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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA
11

12 _____,
13 Plaintiff,
14 v.
15 CHILDREN'S HOSPITAL &
RESEARCH CENTER AT OAKLAND,
16 Respondent/Defendant.
17

Case No.
**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO EX
PARTE APPLICATION FOR
TEMPORARY RESTRAINING ORDER**
Date: December 20, 2013
Time: 1:30 P.M.
Dept: 31

18 **I**
19 **INTRODUCTION**

20 Children's Hospital & Research Center at Oakland (Children's) has no duty to continue
21 mechanical ventilation or any other medical intervention for its deceased minor patient Jahi
22 McMath ("Ms. McMath"). Ms. McMath is deceased as a result of an irreversible cessation of all
23 functions of her entire brain, including her brain stem. Health & Safety Code § 7180. Sadly, this
24 has been true for more than a week. This determination has been made by numerous
25 physicians—including physicians unaffiliated with Children's—satisfying the requirements of
26 Health & Safety Code § 7181.
27

28 Tragically, Ms. McMath is dead and cannot be brought back to life. Children's has given

1 Ms. McMath's family/next of kin ample notice of its decision to stop providing mechanical
2 support to Ms. McMath's body as is required by Health & Safety Code § 1254.4. Accordingly,
3 Children's is under no legal obligation to provide medical or other intervention for a deceased
4 person. The TRO should be denied.

5
6 **II**
7 **RELEVANT FACTS**

8 Ms. McMath was admitted to Children's Hospital on December 9, 2013, for a complicated
9 surgical procedure consisting of an adenotonsillectomy, uvulopalatopharyngoplasty, and
10 submucous resection of bilateral inferior turbinates. Following this surgical procedure, Ms.
11 McMath was admitted, as planned, to Children's's Pediatric Intensive Care Unit, where she
12 suffered serious complications resulting in a tragic outcome—her death.

13
14 On December 12, 2013, pursuant to California law, medical guidelines and Children's
15 procedures, Ms. McMath was declared brain dead as a result of an irreversible cessation of all
16 functions of her entire brain, including her brain stem. Children's follows the standard
17 established by Task Force on Brain Death in Children: Guidelines for the Determination of Brain
18 Death in Children, An Update of the 1987 Task Force Recommendations (2011) in making such
19 determinations. Two separate Children's physicians determined that Ms. McMath was brain
20 dead. In addition, at the request of the family, three additional independent physicians--
21 unaffiliated with Children's and either selected by or approved by Ms. McMath's family/next of
22 kin--examined Ms. McMath. Each confirmed the diagnosis of brain death. All tests and
23 examinations have consistently and definitively confirmed that Ms. McMath is brain dead.
24 Accordingly, Children's has declared Ms. McMath to be dead.

25
26 On December 12, 2013 Children's advised Ms. McMath's family/next of kin that she had
27 been determined to be brain dead. During the ensuing week, Children's undertook extraordinary
28

1 measures to support Ms. McMath's family/next of kin including:

- 2 • Members of Ms. McMath's medical team have met repeatedly and at length with Ms.
3 McMath's mother and other members of the family. They have explained Ms. McMath's
4 complete lack of brain activity and its significance, answered the family's questions, and
5 supported them as they have attempted to come to grips with this tragic situation.
- 6 • The family has also received support from social workers on a daily basis.
- 7 • At the family's request, Children's has provided a way for them to determine who they
8 want to visit during regular visiting hours by instituting a visitor "code" that is used to
9 screen potential visitors.
- 10 • Children's's chaplain has provided support and prayers for family on a near daily basis
11 since 12/11.
- 12 • Child Life professionals have provided support to siblings.
- 13 • In order to accommodate the need for the family to support one another, Children's has
14 also relaxed some of its visitation policies. The family has had permission to have 8
15 family members in the hospital overnight since 12/16. Children's has relaxed the 8 PM
16 visitor hour to 10 PM for siblings. Children's has relaxed its policy regarding the number
17 of visitors allowed during regular visiting hours.
- 18 • In order to provide a gathering place in the hospital, the hospital secured a room in the
19 hospital for the family to meet.
- 20 • In order to provide privacy for family, the hospital secured space at the Family House for
21 the family to gather and have access to nourishment.
- 22 • In order to provide a way for community members to support the family, the hospital has
23 made it possible for donations, cards to be collected and passed to the family.
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25 made it possible for donations, cards to be collected and passed to the family.
- 26 • In order to provide a way for community members to support the family, the hospital has
27 made it possible for donations, cards to be collected and passed to the family.

28 A full week after death, Children's has determined that the time has come to stop

1 providing mechanical support to Ms. McMath’s body. Accordingly, on December 19, 2013
2 Children’s advised Ms. McMath’s family/next of kin of their intent to discontinue all mechanical
3 ventilation and any other medical intervention effective at noon December 20, 2013.
4

5 **III.**
6 **LEGAL ARGUMENT**

7 Pursuant to California Health & Safety Code § 7180, an individual who has sustained
8 “irreversible cessation of all functions of the entire brain, including the brain stem,” is dead.
9 Health & Safety Code § 7181 requires independent confirmation of any determination of brain
10 death by a second physician. Children’s has fully complied with these requirements.

11 In this case, Ms. McMath has received neurological examinations by two separate
12 physicians on staff at Children’s, received two EEGs which detected zero brain activity and three
13 additional independent examinations by outside physicians not associated with Children’s. All
14 five practitioners have unanimously agreed that Ms. McMath is brain dead and that her condition
15 is irreversible. All such determinations have been made in accordance with California law,
16 medical guidelines and Children’s policy and procedure. Children’s cannot be legally required to
17 continue to provide any “medical” intervention to someone who is deceased.
18

19 Any argument that Ms. McMath’s mother has a right to participate in decision-making
20 here is based on a fundamental misapprehension. The next of kin has a right to participate in
21 decisions regarding *life-sustaining* treatment. Children’s’s own procedures acknowledgement
22 this fundamental right. However, there is simply no life-sustaining treatment that can be
23 administered to a *deceased person*. Because Ms. McMath is dead, practically and legally, there is
24 no course of medical treatment to continue or discontinue; there is nothing to which the family’s
25 consent is applicable. To be blunt, Children’s is currently merely preserving Ms. McMath’s body
26 from the natural post-mortem course of events. There is no legal, ethical or moral requirement
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28

1 that it continue to do so or that the family consent in the decision to stop doing so.

2 *Dority v. Superior Court* (1983) 145 Cal. App. 3d 273 does not hold otherwise. In that
3 case, the Court of Appeal affirmed the trial court’s decision to allow withdrawal of support to a
4 brain dead infant over the objections of the infant’s parents. Although the parents were found to
5 lack standing due to allegations of child abuse, the Court of Appeal did explain that the courts can
6 intervene in hospital brain death decisions to terminate support only “*upon a sufficient showing*
7 *that it is reasonably probable that a mistake has been made in the diagnosis of brain death or*
8 *where the diagnosis was not made in accord with accepted medical standards.*” 145 Cal. App.
9 3d at 280.

11 There is not a scintilla of evidence suggesting that the diagnosis of death is a mistake or
12 was not made in accord with accepted medical standards.¹ To the contrary, on December 18,
13 2013, lawyer Christopher Dolan, writing on behalf of Ms. McMath’s mother, stated that Ms.
14 McMath “has been left brain dead” and requested a “complete explanation as to exactly how Jahi
15 has now come to be brain dead.” Copy attached hereto.

17 There is no factual or legal dispute. Ms. McMath is dead. California Health & Safety
18 Code § 1254.4 requires that a hospital provide a reasonable period of accommodation between the
19 time an individual is declared brain dead before discontinuation of cardiopulmonary support for
20 the patient. Ms. McMath’s family was told that she had been determined to be brain dead on
21 Thursday December 12, 2013. At that time, Ms. McMath’s family requested that Children’s
22 allow them through that weekend for family members to gather. Children’s agreed and indeed has
23 now accommodated Ms. McMath’s family for more than a week. Children’s has plainly provided
24 the family/next of kin with far more time than the “reasonably brief period of accommodation”
25

26 _____
27 ¹ *In re Christopher* is even further afield. 106 Cal. App. 4th 533 (2003). As the Court of Appeal explained,
28 “Christopher is not brain dead” because he “has some lower and mid-brain-stem activity.” 106 Cal. App. 4th at 543. Obviously, procedures for withdrawing treatment to a living person are radically different than procedures to be followed in handling the body of a dead person.

1 called for by Children’s Guidelines and California Health & Safety Code section 1254.4. The
2 TRO should be denied.

3
4 **IV.**
5 **CONCLUSION**

6 While tragic, Ms. McMath was declared brain dead December 12, 2013. There is no
7 medical possibility of reversal. There is no legal authority or ethical or moral imperative to
8 compel Children’s to continue mechanical ventilation or provide any other “medical” intervention
9 on an individual who is dead. The TRO should be denied.

10 Dated: December 20, 2013

ARCHER NORRIS

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13 _____
14 By Douglas C. Straus
15 Attorneys for CHILDREN’S HOSPITAL &
16 RESEARCH CENTER AT OAKLAND
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