

STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE CERTIFIED QUESTION FROM THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MICHIGAN

KAREN WAESCHLE, individually and
on behalf of others similarly situated,

Plaintiffs,

vs.

SC : 140263
US Dist: 08-10393

**OAKLAND COUNTY MEDICAL EXAMINER,
LJUBISA J. DRAGOVIC, M.D.**, individually and
In his official capacity as Medical Examiner of
Oakland County, Michigan, and on behalf of
Others similarly situated, et al,

Defendants.

**Brief of *Amici Curiae*, Michigan Association of Medical Examiners,
National Association of Medical Examiners, Wayne County, Michigan,
Michigan Association of Counties, and Kent County, Michigan
Supporting Defendants**

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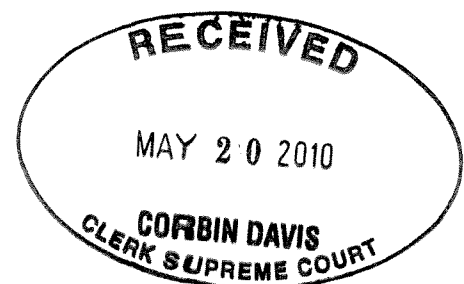


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Statement of Interest of *AMICI CURIAE*

The *Amicus Curiae*, the Michigan Association of Medical Examiners (M.A.M.E.), is the primary professional organization of forensic pathologists and medicolegal death investigators in Michigan. The mission of the Michigan Association of Medical Examiners is to foster the highest professional standards in the performance of the duties of the county medical examiners of Michigan. To this end, the Association produces educational materials and holds scientific meetings, provides a forum for the discussion of professional and managerial issues, and provides information concerning the medical examiners to county and state administrators and legislators and to the general public. Members of the association are the target of this litigation.

The *Amicus Curiae*, National Association of Medical Examiners (N.A.M.E.) is the primary professional organization of forensic pathologists and medical examiners in the United States. Founded in 1966, it has since expanded to include forensic autopsy physicians, coroners, medical examiner administrators, medical examiner investigators, medical examiner support personnel, and medical examiner consultants in the United States and elsewhere. The *Amicus* recognizes the current litigation will have implications for the practice of medicolegal death investigation nationally and internationally.

The *Amicus Curiae*, Wayne County, Michigan, is Michigan's largest county. Wayne County's medical examiner's office performs annually over 2500 autopsies in its medicolegal death investigations, including every incidence of suspected child abuse, and is responsible for the retention and distribution of tissues, blood, organs and other body parts. Medicolegal death investigation serves criminal justice, public health, and homeland security functions. It also has a mission to meet the needs of the citizens of Wayne County which would include orderly and efficient assistance necessary for burial purposes. Both of these interests are presented in this case, the results of which will have a substantial impact on the policies and procedures of the *Amicus* in delivering medical examiner services for the County.

The *Amicus Curiae* Michigan Association of Counties is the organization representing the interests of all 83 counties in the State of Michigan. Each county is charged by statute with the responsibility of providing medical examiner services. This duty has been recognized by the Appellee in filing this action against all 83 counties via the class action designation. *Amicus* Michigan Association of Counties recognizes the current litigation will have substantial implications to their constituent counties.

Amicus Curiae, Kent County, Michigan is Michigan's fourth most populous County. Its Medical Examiner Program annually conducts over 300 autopsies and is responsible for the retention and distribution of tissues, blood, organs and other body parts. The autopsies performed by the Kent County Medical Examiner Program serve the interests of criminal justice, public health and homeland security in Kent County. Further, the autopsies performed by the Kent County Medical Examiner Program promote the orderly and efficient assistance required for burials in Kent County. All of these interests are presented in this case, and the results will have a significant impact on the policies and procedures of the *Amicus* Kent County.

Statement of Facts

Katherine Weins, an 88 year old with Alzheimer's dementia, died after a fall in a nursing home. She was found on the floor with a laceration of her scalp. Her daughter, Ms. Karen Waeschle, suspected that her mother had suffered from neglect or abuse by the nursing home and did not provide adequate protections for her fall. A medicolegal death investigation of the unexpected and suspicious death was performed by the Office of the Oakland County Medical Examiner, Dr. Ljubisa Dragovic. An autopsy was performed by Dr. Dragovic's deputy, Dr. Ortiz-Reyes, on September 8, 2006. The body

was released and the next-of-kin had the body cremated. However, the brain of the decedent had been retained and fixed for a neuropathologic examination to investigate the closed head injury and then was incinerated. The medical examiner certified the death as natural. Subsequently, Ms. Waeschle learned of the brain retention and disposal upon reading the autopsy report. The plaintiff seeks to represent a class of plaintiffs for declaratory, compensatory, and injunctive relief against Dr. Dragovic and all other Michigan medical examiners for deprivation of property without due process of law.

Proceedings in this Case

The Sixth Circuit reversed the District Court's ruling that the Plaintiff had a constitutional right in the decedent's body parts after an autopsy.

The Sixth Circuit ordered the District Court to certify to the Michigan Supreme Court the question:

Assuming that a decedent's brain has been removed by a medical examiner in order to conduct a lawful investigation into the decedent's cause of death, do the decedent's next-of-kin have a right under Michigan law to possess the brain in order to properly bury or cremate the same after the brain is no longer needed for forensic examination?

Further facts will be set forth in the *Amici* Brief.

Summary of Argument

The *Amici* support the ruling of the Sixth Circuit declaring that Michigan law fails to establish a right to autopsy specimens taken during a legal autopsy. the District Court erred in declaring that a property interest of the next-of-kin exists in the dead body or body parts or tissues. It appears that the District Court has misinterpreted case law as Michigan law explicitly holds dead bodies and body parts to be “quasi property” and not “property,” even under a “bundle of rights” argument, *Brotherton v. Cleveland* and *Whaley v. County of Tuscola* notwithstanding. The District Court’s holding may lead to marketization of body parts and tissues and other consequences.

The State, pursuant to its broad “police powers,” has a legitimate right, without consent of the next-of-kin, to conduct a full medicolegal death investigation in cases such as this, to include autopsy and testing and examination of tissues. It is not disputed that the autopsy or retention and later examination of the brain was proper.

It is usual, customary, and optimal practice, to routinely obtain biological specimens during the performance of a forensic autopsy. The Plaintiff, before, during or after the time of autopsy, failed to make any objection or desired disposition of the brain or other tissues known, and now does not seek redress

for any tissues except the brain. There is no legal distinction in the rights of next-of-kin between a brain and other tissues and fluids of the deceased.

Disposal of a brain after fixation and a neuropathology examination, particularly when subsequent to incineration of the body, is not improper. The body of Plaintiff's mother had been returned to Plaintiff and funerary ceremonies and disposition had already occurred. Residual tissues are properly retained, examined and tested, and disposed of by the medical examiner's office as medical waste. Holding that all tissues and body parts after a medicolegal autopsy must be disposed of according to wishes of the next-of-kin would be impractical, undesirable, and impossible and would result in a chilling effect on medicolegal death investigation in this State.

Argument

I. Michigan law conveys only a quasi-property interest in dead bodies to the next-of-kin.

A. Historical Precedent ¹

In very early English law, dead bodies were treated as property, but this notion was found to be contrary to “every principle of law and moral feeling” (*Jones v Ashburnham*, 102 E.R. 905, 1804). By the mid nineteenth century, it was reasonably well settled law that bodies were not property subject to execution of a debt. Thus, the common law as inherited from England specifically held that there is no property interest in dead bodies. American courts were unhappy with this British ‘no property rule’ and invented the concept of “quasi-property” precisely to circumvent the effect of this rule. Without having to declare the dead body to be property, the quasi-property concept permitted plaintiffs a remedy for mutilation of a corpse and other wrongs. This concept merely involved the next-of-kin’s sepulchral rights to determine the time, place, and manner of burial and the right to have the body delivered as it lay.

1. Taken from Nwabueze, *Biotechnology and the Challenge of Property*, 44-66.

B. Quasi-property rights are not property interests

Quasi-property is “property-like” but not property. In *Ritter v.*

Couch, 76 S.E. 428 at 430 (1912), the court declares that “while a dead body is not property in the strict sense of the common law, it is a quasi-property, over which the relatives of the deceased have rights which our courts of equity will protect.” In *State v. Powell*, 497 So. 2d 1188 at 1192 (1986), Judge Overton referred to the concept of quasi-property as a:

“[d]ubious ‘property right’ to the body, [vesting] usually in the next of kin, which did not exist while the decedent was living, cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses. It seems reasonably obvious that such ‘property’ is something evolved out of thin air to meet the occasion, and that it is in reality the personal feelings of the survivors which are being protected under a fiction likely to deceive no one but a lawyer.”

C. Dead bodies do not fall within ambit of “Bundle of Rights”

Although popular notions of “property” involve things, the legal notions involve rights, whether property rights create a legal relation between a person and a thing, between persons with respect to things, and arguably between persons even without respect to things. The law has moved, more or less, from the “reified” notion of property in which the rights are tied strongly to rights to a thing, to a loose “bundle of rights” conception. In this way courts have kept the concept

of property malleable, flexible, and dynamic to meet the new demands of our changing society.

The “bundle of rights” notion of property interests should not be used to overrule settled determinations of property. The concept of property, through “bundle of rights” conception, has been broadened by courts as a useful way to cover hitherto unknown interests. For instance, property interests have been discussed with relation to such things as air space and right of way, information technology, and also genetic technologies. However, in the case of dead bodies and body parts, the courts have previously and specifically held that there is no property interest of the next-of-kin, but only a quasi-property interest has been so conferred.

The “bundle of rights” notion of property is not unlimited, but rather is delimited by a set of characteristics that pertain to the nature of property. This has been most famously articulated by Lord Wilberforce, in see *National Provincial Bank Ltd. V. Ainsworth* (1965) A.C. 1175, at 1247-8 (H.L.), where a deserted wife argued for matrimonial property in the mortgaged land of her husband, when he declared:

Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be identifiable to third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability. The wife’s rights has none of these qualities, it is characterized by the reverse of them.

Judge Goldberg in *First Victoria National Bank v United States*, 620 F. 2d 1096

(1980), wrote:

An interest labeled 'property' normally may possess certain characteristics: it can be transferred to others; it can be devised and inherited; it can descend to heirs at law; it can be levied upon to satisfy a judgment; it comes under the jurisdiction of a bankruptcy court in a bankruptcy proceeding; it will be protected against invasion by the courts; it cannot be taken away without due process of law.

However, he added a caveat:

An interest may qualify as 'property' for some purposes even though it lacks some of those attributes. For example, an individual can have a 'property' right in his job...so that he cannot be fired without appropriate procedural safeguards; yet the job is not assignable, transferable, descendible, or devisable. The 'right to publicity' is transferable during life...but may not be devisable.

Bodies and body parts are not owned nor conveyed in the usual sense. Only the next-of-kin are entitled to them. They are possessed merely for custodial reasons of burial. *Whitehair v. Highland Memorial Gardens*, 327 S.E. 2d 438 at 441 (1985); *Diebler v. American Radiator and Standard Sanitary Corporation*, 92 N.Y.S. 2d 356 at 358 (1949).

Next-of-kin have less of a right to the body than a duty to bury the body. The primary legal causes of action of next-of-kin are for intentional tortious action, such as desecration of the body or interference with burial, rather than conversion or theft. Bodies and body parts cannot be levied. Statutes prohibit their sale for public policy reasons. In *Culpepper v. Pearl Street Building, Inc.*, 877 P.2d 877 at

1880 (1994), the Colorado Supreme Court explained that a dead body is not commercially transferable, has no monetary value and, therefore, is not property and rejected an action for conversion.

D. Nor are body parts and tissues property

Courts have also specifically avoided finding parts of bodies to be property in the few cases that have squarely dealt with the issue. The Supreme Court of California in *Moore v. The Regents of the University of California*, 793 P.2d 479 at 492 (1990), declared that:

[the] statute's (California Health and Safety Code) practical effect is to limit, drastically, a patient's control over the excised cells. By restricting how excised cells may be used and requiring their eventual destruction, the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to 'property' or 'ownership' for purposes of conversion law.

The Court held that the patient had no proprietary interest in his removed cells and thus could not sustain an action for conversion. The Court noted its concern over the negative impact on scientific and commercial activities of public interest that the alternative holding would have. The other two reported cases on patient rights to tissues are in accord with *Moore*, *Greenberg v. Miami Children's Hosp. Research Institute*, 264 F. Supp. 2d 1064 (SD Fla, 2003), *Washington Univ. v. Catalona*, 400 F.3d 667 (8th Cir. 2007).

E. Michigan law does not provide a protected constitutional right to autopsy specimens.

In its *Order Granting in Part and Denying in Part Defendant's the Motion for Summary Judgment*, the court found that Waeschle has a clearly established and federally protected constitutional right to her mother's parts and accordingly ordered the federal constitutional due process claim to proceed.

1. The District Court has confused custodial rights with property rights

The District Court, in noting that "Michigan law regarding general property rights are anchored in the right to possess," has overly relied on the next-of-kin's possessory right. This right of the next-of-kin is temporary and limited. First, the possessory right is merely custodial. It does not indicate a right to own, convey, transfer, or to continue to hold. The next-of-kin cannot use the body as a trophy nor do anything that they wish with the body. Bodies are considered biohazardous and must be handled according to health and mortuary rules. The right to possession is a legal ability to take the body to ensure appropriate burial. In most cases, the next-of-kin never physically take possession of their loved one's dead body, but rather direct its transport and funerary arrangements. The major exception to limited possession relates to the ashes of a cremated body ("cremains").

The District Court seems to confuse recovery from intentional torts arising from the quasi property interest of the next-of-kin and proprietary interests.

The District Court seems to confuse autopsies authorized by consent of the next-of-kin, organ and tissue harvest based upon consent of the next-of-kin, and medicolegal autopsies performed pursuant to the State's broad "police powers" – limited by statutes.

2. Michigan case law provides no rights in autopsy specimens properly removed during authorized autopsy

The District Court specifically cited the 1899 Michigan Supreme Court case of *Keyes v. Konkel*, 119 Mich. 550, 78 N.W. 649 (1899), in which an undertaker withheld a body from the next-of-kin until payment. The Court quoted *Keyes*:

The Michigan Supreme Court held that next-of-kin have a quasi-property right to control/bury a dead body. Id at 551 (citations omitted). The Court held that the cause of action was 'not for the damage to the corpse as property, but damage to the next of kin by infringement of his right to have the body delivered to him for burial without mutilation.

Judge Montgomery is here specifically holding that Michigan law finds a quasi-property interest and not a property interest. In fact, Judge Montgomery states that: "no return of the property can be ordered in case of the replevin of a dead body." The District Court seems to mistake the "quasi-property right" for a property right, which it is not.

The cases of *Doxtator v. Chicago & W. Michigan Ry. Co.*, 120 Mich. 596 (1899), *Deeg v. City of Detroit*, 345 Mich. 371 (1956), and *Dampier v. Grace Hosp. Corp.*, 233 Mich.App. 714 (1999) are cited as further evidence for a

property interest of the next-of-kin in decedents' bodies, but these cases sound in tort, which can be supported by mere quasi-property rights. Furthermore, these cases do not involve medicolegal death investigation by a medical examiner authorized by the police powers of the State and specific statutes. In fact, these actions are against a surgeon and hospitals, which must act on the basis of consent.

Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991), was a deviation from prior case law. It recognized a property interest as defined in the 14th Amendment of the U.S. Constitution in a decedent's tissue by the next-of-kin, whereas prior courts had not found a true property interest. Recently, in *Albrecht v Treon*, the Ohio Supreme Court held that next-of-kin not only had no property interest in a deceased body, but also no "protected interest" in a deceased body—thus, the *Brotherton* decision mistakenly assumed Ohio law. The *Brotherton* court confuses a property right with the quasi-property right to burial, a custodial right that includes a limited possessory right in the body. A significant motivation for the *Brotherton* decision was the reprehensible actions of the defendant coroner, Dr. Cleveland. He intentionally did not ask next-of-kin and intentionally did not look at medical records so that he would not know of an objection to corneal harvest and thus by-passing the intent of the presumed consent scheme whereby corneas could be harvested unless an objection was known. It is said that bad facts make bad law. Other courts have followed *Brotherton*'s lead, including *Whaley v.*

County of Tuscola, 58 F.3d 1111 (6th Cir. 1995). In the ensuing 17 years, courts have been reluctant to extend this analysis to tissues other than corneas. Recently, in *Picon v Foucralt*, the federal court explicitly declined to extend a *Brotherton* progeny to other tissues and found no protected property interest of the next-of-kin in a heart. Still other courts have specifically rejected the *Brotherton* analysis, such as *Crocker v. Pleasant*, 727, So. 2d 1087 (1999), the court held that the body was not property and thus burial without notification to the parents was not a basis to bring a 14th Amendment US Constitutional action. [See criticism of the *Brotherton* case at Michael H. Scanlon, *Brotherton v Cleveland: Property Rights in the Human Body – Are the Goods Oft Interred with their Bones* 37 South Dakota L. Rev. 429, 1992]

The Sixth Circuit, from which this case comes, held that *Brotherton* and *Whaley* were inapplicable, since they involved the unauthorized removal of tissue. 576 F3d at 546-47. Second, it held that the medical examiner was entitled to qualified immunity because, even if there was a right under Michigan law, it was not clearly established. *Id* at 550.

3. Michigan statutory authority provides no rights in autopsy
specimens

MCLA §52.205(5) provides:

The county medical examiner shall, after any required examination or autopsy, promptly deliver or return the body to relatives or representatives of the deceased

and

The medical examiner may retain, *as long as may be necessary*, any portion of the body believed by the medical examiner to be necessary for the detection of any crime.”

These statutes are cited for the proposition that the medical examiner must return body parts and tissues when his examination is completed. However, this interpretation is taken in isolation. This provision can only apply to bodies for the funeral and burial of the body for the limited custodial purposes of the next-of-kin. Thus, the statutory clause must be read as pertaining to only body parts that affect the funeral. To read this otherwise is to assume naïveté and inartful drafting and to hold the clause void as against public policy. Not all tissues and parts can be returned as discussed below. It would also nullify the public interest in favor of a private action. Certainly, the legislature did not intend that an individual shot in the head does not permit further examination as a crime has already been “detected.” Not only is there a problem with the clause reading mere “detection” rather than “prosecution,” but there are other times the medical examiner must act on public health reasons rather than criminal justice purposes. It would be preposterous to hold this clause to prevent full investigation of a dangerous infectious disease.

The Plaintiff also specifically relied on MCLA §700.3206.1:

a [next of kin] is presumed to have the right and power to make decisions about funeral arrangements and the handling, disposition, or disinterment of a decedent's body, including, but not limited to, decisions about cremation, and the right to possess cremated remains of the decedent

as proposition for the right of next-of-kin to possess the remains of the decedent, but the statute only speaks to possession of cremated remains and specifically fails to do so with respect to non-cremated remains. As mentioned above, cremains are an exceptional case—permitting of full ownership by the next-of-kin. A next-of-kin may place an urn of ashes on the mantle or effect burial in a backyard but not so of an embalmed body or body part.

F. “Propertization” of human bodies and body parts may have long term adverse consequences

Public policy rationale continues for not giving a full property ownership of a decedent's dead body or body parts to the next-of-kin. One policy consideration is that human tissues are considered to be biohazardous and thus, should not be available for public possession. Moreover, one should not be able to own someone else in life or in death on societal ethical grounds. Ownership of the body might suggest the possibility of a trophy corpse. Human tissues are considered biohazardous. It may be seen to devalue and objectify life. Moreover, it may facilitate commoditization and markets in body parts.

Jennifer Nedelsky in the context of new reproductive technologies and the stages of life, argues against a property framework, when she asked:

Why would we invoke the concept of property here, when almost none of the usual incidents of property seems likely to be appropriate?

and then continues:

The complex issues of control and decisional authority should be addressed as such without the distortions of the conceptual framework of property...The concept of property will add nothing and will continually skew the inquiry toward the very dangers we must try to avoid: commodification, exploitation, and alienation (Nedelsky, *Property in Potential Life? A Relational Approach to Choosing Legal Categories*, 6 Can. J. L. & Juris. 343 at 360 and 362, 1993).

Joan Gilmour also emphasizes a “nonproperty regulatory system.” She believes that a property framework inexorably leads to markets:

Categorizing something as ‘property’ does not stop with or signify only the right to control; it also carries with it expectations of a market model and market behaviour as the norm. The property, whatever it may be, becomes something it is thought appropriate to buy and sell through a market. Once one adopts the language of property in order to obtain its strong protection for the right of control, one cannot necessarily control all the associations that the institution of property will bring with it... Gilmour, ‘Our’ Bodies; Property Rights in Human Tissues, 8 Can. J.L. & Soc. 113 at 132, 1993.

Thus, a concern is that a property rule may exacerbate the emerging markets in body parts.

According to J.W. Harris, the property talk of self-ownership (Who’s body is it?), is rhetorical and should not be taken literally, since self-ownership is not caught within the defining elements of the institution of property, which he identified as trespassory rules and ownership spectrum. Instead, he believes that what we rhetorically call self-ownership rights are, properly speaking, rights that

arise from the bodily-use freedom principle and not from the institution of property. Harris, Who Owns My Body? 16 Oxford J. of Legal Studies 55-84, 1996.

E. Richard Gold, in his book Body Parts, Property Rights and the Ownership of Human Biological Materials written for his S.J.D. from the University of Michigan Law School, writes:

Because biotechnology results in marketable products, researchers, pharmaceutical companies, and investors will increasingly be making claims to own materials derived from the human body. The way in which these individuals and companies value the body, from a commercial perspective, differs significantly from the ways in which we have traditionally valued the body. [p.x] ...The application of property discourse to the body and related materials involves the superimposition of one system (property discourse, complete with its own set of meanings) on another (our ways of valuing the human body, complete with the meaning that we attach to the body). [p.xi] [quoting W.E.B. DuBois in *The Souls of Black Folks*, Signet Books, New York, Penguin Books, 1982, p. 126)] "...and to ask gently, but in all sincerity, the ever-recurring query of the ages, Is not life more than meat, and the body more than raiment?". [p. 1] ...the property discourse carries with it the assumption that those things that are subject to it—that is, things that are the property of someone—are best allocated through the market. [p. 9] ...Justice Arabian [in Moore] believed that if the courts consider human biological material to be property, the law would come to 'treat human tissue as a fungible commodity of commerce,' leading him to fear for 'the effect on human dignity of a marketplace in human body parts' [p. 36] ...The difficulty with property discourse is that it preempts other discourses.[p. 176] ...The human body, which has largely escaped discussion within property law, ought now not be treated as property. [p.177]

A black market already exists in body parts (A. Cheney, Body Brokers: Inside America's Underground Trade in Human Remains; MJ Cherry, Kidney for Sale by Owner: Human Organs, Transplantation, and the Market, M Goodwin, Black Markets: The Supply and Demand of Body Parts; C Waldby and R Mitchell, Tissue Economies: Blood, Organs, and Cell Lines in Late Capitalism). The concern is that legal treatment of dead human bodies and body parts as property will advance their commodization.

II. The State has a strong interest in medicolegal investigation of death, to include the conducting of autopsies and the taking of tissues, to protect the public that supersedes the individual rights of the next-of-kin

A fundamental role of any government is to protect its citizens from internal and external threats. Medical examiner offices investigate deaths on behalf of the State through its inherent "police powers." Medicolegal death investigation serves criminal justice, public health, and homeland security functions. The medicolegal death investigation involves an investigation of the circumstances and a medical examination of the body. The medical examination may include dissection, examination and testing. Medicolegal death investigation and forensic autopsies are authorized under certain conditions such as sudden unexplained deaths or suspicious deaths. The investigation and autopsy can be conducted over the objection of next-of-kin, unlike hospital autopsies that are only conducted based upon the consent of the next-of-kin.

III. Customary and appropriate forensic pathology practice in Michigan and elsewhere involves the retention, examination, and testing of biologic specimens

A. Tissue and fluid collection is a constituent part of an autopsy

It is usual, customary and optimal practice to sample, store, and test biological tissues as a component of a complete autopsy. This is so integral to the practice that it should be understood by all that tissues will be collected and explicit notice to the next-of-kin of this is not normally given.

Blood, urine, vitreous fluid, bile, and soft tissues are obtained from forensic autopsies for toxicological analysis. Aliquots of these samples are taken for the actual testing, generally leaving residual sample for possible later testing. At the conclusion of the analysis, these fluids and tissues are properly disposed of according to biohazardous waste protocols.

A blood stain is routinely kept by many medical examiner offices in case of later need for DNA testing. This testing may be needed in case of questioned identification. It may be used to compare with results of DNA testing from a crime scene. Next-of-kin may request it for parentage testing. It also may elucidate a heritable genetic disease in a family using a test not yet developed.

Usually, samples of tissues are taken for microscopic histopathology examination. These are embedded in paraffin blocks and cut with a microtome. Some shavings of the tissue are discarded as the histotechnologist cuts into the block. Both the resultant microscopic slides and the paraffin blocks, bearing

tissues of the decedent, are kept for future use. Regardless of whether microscopic slides are initially made, a stock jar of tissues in formalin are generally also kept in case new samples need to be submitted for histopathologic examination.

Organs or larger blocks of tissues are kept for further dissection and examination, consultation by other experts or specialists, or for evidentiary purposes. The brain kept in this instance is an example. A heart may be shown to a cardiovascular pathologist. The eyes of a child suspected of being abused should be retained fixed in formalin and later cut to reveal whether or not retinal hemorrhages are present. Viscera of an infant may be shown to a pediatric pathologist. The skin surrounding a gunshot wound may be kept by the forensic pathologist. A tissue block from an area of surgery in which has become fibrotic and normal anatomy has been obscured may be resected for more careful dissection at a later time when the forensic pathologist has more time.

Special testing may be necessary in a given case. Blood and liver specimens may be used for metabolic screening of infants. Muscle or other tissue may be used for DNA identification or genetic disease testing. Fluid and tissue specimens may be sent for microbiologic culture. A small sample may be fixed in glutaraldehyde for electron microscopy. Tissue may be frozen for certain immunohistochemistry.

B. There is no legal distinction between a brain and other tissues

The Plaintiff contends that the defendants could have easily returned the brain. She did not ask for the other biologic specimens. However, there is no legal basis to distinguish between the brain, a part of the brain, tissue, or fluid from the body. Any attempt to draw such a distinction would be arbitrary and illusory. The rights of next-of-kin in blood (a tissue) drawn from the decedent for toxicology are the same as for the brain. Thus, the remedy sought may sound simple, but the slippery slope places the defendants in an impossible position.

- C. The Plaintiff should have known that an autopsy involved taking of tissues and should have made any objection or any desired special disposition known

Precisely because tissue collection is a routine part of an autopsy, the Plaintiff should have known to declare any objection or desired disposition before, during or immediately after the autopsy. The Plaintiff did not convey any notion of discomfort with the autopsy. To the contrary she was interested in the autopsy if it would show mistreatment by the nursing home.

- IV. It is appropriate for medical examiner offices to retain or dispose of tissues as medical waste

- A. It is impossible to return all tissues

It is impossible to conduct an autopsy without some loss of tissues. An autopsy is an invasive procedure. Blood is a tissue and some will inevitably be spilled and lost down the drain. Some soft tissue will also be lost as a result of careful dissection. While this may be a minimal loss, it is a simple reality that

requires the Court to distinguish negligible from substantial loss and the basis for it.

B. It is appropriate to dispose of residual tissue as medical waste

Residual human tissue from hospitals are considered medical waste and disposed of as such. Medical waste that has not been fixed and is still a biohazard must be specially disposed of. Fixed human tissues are usually found in pathology departments in containers, in paraffin blocks, on microscopic slides, etc. or are discarded, usually by incineration. While regulations are usually not drafted with medical examiner offices in mind, nonetheless they are in much the same position as hospitals in this regard.

C. Involvement of next-of-kin in all disposal decisions is impractical and undesirable

Prepared and residual specimens sent to laboratories for analysis are generally discarded as medical waste, although some original sample may be kept for later analysis. It is not uncommon that a laboratory test must be reanalyzed due to error or suspected laboratory error. The results of a given test may result in the need for further testing. A medical examiner may later need to perform a new test based upon new questions that have come to light.

Stock jars may be kept for weeks or months, but paraffin blocks, microscopic slides, and DNA cards may be kept indefinitely. The College of American Pathologists has guidelines on the storage of such samples by medical

examiner offices that call for storage of paraffin blocks and microscopic slides indefinitely and wet tissues for at least 1 year.

Other tissues will be kept in the medical examiner office for varying lengths of time. An organ or large tissue block may be kept only for some further dissection, while at other times it is kept longer in anticipation of potential further examination or testing or for evidentiary purposes. Some specimens may be kept for examination by opposing counsel's experts. The forensic pathologist may well want to review and re-examine the gross tissues on a case prior to testimony in a trial. Questions may arise in preparation for trial or at trial or on appeal that require further examination and testing.

Surely, next-of-kin do not wish to be called and asked about their disposal wishes each time a decision is made to dispose of the tissue—this would amount to harassment. The whereabouts of the family may no longer be known. There may be conflicts between next-of-kin over disposal issues. Further the administrative burden of such a policy would be enormous and easily outstrip the scant resources of medical examiner offices.

D. To involve next-of-kin in all disposal decisions would have a chilling effect on medicolegal death investigation and forensic autopsy practice in the State

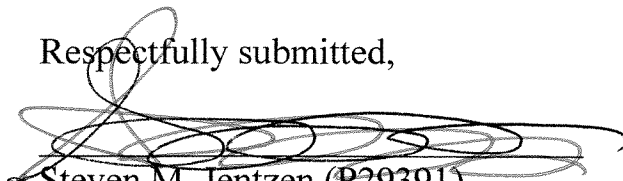
A policy in which next-of-kin may hold liable medical examiners for failure to dispose of tissues removed from autopsy would have a chilling effect. Some

forensic pathologists may simply retire or move to another state. It is noteworthy that there are only about 500 practicing board-certified forensic pathologists in the country and many vacant positions available. Those forensic pathologists that decide to stay may be more reluctant to perform an autopsy. Even where the inquiry may be limited to disposition of the brain, the result may be to conduct fewer neuropathologic examinations. Indeed, Hamilton County where the Plaintiff's attorneys have previously found success in the form of a large settlement, *Hainey v Parrott*, none of the forensic pathologists at the time of the litigation remain and almost no neuropathologic examinations are conducted anymore.

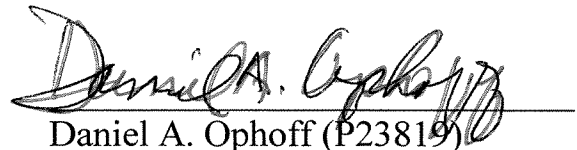
Conclusion

The certified question should be answered in the negative.

Respectfully submitted,



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