

OA 12.3-85

14  
10 8/20/85

IN THE  
SUPREME COURT OF FLORIDA

CASE NO. 67,755

STATE OF FLORIDA, ET AL

**FILED**

SID J. WHITE

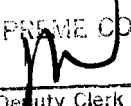
Appellants,

NOV 15 1985

vs.

CLERK, SUPREME COURT

WADE POWELL, ET UX., ET AL

By:   
Chief Deputy Clerk

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTH  
JUDICIAL CIRCUIT IN AND FOR MARION COUNTY, FLORIDA  
OF ISSUE CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE  
BY THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF FLORIDA

BRIEF OF REVEREND THOMAS J. PRICE  
AS AMICUS CURIAE

MELINDA L. McNICHOLS, ESQUIRE  
ARKY, FREED, STEARNS, WATSON,  
GREER & WEAVER, P.A.  
One Biscayne Tower-28th Floor  
Miami, Florida 33131  
(305) 374-4800  
Attorneys for Reverend Thomas J. Price  
District Superintendent  
Miami District  
Florida Conference  
United Methodist Church

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS . . . . .	i
TABLE OF CITATIONS . . . . .	ii
STATEMENT OF THE CASE AND FACTS . . . . .	1
SUMMARY OF THE ARGUMENT . . . . .	2
ARGUMENT. . . . .	4
CONCLUSION . . . . .	9
CERTIFICATE OF SERVICE . . . . .	10
INDEX TO APPENDIX . . . . .	12

TABLE OF CITATIONS

CASES

Danahoo v. Bess,  
200 So. 541 (Fla. 1941) . . . . .

Goldberg v. Kelly,  
397 U.S. 254,  
90 S.Ct. 1011 (1970) . . . . .

Kirksey v. Jernigan,  
45 So.2d 188 (Fla. 1950) . . . . .

Olmstead v. United States,  
277 U.S. 438,  
48 So.Ct. 564 (1928) . . . . .

Rupp v. Jackson,  
238 So.2d 86 (Fla. 1970). . . . .

Yome v. Gorman,  
242 N.Y. 395,  
152 N.E. 126 (1926) . . . . .

Zablocki v. Redhail,  
434 U.S. 374,  
98 S.Ct. 673 (1978) . . . . .

STATUTES

§ 732.9185, Florida Statutes, (1984) . . . . .

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend XIV . . . . .

STATEMENT OF THE CASE AND FACTS

The Reverend Thomas J. Price hereby adopts the Order on Motions for Summary Judgment entered, below as his statement of the case and facts. A copy of that Order has been placed in the appendix for the convenience of the Court.

SUMMARY OF THE ARGUMENT

The removal of tissue and organs from the dead and their transplantation to the living raises important legal issues which cannot be resolved without reference to ethical and spiritual values. Traditional notions of property law are inadequate to describe the relationship involved, and they tend to confuse, rather than clarify, the issues.

The question presented here is whether the State may take tissue from a decedent's remains without even inquiring if the next of kin objects. In this case, the issue is framed by compelling facts. Although the next of kin were available, in fact were in the next room, no effort was made to inquire if they had an objection to the removal of the decedent's corneas. The failure to inquire is conceded. The challenged statute permits removal of corneas in the absence of inquiry or consent.

Section 732.9185, Florida Statutes, is unconstitutional because it authorizes the removal of corneas from decedents within the jurisdiction of the medical examiner without the consent of a person while living, or the next of kin after death, and it does not even require an inquiry to determine whether the next of kin objects to the removal. As such, it constitutes a serious governmental intrusion

into the family's fundamental right to determine the proper disposition of the remains of their dead. Reverence for life and respect for the dead require that the government not be permitted to ignore the family's wishes in this regard, and not be permitted to substitute the judgment of the medical examiner for the judgment of the family on these important questions.

Voluntary donation of organs and tissues clearly provide great benefit to the living. However, the governmental taking of body parts, without even attempting to determine whether the next of kin objects to such a serious intrusion, is simply not consistent with the family and spiritual values involved. Therefore, the statute should be declared invalid, and the decision of the trial court should be affirmed.

## ARGUMENT

THE CHALLENGED STATUTE SHOULD  
BE DECLARED INVALID BECAUSE  
IT INFRINGES ON FUNDAMENTAL  
INTERESTS WITHOUT ADEQUATE  
JUSTIFICATION

The challenged statute should be declared invalid because it infringes on fundamental interests without adequate justification. The statute authorizes medical examiners to remove corneas from decedents within their jurisdiction without seeking or obtaining permission from the next of kin.<sup>1</sup> While this statute thus promotes the availability of corneas for transplants, it permits removal of corneas even where the decedent's family has an objection, and therefore it violates constitutional guarantees.

The relationship between the living and their dead, and especially parents and their dead child, involves

---

<sup>1</sup>While the statute does provide that the corneas of a decedent may not be removed if the next of kin objects, this provision is meaningless because the average family member has no idea that the corneas will be taken unless he objects (consent must be obtained to remove any other tissue or organs from the deceased, Section 732.912, Florida Statutes) and no advance notice of intended removal or meaningful opportunity to object is provided. Compare Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970) (fundamental requirement of due process is notice and opportunity to be heard).

fundamental interests which are beyond the reach of governmental interference, absent the most compelling state interest and then only when there is no less restrictive alternative. This Court has not before been faced with the questions raised by tissue transplantation. Disputes concerning decedent's remains, in the past, have related to a different set of considerations, such as whether next of kin can maintain damage actions for negligent embalming, Danahoo v. Bess, 200 So. 541 (Fla. 1941), for refusing to surrender the decedent's remains to the next of kin except upon payment of an exorbitant fee, Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950) or for unauthorized autopsy, Rupp v. Jackson, 238 So.2d 86 (Fla. 1970). This Court, recognizing the importance of the interest involved, sustained a right of action in each case. However, as this Court discovered in those cases, the language of traditional property law is inadequate to fully describe the relationship between the family and the remains of a deceased family member. That relationship is imbued with spiritual and ethical values which are capable of description in terms of property concepts more commonly used to outline the rights of parties to commercial transactions.

Since the interest involved cannot be adequately described in common commercial terms, is there a more

appropriate legal terminology to describe this interest? The courts, in other areas, have used the legal concepts of liberty and privacy to describe important family interests that should be beyond governmental intrusion except for the most compelling of governmental interests, and then only when no restrictive alternative exists. The United States Supreme Court has recognized that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment includes not only the freedoms explicitly mentioned in the Bill of Rights, but also a freedom of personal choice in certain matters of marriage and family life. Zablocki v. Redhail, 434 U.S. 374, 384-86, 98 S.Ct. 673 (1978) (and cases cited). The interest involved here is similar to the interests which have been recognized as fundamental in other cases, in that important matters of personal choice in family life are involved. Therefore, the same kind of protection afforded in the case of other fundamental rights should be accorded here. Reverence for life and respect for the dead require that the government not ignore the family's wishes with regard to the disposition of their family member's remains. The government should not be permitted to substitute its judgment for that of the family on these important questions.

The benefits available through organ transplants are great, but transplantation of organs from the dead to the living presents important legal and ethical questions. Commercial values do not and should not control our view of this relationship. Spiritual values should be considered in determining how to approach the process of organ and tissue donation. The dead should not be viewed as sources of spare parts to be salvaged in the most efficient manner. Such an approach leads to unacceptable dehumanization. We must make decisions with regard to the availability of cadaver tissue and organs for transplantation without losing sight of "all those promptings and emotions that men and women hold sacred in the disposition of their dead." Yome v. Gorman, 242 N.Y. 395, 402, 152 N.E. 126, 128 (1926) (per Mr. Justice Cardozo).

If involuntary removal is prohibited, tissue will continue to be available by voluntary donation. Therefore, the governmental intrusion authorized by the statute is not justifiable. In fact, the taking of tissues and organs without authorization is not even fairly characterized as a donation. Rather, it is a governmental taking of the most intrusive sort.

In deciding this case, the Court should remember Justice Brandeis' admonition in Olmstead v. United States, 277 U.S. 438, 479, 48 S.Ct. 564 (1928) (Brandeis, J. dissenting):

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.

CONCLUSION

Church groups normally support tissue and organ donation. However, the taking of corneas without even attempting to determine whether the next of kin objects to such an intrusion is simply not consistent with the family and spiritual values involved. Therefore, the challenged statute should be declared invalid, and the decision of the trial court should be affirmed.

Respectfully submitted,

MELINDA L. McNICHOLS  
ARKY, FREED, STEARNS, WATSON,  
GREER & WEAVER, P.A.  
One Biscayne Tower-28th Floor  
Miami, FL 33131  
(305) 374-4800  
Attorneys for Reverend Thomas J. Price  
District Superintendent  
Miami District  
Florida Conference  
United Methodist Church

BY: Melinda L. McNichols  
MELINDA L. McNICHOLS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing  
brief has been furnished by regular U.S. Mail this 15th  
day of November, 1985, to:

JIM SMITH, Attorney General  
LOUIS F. HUBENER, ESQUIRE  
Assistant Attorney General  
Department of Legal Affairs  
The Capitol - Suite 1502  
Tallahassee, FL 32301

DONALD W. WEIDNER, ESQUIRE  
Associate General Counsel  
760 Riverside Avenue  
Jacksonville, FL 32204

JACK SINGBUSH, P.A.  
Post Office Box 906  
Ocala, FL 32670

RICHARD B. COLLINS, ESQUIRE  
CRAIG A. DENNIS, ESQUIRE  
Perkins & Collins  
Post Office Drawer 5286  
Tallahassee, FL 32314

ROBERT L. BLAKE, ESQUIRE  
Assistant County Attorney  
Public Health Trust Division  
Jackson Memorial Hospital  
Suite C - West Wing 108  
Miami, FL 33136

JANET W. ADAMS, ESQUIRE  
333 North Ferncreek Avenue  
Orlando, FL 32803

JAMES T. REICH, ESQUIRE  
606 S.W. Third Avenue  
Ocala, FL 32670

JEROME J. BORNSTEIN, ESQUIRE  
MARK P. LANG, ESQUIRE  
Staff Counsel  
American Civil Liberties  
125 South Court Avenue  
Orlando, FL 32801

ANDREW G. PATTILLO, JR., ESQUIRE  
RUSSELL W. LAPEER, ESQUIRE  
P.O. Box 1450  
Ocala, FL 32678

FREDERICK H. von UNWERTH  
KILPATRICK & CODY  
Suite 500  
2501 M Street, N.W.  
Washington, D.C. 20037

*See page 10*

BY: Melinda L. McNichols  
MELINDA L. MCNICHOLS