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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

LATASHA WINKFIELD, the mother of Jahi McMath, a minor, Petitioner, v. CHILDREN'S HOSPITAL & RESEARCH CENTER AT OAKLAND, et al. Respondents..	Case No. RG 13-707598 **OPPOSITION TO PETITION TO APPOINT DR. PAUL A. BYRNE AS INDEPENDENT EXPERT AND REQUEST TO LIFT DECEMBER 23, 2013 TEMPORARY RESTRAINING ORDER** Date: December 24, 2013 Time: 9:30 A.M. Dept: 31

INTRODUCTION

This brief assumes that Dr. Paul Fisher's Independent Expert Report presented to the Court December 24, 2013 will conclude that Jahi McMath is, unfortunately, brain dead as defined by both California Health & Safety Code section 7180 and medically recognized criteria. Based on that assumption, Respondent Children's Hospital & Research Center at Oakland (Children's) respectfully suggests that: (1) the Temporary Restraining Order obligating Children's to provide continuing care to Jahi McMath should be lifted because Dr. Fisher's independent evaluation of Jahi McMath satisfies the requirements of Health & Safety Code section 7181; and (2) the request

of Petitioner Latasha Winkfield to appoint Paul Byrne as a second independent expert should be denied because such an appointment is unnecessary and Dr. Byrne, who is neither a neurologist nor a California physician, is not qualified and has already taken a position on this matter..

LEGAL ANALYSIS

1. The TRO Should Be Lifted As Health & Safety Code Sections 7180-81 and 1254.4 Have Been Satisfied and There is No Evidence of Diagnostic Error.

This Court is well aware that Jahi McMath is deceased according to California law if she has sustained "irreversible cessation of all functions of the entire brain, including the brain stem.". California Health & Safety Code § 7180. Children's presented two declarations of attending physicians who both concluded that Jahi McMath was brain dead.

Health & Safety Code § 7181 requires independent confirmation of any determination of brain death by a second physician. Because the Court was concerned that both these physicians were affiliated with Children's, the Court appointed Dr. Paul Fisher as an independent expert. Assuming Dr. Fisher concludes that Jahi McMath is dead, there can no longer be any controversy that the statutory criteria establishing brain death have been met.

Petitioner insists that, because she would have a legal right to dictate healthcare measures for her daughter if she were still alive, that her consent is also required before Jahi McMath can be disconnected from the ventilator now that she is deceased. There is simply no law that supports this contention. Petitioner relies exclusively on cases where the patient has ongoing brain activity and section 7180 is inapplicable. In *Bartling v. Superior Court* (1984) 163 Cal. App. 3d 186, the patient was attempting to pull out medical devices because he wished to end his life. In *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, the conservatee was a disabled adult with an IQ of 30. *In The Matter of Baby K* 832 F.Supp. 1022 (1993 D. Va.), which had nothing to do with California law, involved an infant who had brain stem function and, contrary to the

claim of Petitioner, brain death was not the central issue. *In re Wanglie,* No. PX-91-283 (Hennepin County, Minnesota), involved a woman in a persistent vegetative state (i.e., brain activity but unconscious). In *Conservatorship of Drabick* (1988) 200 Cal.App.3d 185, the Court of Appeal carefully explains that the conservatee is not dead because he can breath without a ventilator and his EEG "is not flat." 200 Cal.App.3d at 190.

Because Ms. McMath is dead, practically and legally, there is no course of medical treatment to continue or discontinue; there is nothing to which the family's consent is applicable. Cases cited by Petitioner, regarding the right to self-determination of treatment of a person living in a vegetative state, or on life support, are not applicable. To be blunt, Children's is currently merely preserving Ms. McMath's body from the natural post-mortem course of events. There is no legal, ethical or moral requirement that it continue to do so or that the family consent in the decision to stop doing so.

Petitioner cites no authority for the proposition that the patient's legal representatives have an automatic right to participate in the determination of brain death. Sections 7180-7181 are directly to the contrary. The California Legislature has decided that this is a *medical* determination. Health & Safety Code section 1254.4 recognizes that, after death has been declared, the hospital must provide a reasonable period of accommodation before discontinuation of cardiopulmonary support for the patient. That has, of course, been done here.

Dority v. Superior Court (1983) 145 Cal. App. 3d 273 is 100% consistent with the conclusion that the patient's representatives have no ongoing right to object to a medical determination of death under the facts here and that further court intervention is unwarranted in this case. *Dority* holds that the courts should be involved in second-guessing medical determinations of death only "***upon a sufficient showing that it is reasonably probable that a mistake has been made in the diagnosis of brain death or where the diagnosis was not made in***

accord with accepted medical standards." Emphasis added. 145 Cal. App. 3d at 281. The *Dority* decision goes on to confirm that medical devices should not be disconnected without consulting with the family and giving them time "until the initial shock of the diagnosis dissipates.[1]" *Ibid*. Children's has, of course, done this.

Nothing in *Dority* suggests that the trial court is automatically required to function as final arbiter any time the family objects to the determination of brain death. Rather, *Dority* holds that judicial intervention is appropriate only after proof is offered that it is "reasonably probable" that a mistake has been made or that the diagnosis deviated from accepted medical standards.

Petitioner has offered not a scintilla of evidence of any diagnostic error or deviation from accepted medical standards in the determination of brain death. Children's has fully complied with sections 7180, 7181 and 1254.4 The temporary restraining order requiring continuing care of the body of Jahi McMath should be lifted.

2. Appointment of Another Expert is Unnecessary and Petitioner's Proposed Appointee is Neither Qualified Nor Impartial.

The Court has appointed Dr. Paul Fisher of the Stanford University and Lucile Packard Children's Hospital (Children's Stanford) to serve as an independent expert in this matter. Dr. Fisher has conducted a brain death evaluation of Jahi McMath. Assuming Dr. Fisher has confirmed brain death, the criteria of sections 7180 and 7181 have been satisfied. Absent some proof of a reasonable probability of error—and there is no such evidence—further expert examination of Jahi McMath is unwarranted.

Moreover, respectfully, Dr. Paul A. Byrne is not qualified. Fundamentally, he is not licensed in California. He is simply not allowed to examine patients in the State of California. Indeed, Children's would likely be in violation of licensing and credentialing standards if it were

[1] The *Dority* decision pre-dated section 1254.4.

to allow such an unlicensed professional to examine one of its patients.

In addition, Dr. Byrne is not a neurologist. He is not trained to read EEGs and he has shown no expertise in performing brain death examinations on teenagers. Indeed, Dr. Byrne has shown no knowledge or experience with the California statutory scheme governing brain death.

Finally, Dr. Byrne is not impartial as he has already published on the internet his opinions regarding Jahi McMath. *See* "Jahi Is Not Truly Dead," December 24, 2013, by Paul A. Byrne, renewamerica.com, in which Dr. Byrne, without examining Ms. McMath, concludes "And for Jahi, they just want to kill her, yes change the living Jahi into a cadaver."[2]

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny Petitioner's request to appoint Dr. Byrne and that the Court lift the Temporary Restraining Order.

Dated: December 24, 2013

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[2] Dr. Byrne's lack of objectivity and his rush to asn erroneous judgment here are unsurprising. Internet search also revealed Dr. Byrne has authored a paper titled "Brain Death Is Not Death" (*see* TruthAboutOrganDonation.com) and similar papers—always presented or published in religious rather than academic scientific publications. Dr. Byrne is a crusader with an ideology-based bias, not a neutral expert physician.