Supreme Court of the State of New York
County of Kings

Index Number 1780/2017

Part 91

In the Matter of the Application of

SARAH NAKAR,

Petitioner,

against

NEW YORK PRESBYTERIAN HOSPITAL, COLUMBIA UNIVERSITY IRVING MEDICAL CENTER, AND MILSTEIN PAVILION MEDICAL INTENSIVE CARE UNIT,

Respondents.

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

	Papers Numbered
Notice of Motion and Affidavits Annexed........	
Order to Show Cause and Affidavits Annexed...	1
Answering Affidavits..............................	
Replying Affidavits................................	
Exhibits...	
Other	

Upon review of the foregoing documents, and a hearing on June 9, 2017, a subsequent conference call, and a final conference on January 15, 2019, petitioner's application to revoke and declare null and void the death certificate of Yechezkel Nakar issued by respondents, to permit petitioner to supplement her petition on or before the return date, to allow service by e-mail or fax, and for other such just and proper relief, is decided as follows:[1]

Introduction

This case presents an unusual and complicated question in the area of end-of-life care, cessation of care, and the right of a patient and the patient's family to receive religious

[1] In addition, petitioner requested that respondents be temporarily restrained from transmitting information regarding Mr. Nakar other than to petitioner, and that respondents provide petitioner with all medical records, test results and permission slips for Mr. Nakar's medical treatment. On the Order to Show Cause itself, the court granted petitioner's request for these records of Mr. Nakar's treatment, denied her request to enjoin the transmittal of information, and set a hearing date on the remainder of petitioner's application for June 9, 2017.

accommodation surrounding the declaration of death, balanced against a hospital's policy regarding these same issues.

Factual Background[2]

Petitioner is the wife of Yechezkel Nakar. Mr. Nakar was a patient under the care of respondents in their Intensive Care Unit ("ICU"), having suffered a cerebral hemorrhage. Dr. Natalie Yip, a physician affiliated with respondents, rendered care to Mr. Nakar personally, beginning on May 25, 2017.

On May 26, 2017, Dr. Yip observed that Mr. Nakar had undergone a change in neurological status. A head CT scan was performed, which confirmed a massive intracerebral hemorrhage. Dr. Yip then ordered a CT scan and advised respondents' neurology department, which was part of the protocol when there is a change in neurological status. Dr. Yip described the results of the CT scan to Mr. Nakar's family, and further explained that there was a potential Mr. Nakar would lack brain function as a result of the hemorrhage.

On May 27, 2017, a Saturday, the attending neurologist opined that Mr. Nakar lacked brain stem function, performed certain of the tests to determine brain death, and recommended an apnea test to confirm Mr. Nakar's condition. Dr. Yip and others indicated that they advised Mr. Nakar's family of his condition, and advised that they would like permission to perform confirmatory tests. Mr. Nakar's family objected on religious grounds to performing these

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[2] The factual background of this matter is set forth in the petition, and was further supplemented at the June 9 hearing by various witnesses. The witnesses include Rabbi J. David Bleich, Dr. Kenneth Prager of Columbia University Medical Center, Dr. Natalie Yip of Columbia University Medical Center, Dr. Zachary Lockerman of Maimonides Medical Center, and Rabbi David Zweibel. While additional information was discussed following the June 9 hearing, it was not submitted as evidence at the hearing, nor in an affidavit, and so is not made part of the record in this matter.

confirmatory neurological tests to finally establish brain death. The family also stated that they needed to consult further with their rabbi, but would not be able to reach the rabbi because it was the Sabbath. Dr. Yip responded that there was no immediate need to perform the apnea test, and so the hospital would wait to perform the last test.

Dr. Kenneth Prager stated that he was first consulted on Mr. Nakar's case on May 30, 2017. He said that he spoke with Mr. Nakar's son, and explained to him that respondents could determine brain death over the family's objection. Thereafter, on May 31, 2017, the Jewish holiday of Shavuot, and without the family's consent, respondents' physicians performed a confirmatory test for brain death, although not the apnea test. They declared Mr. Nakar to be brain dead, and issued a death certificate. Respondents did this although they were aware that Mr. Nakar and his family were Orthodox Jews, and that Shavuot was a religious holiday for the Nakar family.

During the hearing, respondents submitted into evidence their written policy regarding the determination of brain death. The policy includes a clinical examination and a confirmatory test, such as an apnea test. Dr. Yip explained that other tests may be performed to confirm death in certain circumstances. The policy accepts that people may have a moral or religious objection to the determination of brain death, and provides that life-sustaining equipment will not be removed and the hospital shall initiate an ethics consultation to address the objection and reach a satisfactory resolution. The policy also provides for a protocol following a determination of brain death, such as discontinuing the use of life-sustaining equipment, unless the patient is a candidate for organ donation.

Dr. Prager further explained respondents' practice for determining brain death at a particular time when metabolic death has not yet occurred. First, he referred to concerns regarding organ donation. Next, Dr. Prager explained that, if the patient is in the ICU, and there is a shortage of ICU beds, the bed should be given to a "living patient", to use Dr. Prager's words.[3] Dr. Prager further explained that the determination should not be delayed even if there is no need for an ICU bed at the moment, because a full determination may take several hours, and the need for the bed may be more immediate. Finally, Dr. Prager stated that it can be distressing to hospital staff to care for a patient who is brain dead, rather than devoting their time and attention to other patients.

None of these concerns are present in this case. For example, there was no evidence submitted at the hearing that Mr. Nakar was an organ donor, or that someone was in need of any of Mr. Nakar's organs. Dr. Prager and Dr. Yip testified that they did not discuss the need for an ICU bed prior to declaring Mr. Nakar dead, and that there was no shortage of available ICU beds at the time. Furthermore, Dr. Prager acknowledged, and this court agrees, that the emotional needs of the patient and the patient's family concerning the declaration of death outweigh any distress to hospital staff concerning the allocation of their time and attention.

Once respondents declared Mr. Nakar to be brain dead, Dr. Yip explained to Mr. Nakar's family that, although brain death was considered death under the law, respondents would continue to provide ventilation, and would not withdraw medication, nutrition or hydration that Mr. Nakar was already receiving. Dr. Yip also advised the family that, should respondents need

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[3] Rabbi Bleich acknowledged that Jewish law would permit, perhaps even require, that a patient in Mr. Nakar's condition be removed from the ICU if necessary to save a more viable patient.

an ICU bed, Mr. Nakar would be moved to another space that would accommodate a ventilator.

Thereafter, respondents arranged to have Mr. Nakar transported by ambulance to a nursing home called Palm Gardens, who later rejected the admission of Mr. Nakar because he was being fed through a nasogastric tube rather than a percutaneous endoscopic gastrostomy ("PEG") tube. Palm Gardens then transferred Mr. Nakar to Maimonides Medical Center ("Maimonides").

Dr. Zackary Lockerman, an associate chief medical officer with Maimonides, explained that Maimonides admitted Mr. Nakar on June 3, 2017. Dr. Lockerman stated that Mr. Nakar arrived at Maimonides on a ventilator, unresponsive, hypothermic, with unstable blood pressure and uncontrolled blood sugar. Maimonides attempted to put Mr. Nakar on dialysis, but the attempt caused Mr. Nakar's pulse to escalate and blood pressure to drop to 60/45. Dr. Lockerman further explained that Maimonides provided ventilation and nutrition through a nasogastric tube, as well as medication. Dr. Lockerman stated that Maimonides chose not to provide Mr. Nakar with a PEG tube due to certain health risks to Mr. Nakar, including the risk of death due to a significant increase in blood pressure caused by the PEG tube. Notably, Dr. Lockerman testified that neither he nor the attending gastroenterologist were aware of the prior declaration of death at the time Maimonides first treated Mr. Nakar, and that Maimonides became aware of the death certificate on Wednesday, June 7, 2017, four days after Mr. Nakar was admitted to Maimonides.

The existing death certificate put Maimonides in a difficult position. Dr. Lockerman acknowledged that the hospital would not have admitted Mr. Nakar if it had been advised that he had been previously declared dead. Likewise, Maimonides could not bill the family. However,

by the time Maimonides became aware of the death certificate, it had admitted Mr. Nakar and had begun to evaluate his condition and treat him. Under the circumstances, and given the objections of Mr. Nakar's family to the declaration of death, Maimonides assumed the responsibility of Mr. Nakar's care until metabolic death.

Analysis

Petitioner requests that this court vacate the death certificate issued by respondents. As petitioner explains in the petition, she requests this relief "so that [Mr. Nakar] may continue to be covered by medical insurance and receive appropriate care at other facilities." Petitioner explains that Mr. Nakar's and her family's religious and moral beliefs, as Sephardic Orthodox Jews, do not recognize brain death as a criterion of death. As Rabbi J. David Bleich explained at the hearing, the standard for death in Jewish law is the irreversible cessation of cardiac and respiratory activity, as determined by whatever medical means are necessary.

The recent legal definition of death has its origins in the Court of Appeals decision in *People v Eulo* (63 NY2d 341, 354 [1984]). There, the Court of Appeals acknowledged that, until that point, the New York legislature had not defined death. The court noted that "[i]t is claimed that in New York, the time of death has always been set by reference to the functioning of the heart and the lungs; that death does not occur until there has been an irreversible cessation of breathing and heartbeat" (*Eulo*, 63 NY2d at 348). However, the court recognized that the advent of machines to continue the working of the heart and lungs made such a definition problematic, and that many courts had turned to the cessation of brain activity as the indication of death (*id.* at 350-355). Accordingly, the court fashioned a two-step test for determining death. The court held that, "Ordinarily, death will be determined according to the traditional criteria of irreversible

cardiorespiratory repose. When, however, the respiratory and circulatory functions are maintained by mechanical means, their significance, as signs of life, is at best ambiguous. Under such circumstances, death may nevertheless be deemed to occur when, according to accepted medical practice, it is determined that the entire brain's function has irreversibly ceased" (*id.* at 355-56).

Thereafter, in 1987, a New York Department of Health regulation codified the standard for determining death in New York. It reads:

> 1. Determination of Death.
>
> (a) An individual who has sustained either:
>
> (1) irreversible cessation of circulatory and respiratory functions; or
>
> (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead.
>
> (b) A determination of death must be made in accordance with accepted medical standards.
>
> (c) Death, as determined in accordance with paragraph (a)(2) of this section, shall be deemed to have occurred as of the time of the completion of the determination of death.
>
> (d) Prior to the completion of a determination of death of an individual in accordance with paragraph (a)(2) of this section, the hospital shall make reasonable efforts to notify the individual's next of kin or other person closest to the individual that such determination will soon be completed.
>
> (e) Each hospital shall establish and implement a written policy regarding determinations of death in accordance with paragraph (a)(2) of this section. Such policy shall include:
>
> (1) a description of the tests to be employed in making the determination;
>
> (2) a procedure for the notification of the individual's next of kin or other person closest to the individual in accordance with subdivision (d) of this section;

and

> (3) a procedure for the reasonable accommodation of the individual's religious or moral objection to the determination as expressed by the individual, or by the next of kin or other person closest to the individual.

(10 NYCRR § 400.16 [1987]).

The phrase “reasonable accommodation” is an inherently subjective standard. It requires communication and collaboration so that the medical provider can properly address the specific moral or religious concerns. It is not surprising, therefore, that the court has found no case construing the meaning of “reasonable accommodation”.

The plain text of the statute directs the medical provider, such as respondents here, to create a written policy that addresses moral and religious objections to a determination of brain death, and requires that the policy include a reasonable accommodation for those objections. Respondents’ policy provides, among other things, that once such an objection has been made, the hospital shall initiate an ethics consultation to address the objection and reach a satisfactory resolution. Dr. Prager further explained respondents’ purported practical concerns for declaring someone brain dead, such as issues regarding organ donation and another patient’s need for an ICU bed.

In this case, respondents did not follow the text, if not the intention, of Section 400.16, and did not follow their own policy. First, the statute requires a reasonable accommodation, which can occur only by working with the patient. Per respondents’ written policy, they were also required to commence an ethics consultation to mediate the Nakar family’s objections and “reach a satisfactory resolution”.

Here, petitioner and her family made clear their objections to respondents' determination of brain death beginning on May 27, 2017. Dr. Prager was not brought in to consult with the family until May 30. On the next day, May 31, and without any resolution of the family's concerns, respondents declared Mr. Nakar brain dead. Furthermore, May 31 was a Jewish holiday during which the family would ordinarily be at home and otherwise observing the day. On such a day, they would not normally travel or even speak with someone on the telephone. Bearing in mind that Dr. Yip acknowledged there was no immediate need to declare Mr. Nakar brain dead, it was not reasonable for respondents to take such action only one day after bringing in the ethics consultant, and when there had been no resolution of the family's concerns. It also was wholly inappropriate for respondents to take action on a Jewish holiday.

Additionally, none of the practical concerns mentioned by Dr. Prager were present here. There is no evidence that, at the time of respondents' brain death determination, Mr. Nakar was an organ donor or that someone was in need of any of his organs. Neither Dr. Yip nor Dr. Prager discussed the actual need for an ICU bed at the time of the brain death determination or before. Finally, as Dr. Prager acknowledged, petitioner's and her family's religious objections deserve greater weight than any potential emotional concerns hospital staff might have for treating someone who could be diagnosed as brain dead.

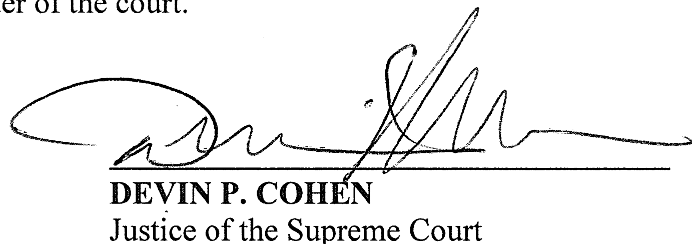
It is also significant that, although respondents declared Mr. Nakar brain dead, they did not treat him as though he was dead in accordance with their written policy. For example, respondents did not remove life-sustaining equipment, although there is no evidence that Mr. Nakar was a candidate for organ donation. Instead, respondents transferred Mr. Nakar's care to a nursing home that it turned out was not prepared to receive him. This occasioned the nursing

home to immediately transfer Mr. Nakar to Maimonides, which they unfortunately did without proper notification to Maimonides that respondents had already declared him brain dead.

Under these circumstances, it would have been reasonable for respondents to accommodate petitioner's objections by delaying the declaration of death until some or all of these concerns were present, or Mr. Nakar's heart or lung function had ceased. It also would have been reasonable to discuss with the family the possibility that Mr. Nakar be transferred to a facility that would better accommodate the family's concerns about declaration of death. For example, the court in *Matter of Long Is. Jewish Med. Ctr. (Baby Doe)* (168 Misc 2d 576 [Sup Ct, Queens County 1996]) held that a hospital reasonably accommodated the next of kin's religious beliefs when it permitted them to get a second opinion on brain death and offered to permit the transfer of the patient to another facility.

Because respondents did not take sufficient steps to reasonably accommodate the Nakar family's concerns, including steps set forth in their own written policy and practice, it was not proper for respondents to declare Mr. Nakar brain dead when they did. For the foregoing reasons, petitioner's application is granted to the extent that respondents are directed to take all steps necessary to vacate the death certificate they issued for Yechezkel Nakar. A new death certificate may be issued based on Mr. Nakar's passing on or about June 22, 2017.

This constitutes the decision and order of the court.



January 15, 2019
DATE

DEVIN P. COHEN
Justice of the Supreme Court