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OPINION COMMITTEE

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July 1, 2005

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RETURN RECEIPT REQUESTED

Honorable Greg Abbott
Office of the Attorney General
Post Office Box 12548
Austin, Texas 78711-2548

RQ-0365-GA

Re: Request for an Attorney General Opinion Regarding the Anatomical Gift Act, Removal of Body Parts, body tissue, and Corneal Tissue and Inquests Upon Dead Bodies

Dear General Abbott:

Montgomery County ("County") is a county in the State of Texas that does not have a medical examiner's office and is not part of a medical examiner's district. As such, the County is governed by Article 49, et seq of the Texas Code of Criminal Procedure. Article 49.04(a) (1)-(8) provides as follows:

a) A justice of the peace shall conduct an inquest into the death of a person who dies in the county served by the justice if:

(1) the person dies in prison under circumstances other than those described by Section 501.055(b), Government Code, or in jail;

(2) the person dies an unnatural death from a cause other than a legal execution;

(3) the body or a body part of a person is found, the cause or circumstances of death are unknown, and:

(A) the person is identified; or

(B) the person is unidentified;

(4) the circumstances of the death indicate that the death may have been caused by unlawful means;

(5) the person commits suicide or the circumstances of the death indicate that the death may have been caused by suicide;

(6) the person dies without having been attended by a physician;

(7) the person dies while attended by a physician who is unable to certify the cause of death and who requests the justice of the peace to conduct an inquest; or

(8) the person is a child younger than six years of age and an inquest is required by Chapter 264, Family Code.

Article 49.05 of the Texas Code of Criminal Procedure concerns the time and place of inquest and the removal of the body from the place of death and provides as follows:

(a) A justice of the peace shall conduct an inquest immediately or as soon as practicable after the justice receives notification of the death.

(b) A justice of the peace may conduct an inquest:

(1) at the place where the death occurred;

(2) where the body was found; or

(3) at any other place determined to be reasonable by the justice.

(c) A justice of the peace may direct the removal of a body from the scene of death or move any part of the physical surroundings of a body only after a law enforcement agency is notified of the death and a peace officer has conducted an investigation or, if a law enforcement agency has not begun an investigation, a reasonable time has elapsed from the time the law enforcement agency was notified.

(d) A law enforcement agency that is notified of a death requiring an inquest under Article 49.04 of this code shall begin its investigation immediately or as soon as practicable after the law enforcement agency receives notification of the death.

(e) Except in emergency circumstances, a peace officer or other person conducting a death investigation for a law enforcement agency may not move the body or any part of the physical surroundings of the place of death without authorization from a justice of the peace.

(f) A person not authorized by law to move the body of a decedent or any part of the physical surroundings of the body commits an offense if the person tampers with a body that is subject to an inquest under Article 49.04 of this code or any part of the physical surroundings of the body. An offense under this section is punishable by a fine in an amount not to exceed \$500.

Article 49.10(a)-(j) of the Texas Code of Criminal Procedure deals with autopsies in those cases where the identity of the deceased is known and provides as follows:

(a) At his discretion, a justice of the peace may obtain the opinion of a county health officer or a physician concerning the necessity of obtaining an autopsy in order to determine or confirm the nature and cause of a death.

(b) The commissioners court of the county shall pay a reasonable fee for a consultation obtained by a justice of the peace under Subsection (a) of this article.

(c) Except as required by Section 264.514, Family Code, for each body that is the subject of an inquest by a justice of the peace, the justice, in the justice's discretion, shall:

- (1) direct a physician to perform an autopsy; or*
- (2) certify that no autopsy is necessary.*

(d) A justice of the peace may not order a person to perform an autopsy on the body of a deceased person whose death was caused by Asiatic cholera, bubonic plague, typhus fever, or smallpox. A justice of the peace may not order a person to perform an autopsy on the body of a deceased person whose death was caused by a communicable disease during a public health disaster.

(e) A justice of the peace shall order an autopsy performed on a body if:

- (1) the justice determines that an autopsy is necessary to determine or confirm the nature and cause of death;*
- (2) the deceased was a child younger than six years of age and the death is determined under Section 264.514, Family Code, to be unexpected or the result of abuse or neglect; or*
- (3) directed to do so by the district attorney, criminal district attorney, or, if there is no district or criminal district attorney, the county attorney.*

(f) A justice of the peace shall request a physician to perform the autopsy.

(g) The commissioners court shall pay a reasonable fee to a physician performing an autopsy on the order of a justice of the peace, if a fee is assessed.

(h) The commissioners court shall pay a reasonable fee for the transportation of a body to a place where an autopsy can be performed under this article if a justice of the peace orders the body to be transported to the place.

(i) If a justice of the peace determines that a complete autopsy is unnecessary to confirm or determine the cause of death, the justice may order a physician to take or remove from a body a sample of body fluids, tissues, or organs in order to determine the nature and cause of death. Except as provided by Subsection (j) of this article, a justice may not order any person other than a physician to take samples from the body of a deceased person.

(j) A justice of the peace may order a physician, qualified technician, paramedic, 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 that the person may have been driving while intoxicated.

After a justice of the peace determines that an inquest is required, Section 693.002 of the Texas Health and Safety Code provides as follows:

(a)(1) On a request from a qualified organ procurement organization, as defined in Section 692.002, the medical examiner, justice of the peace, county judge, or physician designated by the justice of the peace or county judge may permit the removal of organs from a decedent who died under circumstances requiring an inquest by the medical examiner, justice of the peace, or county judge if consent is obtained pursuant to Section 693.003.

(2) If no autopsy is required, the organs to be transplanted shall be released in a timely manner to the qualified organ procurement organization, as defined in Section 692.002, for removal and transplantation.

(3) If an autopsy is required and the medical examiner, justice of the peace, county judge, or designated physician determines that the removal of the organs will not interfere with the subsequent course of an investigation or autopsy, the organs shall be released in a timely manner for removal and transplantation. The autopsy will be performed in a timely manner following the removal of the organs.

(4) If the medical examiner is considering withholding one or more organs of a potential donor for any reason, the medical examiner shall be present during the removal of the organs. In such case, the medical examiner may request a biopsy of those organs or deny removal of the anatomical gift. If the medical examiner denies removal of the anatomical gift, the medical examiner shall explain in writing the reasons for the denial. The medical examiner shall provide the explanation to:

- (A) the qualified organ procurement organization; and*
- (B) any person listed in Section 693.004 who consented to the removal.*

(5) If the autopsy is not being performed by a medical examiner and one or more organs may be withheld, the justice of the peace, county judge, or designated physician shall be present during the removal of the organs and may request the biopsy or deny removal of the anatomical gift. If removal of the anatomical gift is denied, the justice of the peace, county judge, or physician shall provide the written explanation required by Subdivisions (4)(A) and (B).

(6) If, in performing the duties required by this subsection, the medical examiner or, in those cases in which an autopsy is not performed by a medical examiner, the justice of the peace, county judge, or designated physician is required to be present at the hospital to examine the decedent prior to removal of the organs or during the procedure to remove the organs, the qualified organ procurement organization shall on request reimburse the county or the entity designated by the county for the actual costs incurred in

performing such duties, not to exceed \$1,000. Such reimbursements shall be deposited in the general fund of the county. The payment shall be applied to the additional costs incurred by the office of the medical examiner, justice of the peace, or county judge in performing such duties, including the cost of providing coverage beyond regular business hours. The payment shall be used to facilitate the timely procurement of organs in a manner consistent with the preservation of the organs for the purposes of transplantation.

(7) At the request of the medical examiner or, in those cases in which an autopsy is not performed by a medical examiner, the justice of the peace, county judge, or designated physician, the health care professional removing organs from a decedent who died under circumstances requiring an inquest shall file with the medical examiner, justice of the peace, or county judge a report detailing the condition of the organs removed and their relationship, if any, to the cause of death.

(b) On a request from a qualified tissue procurement organization, as defined in Section 692.002, the medical examiner may permit the removal of tissue believed to be clinically usable for transplants or other therapy or treatment from a decedent who died under circumstances requiring an inquest if consent is obtained pursuant to Section 693.003 or, if consent is not required by that section, no objection by a person listed in Section 693.004 is known by the medical examiner. If the medical examiner denies removal of the tissue, the medical examiner shall explain in writing the reasons for the denial. The medical examiner shall provide the explanation to:

- (1) the qualified tissue procurement organization; and*
- (2) the person listed in Section 693.004 who consented to the removal.*

(c) If the autopsy is not being performed by a medical examiner, the justice of the peace, county judge, or designated physician may permit the removal of tissue in the same manner as a medical examiner under Subsection (b). If removal of the anatomical gift is denied, the justice of the peace, county judge, or physician shall provide the written explanation required by Subsections (b)(1) and (2).

Chapter 692 of the Texas Health and Safety Code is also known as the Anatomical Gift Act. Section 692.015 of the Texas Health and Safety Code provides as follows:

(a) This chapter is subject to the laws of this state prescribing the powers and duties relating to autopsies.

(b) Sections 692.013 and 692.014 do not affect the laws relating to notification of the medical examiner or justice of the peace of each case of reportable death.

Please assume the following facts:

1. The circumstances of the death meet the criteria set out in Article 49.04 of the Texas Code of Criminal Procedure, i.e., the justice of the peace is required to conduct an inquest.
2. Before the justice of the peace had reached a decision concerning the necessity of an autopsy, LifeGift Organ Donation Center, a qualified organ procurement organization organized under the laws of Texas ("organization"), sought to remove the organs of the deceased pursuant to the family's consent.
3. The justice of the peace refused to allow the removal of the organs by the organization until the justice of the peace had made a decision regarding the potential loss of evidence in the event the organs were removed.
4. The justice of the peace refused to attend organ removal surgery because a decision regarding loss of evidence had not been made at the time the surgery was scheduled to occur.

You are respectfully asked to resolve the following questions:

1. Does the Health and Safety code require the justice of the peace to allow an organ procurement organization to procure the organs of the deceased before the need for an autopsy has been determined?
2. Can the procurement of the organs occur before the justice of the peace has determined whether procurement of the organs will interfere with the course of the investigation?
3. Can the organ procurement organization require the justice of the peace to make a decision regarding the removal of the organs at a time and place determined by the organization or is this a function of the justice court and subject to the court's schedule and/or rules?
4. Does Section 693.002(a)(6) allow payment by the organization of costs incurred that are necessary to aid and assist the justice of the peace in making a determination that the organs or tissue will or will not interfere with the course of an investigation?
5. Can the justice of the peace deny the removal of the organs or tissue upon the request of the district attorney?

A brief with supporting legal arguments follows:

The provisions of the Anatomical Gift Act and the Removal of Body Parts, Body Tissue and Corneal Tissue Act must be read and, if necessary, reconciled with the provisions of the Code of Criminal Procedure that govern inquests and autopsies. If these statutes are not read

together, their apparent conflict results in problems for those counties that do not have a medical examiner. In those counties, the justice of the peace or county judge may be put in the position of making decisions regarding the removal or destruction of potential evidence. These decisions may require medical training or consultation with medical professionals; however, before these decisions are made, the officials may be asked or ordered to allow the organs of a deceased person to be released to an organ donation organization. Just as the justices of the peace may be ignorant or unknowledgeable in medical issues, the organizations who procure organ donation may not have forensic training or law enforcement investigation training. This lack of training and knowledge may result in the unknowing harm to evidence or interference with a criminal investigation into the death of the potential donor if the organ donation occurs before the justice of the peace has made a decision regarding the effect of removal upon potential evidence.

When statutes are in conflict or appear to require interpretation, the entire act must be read to determine if the legislative intent is apparent. Section 692.015 of the Texas Health and Safety Code specifically provides that the Texas Anatomical Gift Act is subject to the laws of this state prescribing the powers and duties relating to autopsies and does not affect the laws relating to notification of each case of reportable death. Chapter 693 of the Texas Health and Safety Code that deals with the removal of body parts, body tissue, and corneal tissue does not contain a section similar to Section 692.015; however, both chapters are a part of Title 8 of the Texas Health and Safety Code concerning death and disposition of the body. Although there is no specific provision making Chapter 693 subject to the laws of this state prescribing the powers and duties relating to autopsies, the chapter clearly deals with anatomical gifts of a specific type, i.e., the gift of organs or other parts of the body.

By its enactment of these laws, the legislature has clearly recognized the importance of and the need to have organs, tissues and corneas available for transplant; however, the legislature also made the donation of anatomical gifts subject to the laws relating to autopsies. The clear intent of the legislature was to ensure that the interests served and protected by the criminal justice system remain superior to those of anatomical gifts.

The conclusion requires that the requirement that an inquest be held in the event of death in certain instances as set out in Article 49.04 of the Texas Code of Criminal Procedure is superior to the provisions under Chapters 692 and 693 of the Texas Health and Safety Code. In fact, the Texas Code of Criminal Procedure requires that an inquest be conducted immediately or as soon as practicable after the justice receives notification of the death. See, Article 49.05, Texas Code of Criminal Procedure. Article 49.10 (e)(3), Texas Code of Criminal Procedure, requires the justice of the peace to order an autopsy if directed to do so by the district attorney or the criminal district attorney.

The justice of the peace, in counties without a medical examiner, should be able to conduct an inquest and determine the necessity of an autopsy in accordance with the law set out in the Texas Code of Criminal Procedure. The justice of the peace is not required by the law to make these decisions in any manner or at any particular time. An organization for organ donation cannot dictate or require a justice of the peace to act at a time and place determined by the organization. The clear language of Section 693.002(a)(1) that says that the justice of the peace "may permit the removal of organs from a decedent" if the circumstances described in subsections (a)(2)-(5) exist. If the justice of the peace has not yet determined if an autopsy is necessary or that destruction of evidence may occur, these subsections are not applicable.

Before a determination is made by the justice of the peace that the organs may be evidence or required for the autopsy, the justice of the peace must be able to consult with law enforcement and medical personnel, if necessary. After this consultation has occurred, the justice of the peace can make an informed determination regarding the necessity of an autopsy or that evidence may be destroyed by organ donation.


Once the justice of the peace determines that an autopsy is necessary, a secondary inquiry is whether the removal will interfere with the subsequent course of an investigation or autopsy. Asking or requiring the justice of the peace to allow the removal of the organs prior to a decision or answer to the secondary inquiry is not authorized under the statute. The donation of organs must occur only after all investigation has been made. Even at the time of the autopsy, the statute authorizes the justice of the peace to deny the anatomical gift. See, Section 693.002(a)(5), Texas Health and Safety Code.

If an autopsy has been ordered, the justice of the peace must be present during the removal of the organs and payment by the organization of actual costs, not to exceed \$1,000, must be made to the county for the performance of this duty by the justice of the peace. See, Section 693.002(a)(6).

Please provide us with an Opinion in this matter.

Sincerely,

MONTGOMERY COUNTY
ATTORNEY'S OFFICE

By: 
David K. Walker,
County Attorney

DKW/aw