

DATE: 03-11-91

CITATION: VAOPGCPREC 25-91
Vet. Aff. Op. Gen. Couns. Prec. 25-91

TEXT:

SUBJECT: Donation of Kidneys for Transplantation.

(This opinion, previously issued as Opinion of the General Counsel 9-73, dated November 9, 1973, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

To: Chief Medical Director

QUESTIONS PRESENTED:

- (1) What is the proper and legal manner for obtaining donated cadaver kidneys?
- (2) Has the VA published a definition of "death" for this purpose?
- (3) What is the position of the Veterans Administration on the status of the "cerebral or brain death" theory?

COMMENTS:

The kidney transplant program constitutes a part of the VA's overall Federal function of providing care and treatment of veterans over which state law, ordinarily, is not controlling. The Federal Government, however, as a matter of comity, and to avoid potential tort claim liability, has allowed its instrumentalities, e.g., VA hospitals, to follow the laws of the state which surrounds the Federal enclave under certain circumstances (e.g., in obtaining consent for surgery and consent to perform autopsies).

The same approach should be utilized with respect to determinations as to "time of death," and the manner in which organs can be obtained as part of the VA kidney transplant program. This policy is reflected generally in M-2, Part XIV, Chapter 7, paragraph 7.03, subparagraphs a and b, which require that copies of locally approved criteria for determining the time of death of the donor i.e., either conventional or brain death, and of the state or local Anatomical Gift Act be submitted with the request for approval of the transplantation procedure by the Chief Medical Director.

Most states and the District of Columbia have enacted legislation which is patterned after the language of the Uniform Anatomical Gift Act, providing for the

donation before death of all or part of one's body for medical or scientific purposes. These acts also provide that prior to death, such gifts can be made by will or by any other signed document, which would include the use of the VA standard consent form, SF 522. In the absence of a gift made pursuant to the above, consent to donate all or part of the decedent's body generally can be obtained from the individual's next of kin. Clearly, therefore, in order to make a valid anatomical gift, the consent provisions of such acts must be closely adhered to.

Provisions of these acts are also applicable to the determination of the time of the donor's death, which is to be made by the attending doctor, or in the absence of an attending doctor, by the doctor who certified death. Furthermore, death must precede transplantation of the donor's organ.

The legal definition of death as determined by the majority of courts still reflects the criterion that has remained unchanged over the past century, that is, cessation of the vital functions of respiration and circulation. With the advent of transplant surgery, however, several proposals have attempted to provide an alternative definition which would be accepted in those situations where the patient's heartbeat and respiration were being maintained by mechanical devices after the brain had ceased to function. While it appears that the "brain death" criterion has received general acceptance by the medical profession, it has not yet been universally adopted as a principle of law. Therefore, since there are apparently no legal precedents to follow regarding these matters, determinations made by physicians as to time of death must continue to be made in accordance with locally accepted practices until other provisions have been made through legislation or by the courts in appropriate cases.

HELD:

The VA policy with respect to the legal and proper manner of obtaining organs for the kidney transplant program must reflect the state or local Anatomical Gift Act provisions and meet the locally accepted criteria for determining the time of the donor's death.

VETERANS ADMINISTRATION GENERAL COUNSEL
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