



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**WAGGONER CARR
ATTORNEY GENERAL**

September 16, 1966

Honorable Henry Wade Opinion No. C-762
District Attorney
Dallas County Government Re: Interpretation of
Center Article 49.05, Code
Dallas, Texas of Criminal Procedure

Dear Mr. Wade:

Your recent letter requests an opinion of this office, wherein you ask the following questions:

- "1. What is the interpretation of the word 'absence' as such word is contained in the phrase 'and in the absence of any of the foregoing' which phrase is found in the second paragraph of Section 1 of Article 49.05, Code of Criminal Procedure? As an example, situations arise where the father is presently in Viet Nam and we have been submitted the question of whether he is considered to be absent under this statute.
- "2. That last sentence of Section 1 of Article 49.05, Code of Criminal Procedure, states 'If two or more of the above-named persons assume custody of the body, consent of one of them shall be deemed sufficient.' In regard to this sentence, we submit the following two questions concerning its interpretation.
 - a) Does this sentence refer to the entire list of individuals enumerated in the first sentence of the second paragraph of Section 1 of Article 49.05, Code of Criminal Procedure?
 - b) Under this provision, if two persons (i.e., two uncles) of the

deceased assume custody of the body while the father is available for consent to an autopsy, must the father still be the one to consent or is consent of one of the uncles deemed sufficient?"

Article 49.05, Section 1, Vernon's Code of Criminal Procedure, provides as follows:

"Consent for a licensed physician to conduct an autopsy of the body of a deceased person shall be deemed sufficient when given by the following: In the case of a married person, the surviving spouse, or if no spouse survive him, by any child of such marriage, or in the event of a minor child of such marriage, the guardian of such child if any there be, or in the absence of such guardian, the court having jurisdiction of the person of such minor; in the event that neither spouse nor child survives such deceased, then permission for an autopsy shall be valid when given by a person who would be allowed to give such permission in the case of an unmarried deceased.

"If the deceased be unmarried, then permission shall be given by the following for such autopsy, in the order stated: father, mother, guardian, or next of kin, and in the absence of any of the foregoing, by any natural person assuming custody of and responsibility for burial of the body of such deceased. If two (2) or more of the above named persons assume custody of the body, consent of one (1) of them shall be deemed sufficient."

Although there are no cases defining "absence" as that term is used in Article 49.05, Vernon's Code of Criminal Procedure, it is the opinion of this office that the word "absence", as used therein, means "non-existent". If any of the parties enumerated in Article 49.05, Section 1, are living and are capable of giving consent, then consent for the autopsy must be obtained from the party uppermost on the list. Article 49.05, Section 1, Paragraph 1,

provides that consent for autopsy must be obtained from the spouse, if the spouse survives. Paragraph 2 must be given the same construction. If the father of the deceased is living, then he alone can give consent to an autopsy. If all of the enumerated parties are deceased or presumed to be dead under the provisions of Article 5541, Vernon's Civil Statutes, then consent may be obtained from a natural person assuming custody of and responsibility for burial of the body of such deceased.

In answer to question 2(a), it is the opinion of this office that this sentence refers only to natural persons assuming custody of and responsibility for burial of the body of such deceased. A "natural person" evidently refers to any person other than those enumerated. In answer to question 2(b), it is the opinion of this office that the father, if living, must give consent for the autopsy, regardless of whom assumes custody of the body.

S U M M A R Y

(1) The term "absence" as used in Article 49.05, Code of Criminal Procedure, Section 1, Paragraph 2, means "non-existent".

(2)(a) The last sentence of Section 1 of Article 49.05, Code of Criminal Procedure, states: "If two (2) or more of the above named persons assume custody of the body, consent of one (1) of them shall be deemed sufficient". This sentence refers only to natural persons assuming custody of and responsibility for burial of the body of such deceased.

(2)(b) If two uncles of the deceased assume custody of the body, consent for an autopsy must nevertheless be obtained from the father if living.

Yours very truly,

WAGGONER CARR
Attorney General of Texas

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By 
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TWM/er

APPROVED:

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