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STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 90- 81

Pat Johnson
Executive Administrator
Kansas State Board of Nursing
Landon State Office Bldg., 551-S
Topeka, Kansas 66612

Re: Statutes; Administrative Rules and Regulations and
Procedure -- Statutory Construction -- Uniform
Determination of Death Act

Synopsis: The determination of human death is a medical
diagnosis which must be made by a physician in
accordance with accepted medical standards. The
degree to which a physician may rely on information
not gained through personal observation when making
the determination of death is governed by the
applicable medical standard. Cited herein: K.S.A.
22a-231; 65-1113; 65-2412; 65-3212; 65-3215; 77-202
(Weeks, 1977); 77-205.

* * *

Dear Ms. Johnson:

As Executive Administrator for the Kansas state board of
nursing, you have requested our opinion concerning the uniform
determination of death act. Specifically, you ask whether a
nurse may pronounce a person dead. You state that in some
nursing homes and hospitals where a physician is not present,
nurses assess the patient for vital signs. If none are
present, the information is referred to a physician who
releases the body to a mortuary.

There is no legal requirement that death be "pronounced." For purposes of this opinion, we consider the act of pronouncing a person dead as synonymous with the act of determining death, even though the act of saying another is deceased may be done without legal or medical consequence. The determination of death impacts on many subjects, including estate distribution, medical malpractice claims, criminal liability, and receipt of Medicare, Medicaid and Social Security. See Abram, The Need for Uniform Law on the Determination of Death, 27 N.Y.L.Sch.L.Rev. 1187, 1188 (1982). Additionally, transplantation of organs from human cadavers and improved life support technology have "thrust the matter of 'brain death' into public consciousness." H. Richard Beresford, M.D., Defining Death. A Report on the Medical, Legal and Ethical Issues in the Determination of Death., 27 N.Y.L.Sch.L.Rev. 1273 (1982).

Kansas was the first state to legislate a recognition of brain death, and made clear that it was a physician's responsibility to determine whether death had occurred. See K.S.A. 77-202 (Weeks, 1977) ("A person will be considered medically and legally dead if, in the opinion of a physician. . . ."); Lovato v. Dist. Court In & For Tenth Judicial District, 601 P.2d 1072, 1079-80 (Colo. 1979). The statute gave alternative definitions of death, including the absence of spontaneous respiratory and cardiac function, or absence of spontaneous brain function. These criteria were to be determined by ordinary medical standards. State v. Shaffer, 229 Kan. 310, 317 (1981).

The common law definition of death used in other states became outdated by modern advances in lifesaving techniques. In re Welfare of Bowman, 617 P.2d 731, 734-36 (Wash. 1980); Lovato, ante, at 1076. The National Conference of Commissioners on Uniform State Laws approved the uniform determination of death act which was adopted by the Kansas legislature in 1984 and codified at K.S.A. 77-205. The emphasis of the uniform act is not on who makes the determination or how, but rather on the legal standard to which medical criteria will be applied. 12 U.L.A. 320 (Supp. 1990). Regardless of the definition of death being employed, a determination of death involves a medical diagnosis. Abram, 27 N.Y.L.Sch.L.Rev. at 1190-91.


Other statutes support the notion that the determination of death is a medical diagnosis, and must therefore be made by a physician. Deaths are to be recorded in accordance with the uniform vital statistics act, K.S.A. 65-2401, et seq.

The person who assumes custody of a dead body must file a death certificate, and "obtain the medical certification of cause of death from the physician last in attendance prior to burial." K.S.A. 65-2412(b). If the death was not attended by a licensed physician, the district coroner must be notified pursuant to K.S.A. 22a-231, for completion of the medical certification. See K.S.A. 65-2412(c). Additionally, anatomical gifts become effective upon death of the donor. K.S.A. 65-3212. The time of death must be determine by either the attending physician or the physician who certifies the death. K.S.A. 65-3215(b).

Having stated that a determination of death is a medical diagnosis, we do not opine that a physician will actually examine the dead body in every instance prior to making the determination of death. In some instances, a medical diagnosis of death could be made based upon the statements of a nurse attending the patient. However, the recognition that the patient is dead in-fact must come from the physician, as the practice of nursing is limited to nursing diagnoses, as distinguished from medical diagnoses. See K.S.A. 65-1113(b). The degree to which the physician may rely on other than personally gained knowledge is to be determined by application of accepted medical standards, as well as by the legal standard being applied. For example, if death is determined on the basis of irreversible cessation of entire brain function, more sophisticated knowledge may be required than when the determination is made based on obvious decapitation.

In conclusion, it is our opinion that the determination of human death is a medical diagnosis. This diagnosis must be made by a physician in accordance with accepted medical standards. The degree to which a physician may rely on information not gained through personal observation when making the determination of death is governed by the applicable medical standard.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Mark W. Stafford
Assistant Attorney General