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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,
Respondent/Plaintiff-Appellee,

vs.

AIVEN ANGEI,
Petitioner/Defendant-Appellant.

SCWC-18-0000940

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-18-0000940; CR. NO. 1CPC-18-0000163)

MARCH 15, 2023

CONCURRING AND DISSENTING OPINION BY WILSON, J.

Hawai'i Revised Statutes ("HRS") § 327C-1 (2010) protects individuals being kept alive by artificial means of support by requiring a specific process for declaring legal death (a "death determination") prior to the harvesting of their organs. This legal protection compels two separate physicians to produce written opinions that the person at issue "has experienced irreversible cessation of all functions of the

entire brain, including the brain stem" prior to the removal of any of their vital organs for transplant, and the termination of artificial means of support. HRS § 327C-1(b). Jonathan Makana Kanui-Flores ("Kanui-Flores") did not receive that protection. Because Kanui-Flores was never declared legally dead in compliance with HRS § 327C-1 before his organs were harvested, the State could not prove that his death was caused by Aiven Angei ("Angei") rather than by the removal of his organs.

The Majority in State v. Moon, SCWC-19-0000714, 2023 WL 1878104 (Haw. Feb. 10, 2023), as corrected (Feb. 17, 2023), eviscerated the legal protections afforded those in Hawai'i whose organs are harvested while they are still alive by holding that "death determinations" is a term of art which, in the context of criminal actions, limits the statute's application to criminal prosecutions of only physician defendants. Id. at *7. As set forth in my dissent in Moon, the Majority's holding contravened legislative history and the plain language in HRS § 327C-1 applying the statute to "all death determinations in the State . . . for all purposes," in "civil and criminal actions[.]" Id. at *16 (Wilson, J., dissenting). As in Moon, the complainant in the instant case, Kanui-Flores, who was injured and on life-support following a criminal incident, was legally due all the legal protections afforded him by HRS § 327C-1. Yet again, the Majority declines to hold the State accountable for failing to

extend HRS § 327C-1's life-protecting protocols to the uniquely vulnerable population they were tailored for--individuals, still alive and on life support, who have not yet been medically determined to have "experienced irreversible cessation of all functions of the entire brain, including the brain stem." HRS § 327C-1(b) (2010) (emphasis added). The Majority's conclusion that a "death determination" pursuant to HRS § 327C-1 "was neither required nor implicated" prior to the harvesting of Kanui-Flores' organs fails in light of the operative facts.

Kanui-Flores was being kept alive by artificial means of support prior to the harvesting of his organs. HRS § 327C-1,¹

¹ The full text of HRS § 327C-1 (2010) provides:

- (a) Except as provided in subsection (b), a person shall be considered dead if, in the announced opinion of a physician or osteopathic physician licensed under part I of chapter 453, physician or osteopathic physician excepted from licensure by section 453-2(b)(3), physician assistant licensed under chapter 453, or registered nurse licensed under chapter 457, based on ordinary standards of current medical practice, the person has experienced irreversible cessation of spontaneous respiratory and circulatory functions. Death will have occurred at the time when the irreversible cessation of the functions first coincided.
- (b) In the event that artificial means of support preclude a determination that respiratory and circulatory functions have ceased, a person shall be considered dead if, in the opinion of an attending physician or osteopathic physician licensed under part I of chapter 453, or attending physician or osteopathic physician excepted from licensure by section 453-2(b)(3), and of a consulting physician or osteopathic physician licensed under part I of chapter 453, or consulting physician or osteopathic physician excepted from licensure by section 453-2(b)(3), based on ordinary standards of current medical practice, the person has

continued...

titled "Determination of death," sets forth the protocols medical providers must follow before harvesting the organs from an individual being kept alive by artificial means of support. The protocols require obtaining the opinion of (1) a qualified

...continued

experienced irreversible cessation of all functions of the entire brain, including the brain stem. The opinions of the physicians or osteopathic physicians shall be evidenced by signed statements. Death will have occurred at the time when the irreversible cessation of all functions of the entire brain, including the brain stem, first occurred. Death shall be pronounced before artificial means of support are withdrawn and before any vital organ is removed for purposes of transplantation.

- (c) When a part of a donor is used for direct organ transplantation under chapter 327, and the donor's death is established by determining that the donor experienced irreversible cessation of all functions of the entire brain, including the brain stem, the determination shall only be made under subsection (b). The determination of death in all other cases shall be made under subsection (a). The physicians or osteopathic physicians making the determination of death shall not participate in the procedures for removing or transplanting a part, or in the care of any recipient.
- (d) All death determinations in the State shall be made pursuant to this section and shall apply to all purposes, including but not limited to civil and criminal actions, any laws to the contrary notwithstanding; provided that presumptive deaths under the Uniform Probate Code shall not be affected by this section.
- (e) The director of health may convene in every odd-numbered year, a committee which shall be composed of representatives of appropriate general and specialized medical professional organizations, licensed attorneys, and members of the public. The committee shall review medical practice, legal developments, and other appropriate matters to determine the continuing viability of this section, and shall submit a report of its findings and recommendations to the legislature, prior to the convening of the regular session held in each even-numbered year.

(Emphasis added.)

attending physician and (2) a qualified consulting physician that "the person has experienced irreversible cessation of all functions of the entire brain, including the brain stem." HRS § 327C-1(b). The opinions must be stated in a signed declaration. Id.

On January 28, 2018, Officer Che-Wai Lau observed Kanui-Flores was "still alive" in the hospital, intubated and receiving treatment, with eyes that "were open[.]" Approximately forty-eight hours later, on January 30, 2018, Kanui-Flores' dead body was sealed in a bag, his vital organs and life support having been removed. Not one physician rendered a medical opinion in the intervening 48 hours--written or otherwise--that Kanui-Flores "experienced irreversible cessation of all functions of the entire brain, including the brain stem." HRS § 327C-1(b). The law required two such opinions in writing prior to the removal of Kanui-Flores' organs and artificial life support. Thus, Kanui-Flores did not receive the medical certainty afforded him by law that his brain and brain stem had irreversibly and entirely ceased functioning prior to having his vital organs, and life support, removed.

HRS § 327C-1 plainly requires a specific process and method to ensure Kanui-Flores was legally dead before the removal of his organs and his life support. The legal protections afforded by HRS § 327C-1 arose from the

legislature's response to circumstances such as these, where medical and legal certainty is required in determining causation of death and criminal liability.² As set forth in my dissent in Moon:

The Hawai'i State Legislature specifically considered the procedure that must be followed before organs of a person who is kept alive through artificial life support can be harvested. In so doing the legislature addressed the likely scenario that a person being kept alive by

² Christine Mukai et al., Towards a Definition of Death, Legislative Reference Bureau, 1 (1977) [hereinafter "LRB Report" or "Report"]. E.g., Moon, SCWC-19-0000714, 2023 WL 1878104 (Haw. Feb. 10, 2023), as corrected (Feb. 17, 2023), (Wilson, J., dissenting) for a full discussion of legislative history evincing the legislature's intent that death determinations under HRS § 327C-1(b) be rendered in criminal cases such as Kanui-Flores's, so as to avoid the otherwise inevitable uncertainty regarding true causation of death and criminal liability. The discussion states in part:

[T]he LRB Report expressly contemplated the application of a statutory definition of death to criminal prosecutions involving non-physician defendants. Specifically, in the context of death determinations using the brain death standard, the LRB Report discussed criminal cases wherein the defendant was the assailant who inflicted the original injury. In Regina v. Potter, (1963) A.C. (Ct. Crim. App.) (U.K.) (unreported), an English case, the court concluded that the decedent's death was caused by the removal of his respirator after transplantation of his kidney; accordingly, the original assailant's manslaughter charge was reduced to assault. LRB Report at 30-31, 55. In People v. Lyons, No. 56072 (Cal. Super. Ct., Alameda Co. 1974), the court rejected the argument that the decedent's death was caused, not by the defendant's gunshot, but by subsequent heart removal surgery, and instructed the jury that death could be proven by a showing of irreversible cessation of brain function. LRB Report at 32, 55. See also People v. Saldana, 121 Cal. Rptr. 243 (Cal. Ct. App. 1975), and State v. Brown, 491 P.2d 1193 (Or. Ct. App. 1971), discussing similar outcomes as in Lyons. LRB Report at 55. Thus, considering the criminal cases discussed within the LRB Report, the legislative history clearly contemplates application of a statutory definition of death to criminal prosecutions involving non-physician defendants.

Moon, SCWC-19-0000714, 2023 WL 1878104 (Haw. Feb. 10, 2023), as corrected (Feb. 17, 2023) at *17 (Wilson, J., dissenting).

artificial life support was rendered brain-dead by a criminal act. The State legislature—recognizing the complexity of death declarations, the dichotomy between advancing medical practice and common law legal standards, and the growing inconsistencies among courts considering the issue—enacted Hawai'i Revised Statutes ("HRS") § 327C-1 with the goal of creating a uniform definition of "death."

Moon, SCWC-19-0000714, 2023 WL 1878104 (Haw. Feb. 10, 2023), as corrected (Feb. 17, 2023) at *17 (Wilson, J., dissenting).

Kanui-Flores' organs were harvested without a declaration of death as required by HRS § 327C-1(b). Without a valid declaration of death for him pursuant to HRS § 327C-1(b), there is no definitive medical and legal conclusion regarding the cause of his death. The State cannot therefore prove that Angei caused Kanui-Flores' death rather than those who removed his organs while he was alive by artificial means of support.

The Majority argues that HRS § 327C-1 does not apply in the instant case because "a death determination was neither required nor implicated because both the State and Angei stipulated that Kanui-Flores was declared brain dead and cardiac dead, and that Kanui-Flores was approved for organ donation." Angei's stipulation to these facts does not relieve the State from its obligation to extend HRS § 327C-1's legal protections to Kanui-Flores. Further, it is of critical import to note that Angei stipulated to facts, not conclusions of law. Specifically, Angei stipulated to the above-listed facts, but not the conclusions of law as to (1) whether the harvesting of Kanui-

Flores's organs was lawful pursuant to HRS § 327C-1, (2) whether Kanui-Flores was legally dead before the removal of his organs and life support, and (3) whether HRS § 327C-1 applies in the instant case.

The critical question of whether Kanui-Flores was legally dead before having his vital organs and life support removed is a mixed question of law and fact. This court has determined that "[a] mixed question of law and fact . . . is simply an issue that must be determined by applying the law to the facts of a case[.]" Panado v. Bd. of Trs., Emps.' Ret. Sys., 134 Hawai'i 1, 12, 12 n. 11, 332 P.3d 144, 155, 155 n. 11 (2014). Pursuant to HRS § 327C-1, undisputed preconditions of law apply to establish that an individual being kept alive on life support is "legally dead" prior to having their organs harvested. Angei and the State both stipulated, *inter alia*, to the following facts:

1. On January 29, 2018, at approximately 8:15 a.m., Dr. Chang made a brain death pronouncement for Jonathan Makana Kanui-Flores at Queen's Medical Center.
2. An apnea test was performed on January 29, 2018, at approximately 11:53 a.m. by Dr. Chang, which was listed as the time of death.
3. On January 30, 2018, at approximately 5:56 p.m., the body was transferred to the Queen's Medical Center operating room. Dr. Jacqueline Lee pronounced the decedent cardiac dead prior to organ donation.
4. On January 30, 2018, at approximately 8:25 p.m., medical examiner investigator Casey Nuesca secured Jonathan Makana Kanui-Flores's body in a blue body bag and sealed the bag with lock No. 13032.

These stipulations of fact are not accompanied by any

stipulations to any conclusions of law. Yet the Majority arrives at the legal conclusion that a "death determination" pursuant to HRS § 327C-1 was "neither required nor implicated" based solely on the stipulation of these facts. The Majority thus conflates factual stipulations with legal conclusions. Rather than analyzing the stipulated facts to determine whether they satisfy the legal requirements of HRS § 327C-1 governing the determination of the cause of Kanui-Flores' death, the Majority concludes the existence of the stipulated facts alone precludes the necessity of applying the provisions of HRS § 327C-1 to determine the true medical and legal cause of Kanui-Flores' death.

Analysis of the stipulated facts makes clear that nothing in the facts satisfies HRS § 327C-1(b)'s requirements that two physicians produce written opinions certifying that Kanui-Flores "experienced irreversible cessation of all functions of the entire brain, including the brain stem" prior to the removal of his organs and artificial life support. The Majority relies on the stipulations concerning Dr. Chang and Dr. Lee to justify their holding that a "death determination" was not indicated or required. This reliance is misplaced; neither of the stipulated facts concerning Dr. Chang's "brain death pronouncement" and Dr. Lee's pronouncing Kanui-Flores "cardiac dead" constitutes the substantive, material medical findings

required to satisfy the protocols set forth under HRS § 327C-1(b).

The parties stipulated that Dr. Chang made a "brain death pronouncement" on January 29, 2018 at around 8:15 AM, which was confirmed by an apnea test³ performed a few hours later. Nothing in the record indicates Dr. Chang's pronouncement was written and signed. Nothing in the record indicates that Dr. Chang determined Kanui-Flores "experienced irreversible cessation of all functions of the entire brain, including the brain stem" as required under HRS § 327C-1(b). At the time of Dr. Chang's brain death pronouncement, Kanui-Flores was still breathing and his heart was still beating, facilitated by a ventilator,⁴ and the record indicates that his body was thereafter "kept on a ventilator awaiting organ donation." Thus, Kanui-Flores' living body was due precisely the protection contemplated by HRS § 327C-1(b) and (c): he was on a ventilator,

³ An apnea test is conducted to determine brain death for an individual on a ventilator. J. Brady Scott, Michael A. Gentile, Stacey N. Bennett, MaryAnn Couture & Neil R. MacIntyre, Apnea Testing During Brain Death Assessment: A Review of Clinical Practice and Published Literature, 58(3) Respiratory Care 532, 532 (2013); Brain Death: Frequently Asked Questions for the General Public, Neurocritical Care Society, <https://bioethics.yale.edu/sites/default/files/files/Brain%20Death%20FAQ%20-%20final%20posted.pdf> (last visited January 12, 2023) (hereinafter "Brain Death FAQ").

⁴ A ventilator assists a person in breathing or takes over the breathing process entirely. Carrie MacMillan, Ventilators and COVID-19: What You Need to Know, Yale Medicine (June 2, 2020), <https://www.yalemedicine.org/news/ventilators-covid-19>. A ventilator allows a brain dead person to experience a "continued heartbeat and circulation, which keeps most of the vital organs working," including the heart. Brain Death FAQ.

presumably to preserve his organs for donation, which kept him breathing and his heart beating--a condition that "preclude[d] a determination that [his] respiratory and circulatory functions ha[d] ceased." HRS § 327C-1(b). Since Kanui-Flores was an organ donor, pursuant to HRS § 327C-1(c), Kanui-Flores' "[death] determination shall only be made under subsection (b)."

(emphasis added). As such, the stipulated fact with respect to Dr. Lee's pronouncement of "cardiac death" has no relevance with regards to whether Kanui-Flores was legally alive when medical personnel removed his organs and life support. The stipulated facts, individually and as a whole, therefore do not support the legal conclusion pursuant to HRS § 327C-1(b) that Kanui-Flores was dead at the time his organs were harvested.

Even assuming, *arguendo*, that Angei was stipulating to conclusions of law, Angei's stipulations are not binding on the Court. See State v. Tangalin, 66 Haw. 100, 101, 657 P.2d 1025, 1206 (1983) ("it is well established that matters affecting the public interest cannot be made the subject of stipulation so as to control the court's action with respect thereto.") (internal citations omitted). It is a matter greatly affecting the public interest for one's vital organs, and life support, to be removed without the legal determination required pursuant to HRS § 327C-1 that one's brain and brain stem have irreversibly ceased functioning. The protection of this vulnerable population

artificially kept alive but awaiting certain death from organ harvesting is a matter of great public interest; it cannot be circumvented by the stipulation relied upon by the Majority.

In both Moon and the instant case, the vital organs and life support of complainants were removed prior to their being declared legally dead, in violation of HRS § 327C-1. This is the reoccurring scenario the legislature sought to address by providing the protections of HRS § 327C-1 to all Hawai'i's people kept alive for organ harvesting whose death the State seeks to use as proof in criminal prosecutions. The life-protecting measures mandated by HRS § 327C-1 are not limited to prosecutions of physicians, nor can they be circumvented by stipulation. Accordingly, I respectfully dissent.⁵

/s/ Michael D. Wilson



⁵ I concur with the Majority opinion's conclusion that there was no rational basis in the evidence to support an instruction for the offense of Reckless Endangering in the Second Degree.