

Legal Update 2018

Top 10 Legal Developments in Bioethics

Thaddeus Mason Pope, JD, PhD
ASBH Annual Meeting, Anaheim, CA
October 20, 2018

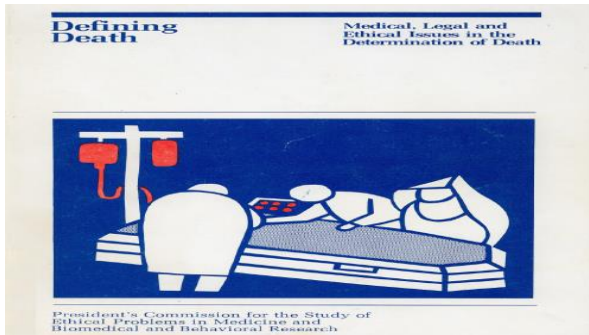
3

Brain death
Medical futility
Unrepresented

Brain Death

1968





**More families
 dispute BD**

CONTEMPORARY ISSUES

Organ support after death by neurologic criteria
 Results of a survey of US neurologists **(200)**

NEUROLOGY
Aug. 2016

Ariane Lewis, MD
 Nellie Adams, BA
 Panayiotis Varelas, MD, PhD
 David Greer, MD, MA
 Arthur Caplan, PhD

**50% report
 families request
 organ support
 after BD**



“**reject** this diagnosis”

“**deviate** from standard procedures”

More
conflict

Many cases
to **court**

2016 -
2018



2 BD
issues

Brain death
Issue **1**

Moral **exemption**
from DDNC



Only
NJ

Clinicians **may not** declare you dead on neuro criteria, if religious objection

Rejected **everywhere** outside NJ

Still **asked** for



Israel Stinson

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Jonee Fonseca, an individual parent and guardian of Israel Stinson, a minor,)	Case No.: 2:16-cv-00889-KJM-EFB
Plaintiff,)	
)	Second Amended Complaint for Equitable Relief
v.)	
Karen Smith, M.D. in her official capacity as Director of the California Department of Public Health; and 2 through 10, inclusive,)	REQUEST FOR JURY TRIAL
Defendant.)	

Suing State of California

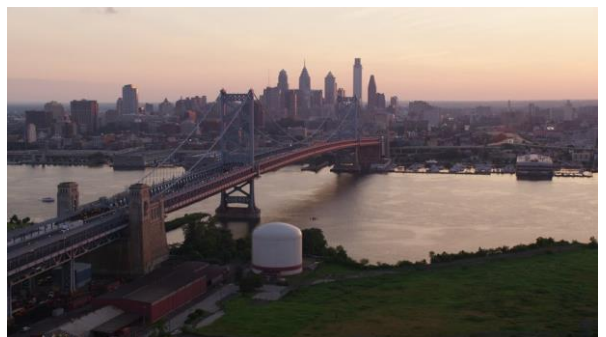
“Plaintiffs are Christians with firm **religious beliefs** . . . heart is beating . . . is alive.”

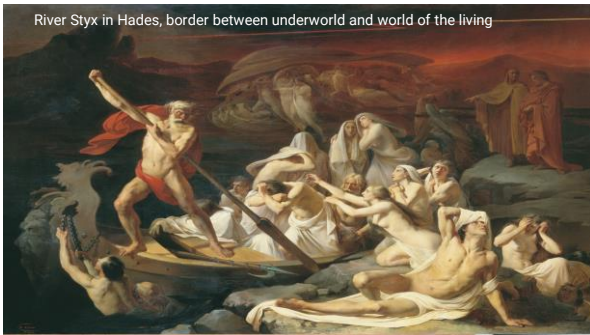
“removal of CP support . . . **unconstitutional** . . . interferes with . . . freedom of religion . . . first amendment”



Shalom Ouanounou

BD guidelines “failed to . . . accommodate Shalom’s express **religious beliefs**, . . . violate . . . constitutional and human rights”





Religious opt outs



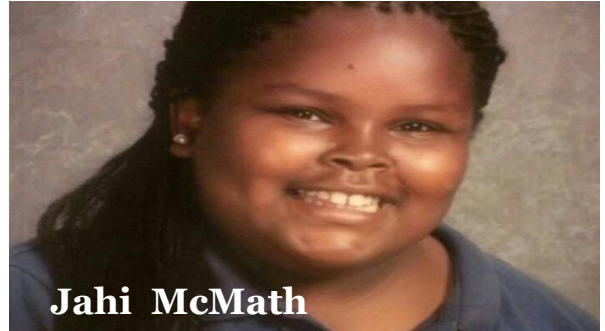
[Request Legal Help](#)



That's religious
opt-out issue

Brain death
Issue **2**

Legitimacy of accepted
medical standards for
determining DNC



Argument 1

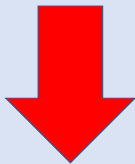
Dec. 2013

+

Feb. 2019

-

Dead at T1



Not dead at T2

stay dead

Argument 2

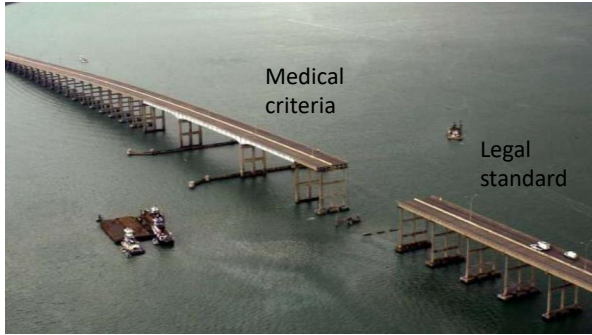
Even if she **still meets** clinical criteria, they are **legally** inadequate

UDDA

“irreversible cessation
... **all** functions of
... **entire** brain”

AAN/AAP measures cessation of only **some** functions of **part** of brain





21032617

ATTORNEY OR PARTY WITHOUT ATTORNEY (Print Name, State Bar number, and address) SBN 93578 Bruce M. Brusavich AgnewBrusavich, 20355 Hawthorne Boulevard, 2nd Fl., Torrance, CA 90503 TELEPHONE NO: (310) 793-1400 FAX NO (OPTIONAL): (310) 793-1499 E-MAIL ADDRESS (OPTIONAL):		FOR COURT USE ONLY FILED ALAMEDA COUNTY SEP 07 2018 CLERK OF THE SUPERIOR COURT <i>Sue Kato</i> Deputy	
ATTORNEY FOR (Name) Plaintiffs LATASHA NAILAH SPEARS, et al. SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA STREET ADDRESS: 24405 Amador Street MAILING ADDRESS: 24405 Amador Street CITY AND ZIP CODE: Hayward, CA 94544 BRANCH NAME: Hayward Hall of Justice		PLANTIFF/PETITIONER: LATASHA NAILAH SPEARS WINKFIELD, et al. DEFENDANT/RESPONDENT: FREDERICK S. ROSEN, M.D.; et al.	
REQUEST FOR DISMISSAL		CASE NUMBER: RG 15760730	
A conformed copy will not be returned by the clerk unless a method of return is provided with the document. This form may not be used for dismissal of a derivative action or a class action or of any party or cause of action in a class action. (Cal. Rules of Court, rules 3.760 and 3.770)			
1. TO THE CLERK: Please dismiss this action as follows:			

BUT

12/2013

6/2018

1 Christopher B. Dolan (SBN 165358)
 2 Aimee E. Kirby (SBN 216909)
 3 **THE DOLAN LAW FIRM, PC**
 4 1438 Market Street
 5 San Francisco, California 94102
 6 Telephone: (415) 421-2800
 7 Facsimile: (415) 421-2830

Nov. 6

8 Attorneys for PLAINTIFF
 9 JAHIL MCMATH, a minor
 10 and NAILAH WINKFIELD

11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA

13 JAHIL MCMATH, a minor; NAILAH
 14 WINKFIELD, an individual, as parent, as
 15 guardian, and as next friend of JAHIL McMath,
 16 a minor

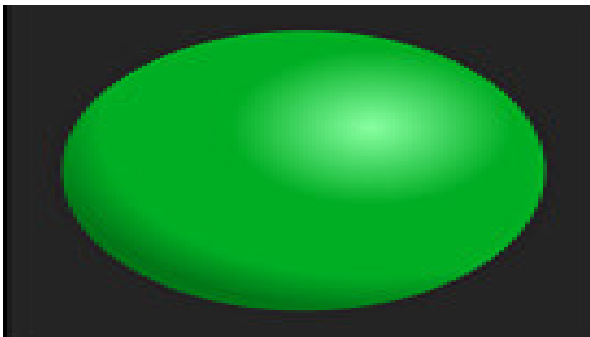
Case No. 3:15-cv-06042 HSG

**STIPULATION AND ORDER TO SET
 STATUS CONFERENCE**

Plaintiffs.

That's enough
brain death

Medical Futility



Stop LSMT
without
consent

for **any reason**
if hospital review
committee agrees



2018



20 years

“conflict remains unresolved,
the physician shall make a
reasonable effort to **transfer**
the patient. . . not less than
fourteen 14 days”

Day 15 ?



“If, at the end of the
14-day period, the conflict
remains unresolved . . .
unable to identify another
facility willing . . .”

“**may cease** to
provide
the treatment”

VA = TX

2018



20 years

Cal. Prob. Code 4735

“health care provider . . .
may decline to comply
. . . health care decision
that . . .”

“requires **medically
ineffective** health care or
health care **contrary to
generally accepted health
care standards”**

PLUS

Cal. Prob. Code 4740(d)

“Declining to comply . . .
in accordance with
Section 4735”

“**not subject** to civil or
criminal liability or to
discipline for
unprofessional conduct”

BUT

Scared,
reluctant
to use



Elizabeth Alexander

70 years old

end-stage pancreatic
cancer

“clearly an individual who should not undergo aggressive resuscitation . . . She is frail, debilitated, and . . . metastasis . . . extensive.”

POLST AD Agent

“**all measures** to prolong life”

Appropriate care committee

DNR

Entered
Patient dies

Family sues &

loses

9	SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO	
10	CENTRAL DIVISION	
11		
12	ESTATE OF ELIZABETH ALEXANDER, and CLENTON ALEXANDER, HEIR,	CASE NO. 37-2014-00016257-CU-MM-CTL
13	Plaintiffs,	NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION BY SCRIPPS DEFENDANTS
14		
15	v.	IMAGED FILE
16	SCRIPPS MEMORIAL HOSPITAL LA JOLLA, a California corporation; DONALD RITTI, an individual; GUSTAVO LUGO, an individual; CHRIS TOPHER WIENSNER, an individual; PREFETI MEHTA, an individual; MARIE SHIEH, an individual; SHAWN EVANS, an individual; MARIE SHIEH, an individual; AYANA BOYD KING, an individual; ERNEST PUND, an individual; CHARLES ETTARL, an individual; KAREN KNIGHT, an individual, and DOES 1 through 15, inclusive,	DATE: June 3, 2016 TIME: 11 a.m. DEPT: C-70 IC JUDGE: Hon. Randa Trapp
17	Defendants.	CASE FILED: May 20, 2014 TRIAL DATE: September 9, 2016
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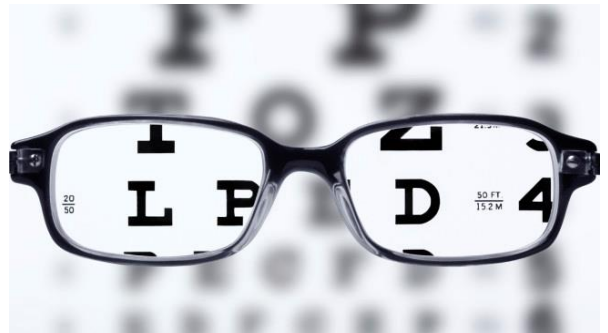
“**immune** from liability under section 4740”

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
 DIVISION ONE
 STATE OF CALIFORNIA

CHRISTOPHER ALEXANDER et al.,
 Plaintiffs and Appellants,
 v.
 SCRIPPS MEMORIAL HOSPITAL LA
 JOLLA et al.,
 Defendants and Respondents.

D071001
 (Super. Ct. No.
 37-2014-00016257-CU-MM-CTL)

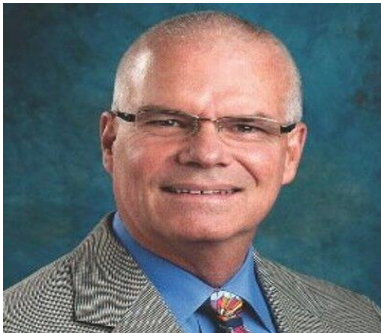
April 16, 2018



CA ≠ TX

“contrary to generally accepted health care standards”

Difficult to be sure treatment is contrary to GAHCS



Easy for DEFs because
 Bad plaintiff expert

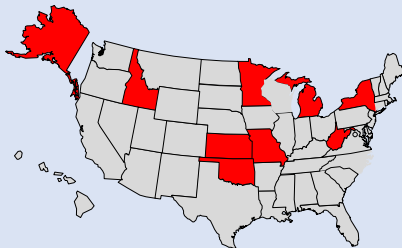
That's enough on
green light laws



Consent
always



111



Governor Abbott Signs Legislation Reforming Do-Not-Resuscitate Orders In Texas

August 16, 2017 | Austin, Texas | [Press Release](#) | [Legislative](#)

Governor Greg Abbott today signed Senate Bill 11 (SB 11) to strengthen patient protections related to Do-Not Resuscitate Orders. This bill closes a loophole in state law that permitted doctors to place Do-Not Resuscitate Orders on patients without their consent. Protecting life in all its forms was an essential part of the Governor's special session agenda.

"Patients' rights must be protected when it comes to decisions about their care," said Governor Abbott.



April 2018

No in-facility DNR
without consent



Caroline Kirsch
11th Grade

**Unrepresented
patients**

Definition
3 conditions

1

**Lack
capacity**

2

No available,
applicable
AD or POLST

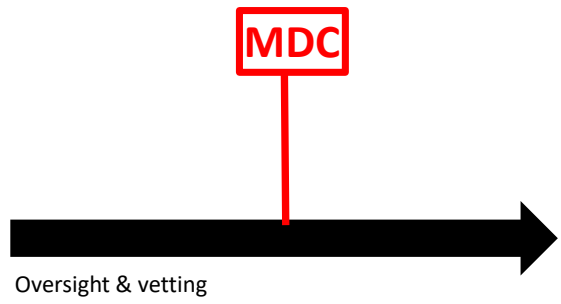
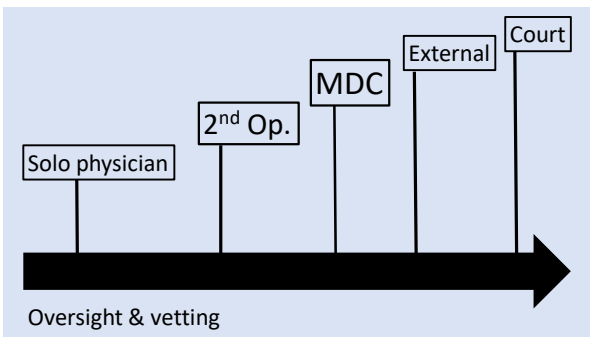
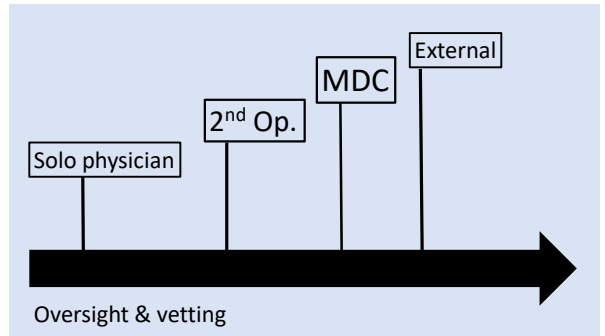
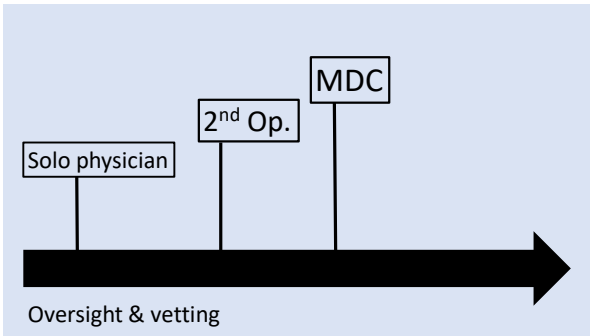
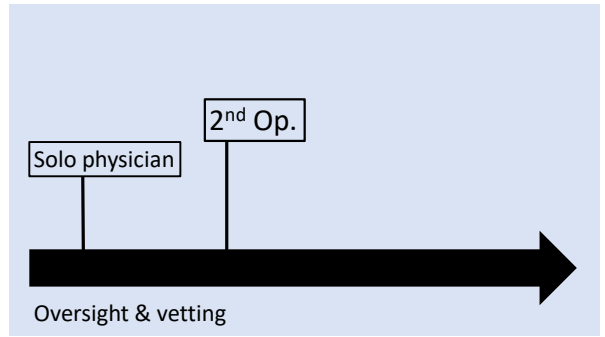
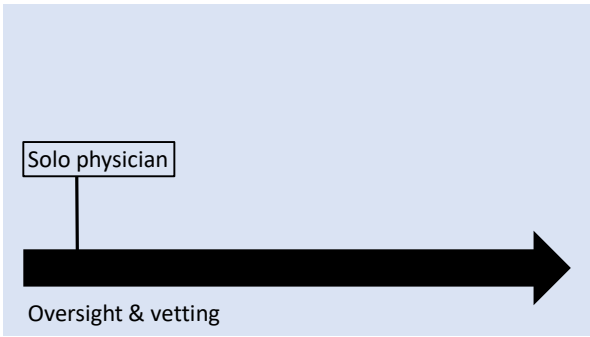
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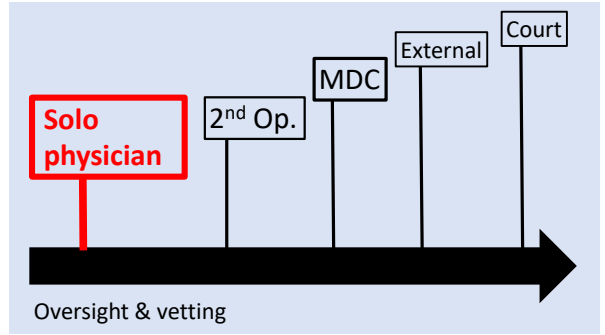
No reasonably
available
authorized
surrogate

Who may
consent to
treatment



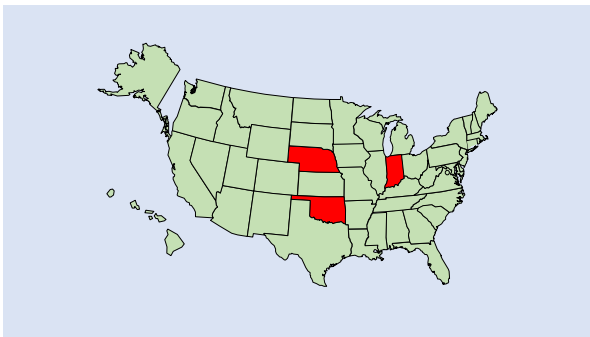
Oversight & vetting





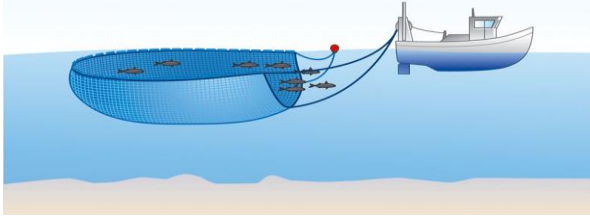
BUT

New default surrogate statutes



Lowers probability patient will be unrepresented

Bigger net → catch more fish



Brain death
Medical futility
Unrepresented

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