

IN THE SUPREME COURT OF OHIO

MARK ALBRECHT, et al. : Case No. 2007-507  
Plaintiffs-Respondents : Merit Brief On Question of State  
Law certified by the United States  
District Court for the Southern  
District of Ohio, Western Division  
:  
v. :  
:  
BRIAN TREON, M.D., et al. :  
Defendants-Petitioners :

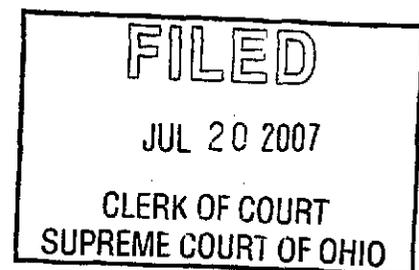
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BRIEF OF *AMICUS CURIAE*  
THE NATIONAL ASSOCIATION OF MEDICAL EXAMINERS  
IN SUPPORT OF DEFENDANTS-PETITIONERS, BRIAN TREON, M.D.,  
ET AL.

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# **I. INTRODUCTION**

## **A. INTEREST OF *AMICUS CURIAE***

The National Association of Medical Examiners (NAME) is the primary professional organization of forensic pathologists and associates in the United States. Founded in 1966 and it has since expanded to include medical examiners and coroners, medicolegal death investigators and administrators throughout the world.

## **B. CERTIFIED QUESTION OF LAW**

The certified question of Ohio State law to be addressed by the Court is as follows:

Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing.

This question arises in the context of federal litigation in which the Plaintiffs-Respondents allege that the right to bury the body of their deceased next-of-kin creates a property interest which provides a basis for a federal constitutional claim of violation of deprivation of property without due process of law.

In the view of the Amicus Curiae, NAME, the Plaintiffs-Respondents challenge the fundamental and routine practices of coroner offices in Ohio and medicolegal death investigation agencies generally, to take, retain, and dispose of tissues, organs, blood, or other body parts in the course of legitimate forensic medicolegal death investigations of deaths falling within their jurisdictions. In other words, NAME views the litigation to be a direct challenge to the fundamental "police power" of the State.

## **II. ARGUMENT**

### **A. PRIVATE INTERESTS (NEXT-OF-KIN) IN MEDICOLEGAL DEATH INVESTIGATION**

Most legal commentaries conclude that the next-of-kin do not have a full property interest in dead bodies (22A Am Jur 2d, Dead Bodies). In essence, no one can own someone else in life or in death.

Human beings relate to the personhood and soul of other living human beings, but these qualities are extinguished at death. Thus, the law should distinguish dead bodies from living beings. There are various religious and personal thoughts on after-life, but they hold in common the notion of a separation of the “vessel” and the “soul” or whatever essence that was present in the living being. Others believe the qualities of living beings are found in human cognitive thought which merely cease at death. Regardless, next-of-kin and the public at-large tend to perceive “living qualities” in dead bodies, analogous to anthropomorphism—in which uniquely human characteristics and qualities are ascribed to non-human objects and inanimate objects. We see the face of the person in death and remember the face of the person in life. This sentimental reaction is deep and serves us well to emotionally and psychologically cope with the death and put perspective on our own lives. However, it should be recognized that this is imputing something which is no longer present. The real family interest is in the “soul” of the deceased, if it continues in an afterlife, or in the memory of the “soul”, rather than to the dead carcass—the tangible symbol of that soul. Some next-of-kin harbor sentimental and emotional attachments and adhere to religious practices regarding the organs and tissues of the deceased as a surrogate for the soul and personhood of their loved one.

The next-of-kin have interests in the dead bodies other than funerary custodial interests and sentimental, emotional, and religious interests. For instance, the family may need or want

the organs and tissues for transplantation purposes. Similarly, the family may also want the medical and genetic information which may be derived from the body.

While the legal status of dead bodies is not that of living beings, neither does the law treat dead bodies as other physical property. There is no ownership of bodies and human remains. This special legal status seems to be driven by other considerations. There is, of course, a strong public health concern in retaining decomposing human bodies and thus next-of-kin are not allowed to keep unpreserved bodies. On the other hand, there is a strong moral repugnation against preserving bodies like stuffed safari trophies. Rather, state mortuary laws strictly control the disposition of human remains. Thus, next-of-kin are not permitted to inherit, retain, and use dead bodies, like other property of the deceased. The legal interest of the next-of-kin in a dead body in most jurisdictions is described merely as a "quasi-property" or custodial interest, rather than a full property interest, for the limited purpose of proper burial or other disposition.

The legal rights and interests of the next-of-kin are limited in other ways as well. For example, the Uniform Anatomical Gift Act, which confers some discretion to the deceased individuals themselves, despite contrary family wishes. Bodies and body parts cannot be sold. Financial gain otherwise derived from tissues of the body will not necessarily flow to the families (*Moore v. Regents* 1990).

## **B. PUBLIC INTERESTS (THE STATE) IN MEDICOLEGAL DEATH INVESTIGATION**

Society has a strong interest in the use of bodies and tissues for biomedical purposes. Organs and tissues are harvested for transplantation for those in need. Dead bodies are used in medical education for teaching anatomy. Skeletal remains are studied by anthropologists. Academic life sciences research and biomedical commercial enterprises rely on the availability of tissues and would screech to a grinding halt without them. Tissues and fluids are used for laboratory control materials necessary for the operation of all clinical laboratories. The finding of a protected interest by the next-of-kin may have unintended and widespread consequences.

Society also has a strong interest in the investigation of bodies, tissues and fluids for public policy, public health, homeland security, and criminal justice concerns, regardless of the consent of the next-of-kin. Public policy considerations for death investigation include identification of remains, generation of important statistical data, administration of testamentary estates, and insurance claims, investigation of deaths in custody, among others. Public health is served in the recognition of heritable and transmissible diseases as well as other health hazards, such as unsafe consumer products or inadequate mining safety precautions. The first driver's licensure laws, crib slat manufacturing standards, and the collapsible steering wheel are examples of important developments from medicolegal death investigation. An important homeland security function is surveillance for bioterrorist victims. In times of mass disaster, bodies must be examined for identification purposes. The criminal justice system is served in the examination of bodies for determination of the cause and manner of death, assessment of injuries, comparing findings to the statements of events, evidentiary collection, and a basis of expert testimony.

Essentially, coroner and medical examiner offices are the last societal screen to catch premature deaths and prevent others from a similar fate. Coroners and medical examiners function as neutral parties who bring professional skills to death investigation. While some may naively and mistakenly consider such offices to exist merely to handle dead bodies, in fact, everything done by such offices is done for the living.

### **C. PRIORITY OF INTERESTS IN MEDICOLEGAL DEATH INVESTIGATION**

Medicolegal death investigation is a fundamental function of government. Medicolegal death investigation coroner and medical examiner offices have been established in all jurisdictions. This function derives from the State's "police powers" which permits investigation over private interests for public safety purposes. Often coroner and medicolegal offices confiscate property, such as prescription pill bottles at scenes of suicides or machines in cases of industrial accidents, based upon this power. These offices do not investigate all deaths, but instead are restricted to only suspicious and certain other deaths, precisely because of a public interest in investigating them. Thus, medical examiners and coroners are authorized to perform medicolegal death investigation and conduct autopsies, despite the potential objection of next-of-kin. This is unlike the authority to conduct a hospital autopsy or procure organs or harvest tissues, which are based upon the consent of the next-of-kin.

The coroners, medical examiners, and forensic pathologists recognize the sensitive nature of their work and attempt to cater to the wishes of the next-of-kin, but balance this against the need to do their job. Medicolegal death investigative officials must be in a position to proceed with a full autopsy over the objections of the next-of-kin when there is a compelling reason to do the case or the next-of-kin are themselves under suspicion. Families must not be given veto

power. In the face of the sudden death, the next-of-kin are usually grief stricken and emotional and in a state not conducive to rational decision-making. Family members will not consider the consequences of an undetermined cause of death on insurance or potential discovery of a heritable genetic condition. It is the common experience of coroners and medical examiners that the families will often request that an autopsy not be performed only to find later that an insurance payment is denied due to an undetermined cause of death or that closure is difficult to find when questions are not answered.

Not only must families not be permitted to veto a forensic autopsy which is performed under legitimate jurisdiction and for compelling reasons, but similarly they should not be able to stop the sampling and testing of tissues and fluids, which may or may not accompany the autopsy (for instance, some offices a bus passenger victim may be tested for toxicology, but not autopsied). In the larger sense, the autopsy and the blood draw for toxicology are both procedures of medicolegal investigations.

The American Academy of Forensic Sciences (AAFS), the leading professional association of the general forensics community, recently issued the following statement:

While the AAFS recognizes and respects the rights of the next-of-kin of the decedent, these rights should not be allowed to extend to biological specimens collected for the legitimate investigation of the cause and manner of death, and the establishment of identity.

This statement is in accord with the belief of NAME. The AAFS recognizes that the challenge posed by the Plaintiffs/Respondents not only affects forensic pathologist members, but also forensic toxicologists, forensic anthropologists, criminalists, and others in the forensics community involved in death investigation.

## **D. BIOLOGICAL SPECIMENS FROM MEDICOLEGAL DEATH INVESTIGATION**

Authority for the taking of biological specimens from dead bodies during a forensic investigation is the same as for the performance of forensic autopsies. The dead body is itself a biological specimen. In the case of body fragmentation, as in an airplane crash, the fragmented remains, such as a leg or liver, may be all that is recovered and will constitute "the body". This may be considered analogous to prosecution of a homicide where the corpus delicti is the pool of blood left at the scene. Thus, the distinction between bodies and biological specimens from the bodies is blurred. Also, some offices in some cases will perform limited autopsies, rather than complete autopsies, thus blurring the distinction between the conduct of an autopsy and a specimen collection.

Many biological specimens are routinely collected during the performance of a forensic autopsy, although the specimens will vary from office to office and case to case. Typically, blood, urine, bile, eye fluid, portions of liver, and gastric contents are taken for toxicology. Samples of tissues are taken for microscopic (histologic) examination or possible microscopic examination. A dried bloodstain may be collected on filter paper for potential DNA analysis. Hair exemplars and fingernail clippings may be taken in cases of suspected homicide. Vaginal, oral, and rectal swabs may be taken in the case of suspected sexual assault victims. Brains, hearts, other organs, or blocks of tissues may be taken for special examination or retained for its evidentiary value, where deemed appropriate. It is not uncommon to cut out and retain the skin around a gunshot or stabwound.

Tissues and fluids are also routinely collected by medicolegal death investigation offices when a forensic autopsy is not performed. Most offices will collect toxicology specimens in

cases when they perform only external examinations (“inspections” or “views”). In some cases, swabs, fingernail clippings, DNA specimens, or limited biopsies may also be obtained.

Some biologic specimens may be sufficiently altered as to no longer be considered part of the person’s body anymore. Some might perceive that any tissue that has been removed or is no longer living is no longer part of a living person’s body. Beyond such an argument, some biologic specimens are sufficiently altered to no longer be considered part of a dead body. Tissue culture performed immediately after death will involve the replacement of old cells by new cells. Formalin fixation involves chemical cross-linkage of existing chemical molecules. Paraffin embedding involves infiltration and impregnation of waxy substances into the tissues and incorporation of those tissues in a solid block of wax and perhaps no longer recognizable without special examination. Blood for toxicology may be mixed with preservatives and diluted such that they can no longer be called “blood”. Thus, the definition of biological specimens may be blurred.

The collection of biological specimens during medicolegal death investigation is necessary. Despite continuing medical technological advance, the Star Trek “tricorder” sensor probe of Dr. Leonard McCoy simply does not exist. In fact, the purpose of autopsies is to examine the organs and tissues and sample them for laboratory analysis and testing. Toxicological testing is crucial to definitively determine the identification of a drug, its metabolites, presence of other drugs, and their quantities or the absence of prescription drugs, drugs of abuse, or poisons. DNA testing may be crucial to the identification of the individual or the diagnosis of a genetic condition. Metabolic studies are routinely conducted in infants. Thus, a complete forensic autopsy will include the collection of biological specimens.

Not only will samples of fluids and tissues be collected and analyzed, but, in selected cases, brains, hearts, other organs or tissue blocks may be saved for examination and analysis. This is not done routinely, but is done commonly and precisely because of a particularized need for further investigation. These examinations should be considered part of the autopsy examination itself, even though conducted at a later point in time. It may be that the pathologist needs more time to carefully examine the organ. It may be that the pathologist would like to examine the organ in the presence of a colleague, a specialist, or a clinician. It may be that the organ needs to become "fixed" in formalin to permit careful dissection. It also may be that the organ is saved for special analysis or testing, such as opiate and dopamine receptor levels in the frozen brain of a suspected excited delirium victim. Special examination of a whole organ is not infrequently key to the proper and definitive determination of the cause of death.

It should also be pointed out that some tissues and organ blocks may be kept for evidentiary purposes, not just for more detailed examination. In cases of apparent homicide, retention of specific organs/and or tissues may ensure that the defense has access to the material of interest. Specific examples of this would be retention of the brain and eyes in purported child abuse, or retention of the larynx and surrounding muscles in alleged strangulation.

The instant case involves the examination of the brain of the deceased. Brain pathology is involved in high proportion of all deaths seen by medicolegal death investigation offices and is, of course, often the critical or only pathology in such deaths. In fact, an autopsy is not considered a complete autopsy without an examination of the brain. While brains can and often are examined fresh, there is often a need to examine them more carefully, given an appropriate history or external finding, and this usually requires two weeks of fixation in formalin fluid. It

is, in fact, standard practice to fix brains for neuropathology examination. This requires retention of the whole brain after the body after the body has been released to the funeral home.

Meaningful distinction between whole organs, parts of organs, tissue samples, and fluids is blurry, if at all. Indeed, the certified question before the court involves “tissues, organs, blood, or other body parts that have been removed and retained”.

### **E. NOTICE TO TAKE AND RETAIN BIOLOGICAL SPECIMENS**

Generally, the next-of-kin are not notified beforehand of the specifics of the autopsy, but rather are given generally descriptions and opportunity to ask questions when discussing the case with the medicolegal death investigators or other officials. Sometimes a brochures is handed out that explains procedures of the autopsy. An autopsy report may note that specimens have been taken for histology and toxicology or those whole organs were retained and specially examined.

The Plaintiffs-Respondents suggest that it is straight-forward to provide families with notice when a brain is retained to permit a discussion on the later disposition of the brain. However, as stated above, there seems to be no true legal distinction between a brain and other organs, tissues, and fluids. Would such notice need to be given for half of the brain? What if the half of the brain was sent to Deborah Mash in Miami and consumed in the process of performing receptor analysis levels? Would such notice need to be given where only a small portion of the brain is retained? Would it matter if pieces of brain are routinely retained for microscopic examination? If there is no difference between a whole organ and part of an organ, then can there be a distinction between the sampling of blood for toxicology and the examination of the whole brain? If samples of biological specimens are retained in every autopsy, then isn't notice implied by the performance of the autopsy itself?

Perhaps, the most important practical problem is that the decision to retain a whole organ, part of an organ, or tissue block is not made until the time of the autopsy. Thus, the decision to take and retain the organ or tissues and provide notice to the next-of-kin would interrupt the autopsy procedures—or the decision would not be made.

What if the next-of-kin were unknown, not found, unavailable, or uncooperative? The burden of tracking down next-of-kin, communicating with next-of-kin, and documenting notification or approval prior to the performance of an autopsy will result in delays. Meanwhile, the value of the autopsy declines as the body deteriorates, even when refrigerated. Also, the delay may hamper the overall investigation of the death.

How much notice would be required under the Plaintiffs-Respondents suggested regime. If notice of retention of the brain is required of coroners and medical examiners, then wouldn't notice also be required for other biologic specimens? The Plaintiffs-Respondents would also require information on the disposition of the specimens. So, if all biologic specimens are included then this would require information on the disposition of all tissues and blood that have been retained or used in testing. Are coroners and medical examiners supposed to describe the entire autopsy and, if so, in how much detail? It is the experience of coroners and medical examiners that the families are often emotionally distraught immediately after a sudden death and at the time the autopsy is to be performed. In this milieu, next-of-kin should not be presented with the details of the dissection and the whereabouts of the various tissues and fluids of their loved one. Furthermore, coroners and medical examiners would also be confronted by practical decisions on which and how many next-of-kin to notify.

In a time of acute and great grief, additional calls from the coroner or medical examiner querying the family about organs and tissues often cause more pain than it will alleviate.

Moreover, it is the experience of coroners and medical examiners that in their emotionally distraught state, next-of-kin tend to simply say "no" to questions of this sort, rather than even consider the merits of the questions.

## **F. DISPOSAL OF BIOLOGICAL SPECIMENS**

The various biological specimens obtained and retained by coroners and medical examiners are disposed of in various ways. Toxicology specimens may be kept for a few years. Wet tissues for histology may be kept for several months if not years. Paraffin blocks and glass slides may be kept indefinitely. Organ and tissue blocks are kept until they are fully examined or kept until the criminal prosecution or civil litigation is final. These seem to be mundane details of the practical day-to-day operation of coroner and medical examiner offices that are required for operation. To discuss mundane issues will raise concerns and place a drastic burden on offices, which are generally very poorly funded. Moreover, it is the general experience of coroners and medical examiners that most families do not want to be re-contacted about residual body parts, tissues and fluids, as it resurfaces emotions of the death of their loved ones. Routine reburial would be burdensome, expensive, and emotionally wrenching and to delay burial for such disposition would seem even more emotionally wrenching and delay closure. Thus, most disposal of biological specimens involve incineration, like specimens in clinical pathology departments.

It may be important in this discussion to note that biologic material from a dead body will inevitably be lost. Analogous to cut hair on the floor of a barbershop, blood, urine, saliva, and purge fluid may be left at the scene of the death or lost during transport. During mass disasters, portions of remains may not be recovered. Of course, some blood, other fluids, and soft tissue

fragments will be washed down the sink or blotted on paper towels and thrown away. There will even be residual fluid in the needles used for sample collection or epithelial cells deposited on a fingerprint card. Thus, it is impossible to truly return all biologic material to the body or to the family after autopsy.

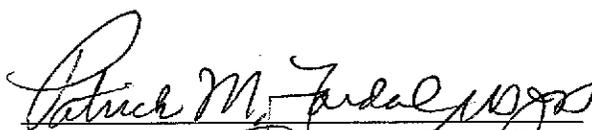
Biologic materials previously collected during life are often not considered for reassociation with the body for burial. Families sometimes keep locks of hair or baby teeth from family members. Specimens for research may be on deposit in a medical school. Blood may have been given to a blood bank. Residual biopsy materials, in the form of microscopic slides and paraffin blocks, may reside in archives of the hospital. Bloodstains from neonatal heel sticks on Guthrie cards may be kept by the health department. Of course, biological traces are deposited widely from DNA on paper cup rims to shed hairs on floors, oral specimens on toothbrushes, rings on shirt collars, and semen deposits on bed sheets.

The plaintiff's argument, taken to the extreme, would demand the return of every drop of blood. No autopsy or toxicologic analysis could be performed.

### III. CONCLUSION

For all these reasons, *amicus curiae* respectfully request this Court find no protected interest of the next-of-kin in the residual biological specimens from autopsies in legitimate medicolegal death investigations and that fundamental authority of state-sponsored medicolegal death and other forensic investigations are preserved.

Respectfully submitted,

  
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## CERTIFICATE OF SERVICE

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