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In re Guardianship of Hailu, 131 Nev. Adv. Op. 89 (Nov. 16, 2015)

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FAMILY LAW: DEATH, HEALTH

Summary

The Court determined that under NRS § 451.007 (the Uniform Determination of Death Act) the District court failed to consider whether the American Association of Neurology (AAN) guidelines adequately measure all functions of the entire brain and whether the guidelines are considered accepted medical standards by states that have adopted the Act.

Background

Medical history

On April 1, 2015, after experiencing abdominal pain, a 20-year-old university student Aden Hailu went to St. Mary's Regional Medical Center (St. Mary's). The medical staff decided to perform an exploratory laparotomy and remove her appendix. During the laparotomy, Hailu's blood pressure dropped and she suffered lack of brain oxygen damage and never woke up. Hailu was transferred to St. Mary's Intensive Care Unit. During the first two weeks of April three different electroencephalogram (EEG) tests were conducted, all of which showed brain functioning. On April 13, 2015, Dr. Aaron Heide conducted an examination of Hailu's neurological functions and determined that Hailu was not brain dead at that time but was "rapidly declining." On May 28, 2015 St. Mary's performed an apnea test, which involved taking Hailu off ventilation support to determine if she could breathe on her own. Hailu failed the apnea test. Based on the test St. Mary's concluded that brain death was unequivocally confirmed and notified Hailu's father, Fanuel Gebreyes, that it intended to discontinue Hailu's ventilator and other life support. Gebreyes opposed taking Hailu off life support and sought judicial relief.

Procedural History

June 18, 2015 hearing

Gebreyes filed an emergency motion for temporary restraining order to enjoin St. Mary's from removing Hailu from life support. The parties agreed that St. Mary's would continue Hailu's life support until July 2, 2015 to allow Gebreyes to have an independent neurologist examine Hailu. If the neurologist determined that Hailu was legally and clinically deceased, St. Mary's would proceed as it saw fit. Based on the agreement, the District court dismissed the complaint for a temporary restraining order.

¹ By Adrienne Brantley

July 2, 2015 hearing

Gebreyes was unable to obtain a neurologist before the July 2, 2015 deadline. On July 1, 2015, Gebreyes filed an “Emergency Petition for Order Authorizing Medical Care, Restraining Order and Permanent Injunction.” He alleged that the doctors had prematurely determined that Hailu had experienced brain death. During the hearing, Dr. Heide testified on behalf of St. Mary’s. Dr. Heide applied the AAN guidelines to determine if Hailu was brain dead. The AAN guideless require three determinations: 1) whether there is a coma and unresponsiveness; 2) whether there is brainstem activity; and 3) whether the patient can breathe on her own (determined by an apnea test). After Gebreyes stated that he wanted to bring in his own neurologist, the parties agreed to extend the hearing until July 21, 2015. Based on the agreement, the District court continued the hearing until July 21, 2015.

July 21, 2015 hearing

On July 21, 2015 Gebreyes presented a plan to transport Hailu to Las Vegas and called Dr. Brain Callister to testify. Dr. Callister questioned the reliability of the AAN guidelines. St. Mary’s called Dr. Anthony Floreani, who cared for Hailu in the ICU, to testify. Dr. Floreani, a pulmonologist, agreed with the conclusions of Dr. Heide that Hailu was brain dead. Based on all the evidence from the July 2 hearing and the July 21 hearing the District court concluded that a restraining order should not be granted because the medical evidence from Dr. Heide and Dr. Floreani suggested that the AAN guidelines were followed and therefore the medical standards criteria was satisfied in terms of the statute. Gebreyes appealed on August 3, 2015.

Discussion

The Court noted that the statutory requirements of Nevada’s Determination of Death Act require that death be determined by “accepted medical standards”² and that the Act be construed in a manner “uniform among the states which enact it”³ and necessitates a legal analysis regarding what the accepted medical standards are across the country. The Court first examined the Uniform Determination of Death Act, its predecessor the Uniform Brain Death Act, and their adoption in Nevada.

Uniform Determination of Death Act

In 1978, the Uniform Law Commission created the Uniform Brain Death Act.⁴ In 1980 the Uniform Brain Death Act was replaced by the Uniform Determination of Death Act (UDDA).⁵ The UDDA stated that an individual is dead if the individual has sustained either “1) irreversible

² NEV. REV. STAT. § 451.007(2).

³ NEV. REV. STAT. § 451.007(3).

⁴ State v. Guess, 715 A.2d. 643, 649 (Conn. 1998)

⁵ *Id.*

cessation of circulatory and respiratory functions, or 2) irreversible cessation of all functions of the entire brain, including the brain stem.”⁶

Nevada’s Determination of Death Act

In 1979, Nevada adopted the Uniform Brain Death Act.⁷ Under the Act, determinations of death had to be made using “reasonable medical standards.”⁸ In 1985, Nevada amended the Act and adopted the UDDA.⁹ The Act states, “[f]or legal and medical purposes, a person is dead if the person has sustained an irreversible cessation of: (a) Circulatory and respiratory functions; or (b) All functions of the person’s entire brain, including his or her brain stem.”¹⁰ The Court emphasized that the legislative history of NRS 451.007 made it clear that the legislative purpose was to ensure that there was no functioning of the brain before determining death.

Are the AAN guidelines considered “accepted medical standards,” which adequately measure all functions of a person’s entire brain, including the brain stem?

The Court concluded that the District court and St. Mary’s failed to demonstrate that the AAN guidelines are considered “accepted medical standards”¹¹ that are applied uniformly throughout states that have enacted the UDDA. St. Mary’s cited the New Jersey Law Revision Commission’s Report relating to the Declaration of the Act however, the report supported the conclusion that New Jersey decided against the adoption of the AAN guidelines.¹² The report stated that the guidelines were not so broadly adopted or utilized to have become the accepted medical standard for determining brain death.¹³ On the other hand, case law demonstrated that at the time states began adopting the UDDA, the accepted medical standard was the Harvard criteria.¹⁴ The Harvard criteria requires three steps, followed by a flat EEG: 1) unresponsivity and unresponsivity to painful stimuli; 2) no spontaneous movements or spontaneous respiration; and 3) no reflexes, as demonstrated by no ocular movement, no blinking, no swallowing, and fixed and dilated pupils.¹⁵

⁶ UDDA § 1, 12A U.L.A. 781 (2008).

⁷ *Hearing on S.B. 5 Before the Assembly Judiciary Comm.*, 1979 Leg., 60th Sess. (Nev. 1979).

⁸ 1979 NEV. REV. STAT. ch. 163 § 1, at 226.

⁹ NEV. REV. STAT. §451.007

¹⁰ NEV. REV. STAT. §451.007(1)

¹¹ NEV. REV. STAT. §451.007(2)

¹² *See* N.J. Law Revision Comm’n, *Final Report Relating to New Jersey Declaration of Death Act*, at 14 (Jan. 18, 2013).

¹³ *Id.*

¹⁴ *United States v. Gomez*, 15 M.J. 954, 059 (A.C.M.R. 1983); *Gallups v. Cotter*, 534 So. 2d 585, 586 n.1 (Ala. 1988); *State v. Fierro*, 603 P. 2d 74, 77-78 (Ariz. 1979); *Lovato v. Dist. Court in & for Tenth Judicial Dist.*, 601 P.2d 1072, 1076 (Colo. 1976); *State v. Guess*, 715 A.3d 643, 648 (Conn. 1988); *Janus v. Tarasewicz*, 482 N.E.2d 418, 422 (Ill. App. Ct. 1985); *Swafford v. State*, 421 N.E.2d 596, 599 (Ind. 1981); *Commonwealth v. Golston*, 366 N.E.2d 744, 747 (Mass. 1977); *State v. Meints*, 322 N.W.2d 809, 815 (Neb. 1982); *People v. Eulo*, 472 N.E.2d 286,298 n.15 (N.Y. 1984); *State v. Clark*, 485 N.E.2d 810, 812 (Ohio Ct. App. 1984); *In re Welfare of Bowman*, 617 P.2d 731, 737 (Wash. 1980); *Black’s Law Dictionary* 170 (5th ed. 1979) (incorporating the Harvard criteria into the definition of brain death).

¹⁵ *Ad Hoc Comm. of the Harvard Med. Sch., A Definition of Irreversible Coma*, 205 JAMA 337, 337-38 (1986).

The Court therefore determined that while the Harvard criteria was not the newest medical criteria the Court was not convinced that the AAN guidelines had replaced the Harvard criteria. However, the briefing and testimony before the Court did not establish whether the AAN guidelines were considered accepted medical standards among states that have enacted the UDDA. St. Mary's failed to cite in its brief or oral arguments any medical or legal document that supported the AAN guidelines as accepted medical standards. The briefing and testimony also did not establish whether the AAN guidelines adequately measure the standard laid out by NRS 451.007. Thus, the Court was not convinced that St. Mary's properly determined death as required by NRS 451.007 and held that the District court erred in denying Gebreyes' motion for a temporary restraining order.

Conclusion

As an important issue of first impression in Nevada, the Court declined to make a determination based on the undeveloped record before the Court. If St. Mary's continues to advocate for only being required to follow the AAN guidelines, expert testimony is necessary to demonstrate that the AAN guidelines, if met, establish "an irreversible cessation of... all functions of the person's entire brain, including his or her brain stem." Because the record did not establish these key points, the Court reversed the District court's order denying a temporary restraining order and remanded for further proceedings.