other proceeding. At present, there is no such pending proceeding. Although there may have been ex parte communication with the Court initiated by one of the parties, no notice of any such ex parte communication was given to Defendant/Respondent UCSF Benioff Children's Hospital Oakland.[1]

While it is difficult to determine what statutory or equitable basis Petitioner/Plaintiff might be proceeding under, grounds for challenging the Judgment do not exist here because of substantive issues and/or time bars. There is a very strong policy in favor of finality of judgments. *See Arambula v. Union Carbide Corp.*, 128 Cal.App.4th 333, 345 (2005). Thus, while a judgment may be attacked, there is no valid basis for challenging a Judgment reached more than nine months ago where there is no evidence of fraud, duress or other wrongful conduct and the judgment is not void on its face.

A short discussion of each hypothetical ground for challenging a Judgment in the trial court ensues. None of them are available to Plaintiff/Petitioner here.

I. Motion for New Trial is Time-Barred

Under California Code of Civil Procedure §§ 656-660, where any of the errors identified in § 657 exist, "[t]he verdict may be vacated and any other decision may be modified or vacated, in whole or in part and a new or further trial granted on all or part of the issues, on the application of the party aggrieved[.]" Cal. Civ. Proc. § 657. No such errors occurred in connection with the instant Judgment. Indeed, there has not even been any effort to establish error by the trial court.

However, a motion for new trial would be time-barred in any event. Such a motion must be made not later than 15 days after Notice of Entry of Judgment or within 180 days after the entry of judgment, *whichever is earliest.* Code of Civil Procedure § 659. Here, the court clerk mailed notice of the Judgment, via first class mail, to each of the parties on January 21, 2014. Any motion for new trial needed to be filed more than seven months ago.

[1] Defendant/Respondent's name has changed as a result of an affiliation with UCSF entered into earlier this year. Defendant/Respondent has ongoing interests in this proceeding because, *inter alia*, physicians with Hospital privileges were involved in the determination of death and the body of Jahi McMath was released to the Alameda County Coroner pursuant to this Court's Judgment.

II. Motion to Vacate Judgment is Time-Barred

Code of Civil Procedure § 663 allows an aggrieved party to move the court to set aside and vacate a judgment and have a different judgment be entered. Code of Civil Procedure § 663. There are no grounds for such a motion. No one has even contended otherwise.

Moreover, a motion to vacate a judgment is subject to the same time limitations as a motion for new trial. *See* Code of Civil Procedure § 663a. Therefore, a request for this relief is also time-barred.

III. Relief From Judgment Based on Mistake, Inadvertence, Surprise or Excusable Neglect Under Code of Civil Procedure Section 473(b) Is Time-Barred

Code of Civil Procedure § 473(b) allows the court to relieve a party from a judgment "taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." There are no grounds for such a motion here. Again, no one has even alleged otherwise.

Moreover, this relief may only be sought "within a reasonable time, *in no case exceeding six months*, after the judgment . . . was taken." Code of Civil Procedure § 473(b), emphasis added. Here, the Judgment was entered more than six months ago; therefore, relief under section 473 is unavailable.

IV. Relief From Judgment That Is Void On Its Face Pursuant to Code of Civil Procedure Section 473(d)

The Court retains power to "set aside any void judgment or order." Code of Civil Procedure § 473(d). For example, a judgment could be declared void where service of the summons was not effective. *See e.g. Carol Gilbert, Inc. v. Haller*, 179 Cal.App.4th 852 (2009). Here, there is no allegation, let alone, evidence that the Court's final judgment is void. All parties were present and fully participated in the trial court proceedings.

V. Equitable Relief Based on Extrinsic Fraud, Mistake, or Duress

Where a judgment is obtained under circumstances of extrinsic fraud, mistake, or duress that prevent a fair adversary hearing, equitable relief is allowed even after the time for appeal,

new trial, and other statutory means of review have expired. *In re Marriage of Guardino*, 95 Cal.App.3d 77, 88 (1979). Here, there is not even any allegation that, the judgment was obtained by any wrongful conduct. Nor could there be any such allegation. The Court used the services of a renowned independent medical expert to examine Jahi McMath and gave Petitioner/Plaintiff opportunity to employ her own competent expert as well as consult in depth with the Court's independent expert.

This is simply not a case of fraud, mistake or duress. This is a sad situation where the Court made the correct determination that Jahi McMath was dead. There is no factual basis or legal justification for requiring those involved to endure re-litigation of that properly-reached determination. Thus, equitable relief is wholly unwarranted.

VI. Code of Civil Procedure Section 1008(b) May Not Be Used to Challenge Judgment

Code of Civil Procedure § 1008(b) permits a party to renew an *interim* motion or application that was previously refused in whole or part on the basis of new facts, circumstances, or law. However, such a motion for reconsideration is not available to challenge a final judgment.

> [There is] a critical distinction between an order of dismissal, which is a judgment, and other orders. A court may reconsider its order granting or denying a motion and may even reconsider or alters its judgments so long as judgment has not yet been entered. *Once judgment has been entered, however, the trial court may not reconsider it and loses its unrestricted power to change the judgment. It may correct judicial error only through certain limited procedures such as motions for new trial and motions to vacate the judgment.*

20th Century Ins. Co. v. Superior Court, 90 Cal.App.4th 1247, 1259 (2001) (quoting *APRI Ins. v. Superior Court*, 76 Cal.App.4th 176 (1999)), emphasis added. A § 1008(b) motion for reconsideration cannot be used to challenge a Judgment.

VII. Code of Civil Procedure Section 128(a)(8) Has No Application Here

Code of Civil Procedure Section 128(a)(8) allows a court to amend orders "so as to make them conform to law and justice." However, this is hardly an unlimited power. It may be exercised by a trial court for purposes such as the correction of clerical errors, the setting aside of judgments and orders inadvertently made and not the result of an

exercise of judgment and the prevention of the wrongful use of process rightfully issued. *Bloniarz v. Roloson* (1969) 70 Cal.2d 143, 148. A trial court acting under § 128(a)(8) may not consider equitable factors such as extrinsic fraud, mistake or inadvertence. *Ibid*; *see also Anderson v. Farquhar* (1937) 18 Cal.App.2d 392, 395 (trial court may correct clerical error, but not judicial error under its inherent discretion).

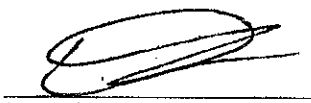
There are no errors here to correct. Regardless, § 128 is not a vehicle for challenging this Court's Judgment.

CONCLUSION

There are no substantive grounds and no available procedures for any challenge this Court's proper entry of Judgment in this matter. Judgment is final and, respectfully, this Court has no jurisdiction to entertain any contrary argument.

Dated: September 30, 2014

ARCHER NORRIS



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