



**THE ATTORNEY GENERAL
OF TEXAS**

October 20, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Mr. R. C. "Dick" Lindsey
Deputy Director/Chief Investigator
Texas Funeral Service Commission
8100 Cameron Road
Building B, Suite 550
Austin, Texas 78753

LO-89-88

Dear Mr. Lindsey:

You ask the following questions relative to the taking of blood specimens from dead persons.

1. Does Article 49.10 [of the Code of Criminal Procedure] or Article 6701₁-5 [V.T.C.S.] take precedence as they relate to the taking of blood specimens from dead humans?

2. If a licensed mortician (Funeral director/embalmer) is required to and/or authorized to withdraw blood specimens, who is authorized to order such action and to what extent, if any, is the licensed mortician liable?

3. Who is responsible for the chain of evidence of said blood specimen?

Subsection (j) of article 49.10 of the Code of Criminal Procedure provides:

A justice of the peace may order a physician, qualified technician, chemist, registered professional nurse, or licensed vocational nurse to take a specimen of blood from the body of a person who died as the result of a motor vehicle accident if the justice determines that circumstances indicate the person may have been driving while intoxicated. (Emphasis added.)

Section 3(h) of article 67011-5, V.T.C.S., provides:

Any person who is dead, unconscious, or otherwise in a condition rendering the person incapable of refusal, whether the person was arrested or not, shall be deemed not to have withdrawn the consent provided by Section 1 of this Act. If the person is dead, a specimen may be withdrawn by the county medical examiner or the examiner's designated agent or, if there is no county medical examiner for the county, by a licensed mortician or a person authorized as provided by Subsection (c) of this section. If the person is not dead but is incapable of refusal, a specimen may be withdrawn by a person authorized as provided by Subsection (c) of this section. Evidence of alcohol concentration or the presence of a controlled substance or drug obtained by an analysis authorized by this subsection is admissible in a civil or criminal action. (Emphasis added.)

Article 67011-5 provides for the taking of blood samples from a person at the order or request of a peace officer who has reasonable grounds to believe the person was driving a motor vehicle while intoxicated. Article 49.10 concerns the authority of a justice of the peace in conducting inquests.

A justice of the peace is required to conduct an inquest under any of the circumstances set forth in article 49.04 of the Code of Criminal Procedure. Subsection (i) of article 49.10 of the Code of Criminal Procedure provides that if a justice of the peace determines that a complete autopsy is unnecessary, the justice may order a physician to remove from a body a sample of body fluids to determine the cause of death. The justice may not order any person other than a physician to take samples except as provided by subsection (j). Id. Subsection (j), as noted above, allows the justice to order other designated persons to take specimens of blood if the justice determines the circumstances indicate the person may have been driving while intoxicated.

In your first question you ask which of the two statutes take precedence. Article 49.03 of the Code of Criminal Procedure provides:

The powers granted and duties imposed on a justice of the peace under this article are independent of the powers and duties of a law enforcement agency investigating a death.

A licensed mortician is not one of the persons a justice of the peace is authorized to order to take a specimen of blood. Since the powers and authority granted a justice of the peace are independent of those given law enforcement officers, the justice of the peace may order any person authorized by subsection (j) of article 49.10 to take a blood sample without regard to any order that may have been given by a peace officer under section 3(h) of article 67011.

In your second question you ask who is authorized to order a licensed mortician to withdraw blood, and to what extent, if any, is the licensed mortician liable. A peace officer is authorized to order a licensed mortician to withdraw blood from a dead person if the peace officer has reasonable grounds to believe the deceased was driving a motor vehicle while intoxicated. Subsection (c) of section 3 of article 67011-5 provides in pertinent part:

The person drawing the blood specimen at the request or order of a peace officer under the provisions of this Act, or the hospital where that person is taken for the purpose of securing the blood specimen, shall not be held liable for damages arising from the request or order of the peace officer to take the blood specimen as provided herein, provided the blood specimen was withdrawn according to recognized medical procedures, and provided further that the foregoing shall not relieve any such person from liability for negligence in the withdrawing of any blood specimen. (Emphasis added.)

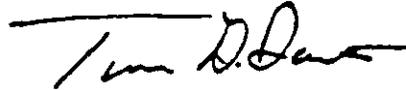
The blood specimen must be withdrawn according to recognized medical standards. What set of circumstance may constitute negligence so as to render the mortician liable in withdrawing blood is a factual issue not subject to resolution by the opinion process.

In your last question you ask who is responsible for the chain of evidence of the blood specimen. The action of the licensed mortician in withdrawing the blood is taken at

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the request or order of the peace officer. We conclude that the possession of the specimen following its withdrawal is under the control of the peace officer giving the order since the mortician is only authorized to withdraw the blood.

Very truly yours,



Tom G. Davis
Assistant Attorney General

TGD/er

APPROVED: Sarah Woelk, Chief
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Opinion Committee

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