

MSC Opinion: In re Certified Question (Waeschle v. Oakland County Medical Examiner)

30. October 2010 By Matthew Nelson

On Friday, October 29, 2010, the Michigan Supreme Court decided *In re Certified Question (Waeschle v. Oakland County Medical Examiner)*, No. 140263. The Court held that a decedent's next of kin do not have a right to possess the decedent's brain that had been removed from the body as part of a lawful autopsy. Justices Young and Davis separately dissented because they did not believe that the Court should have addressed the certified question.

The *Waeschle* case raised the issue of whether a decedent's next of kin had a right, under Michigan law, to possess the decedent's brain which had been removed during a lawful autopsy for the purpose of cremating or burying it. This unusual question arises from a putative class action pending in the United States District Court for the Eastern District of Michigan against the Oakland County Medical Examiner and a putative defendant class of all Michigan counties. The Eastern District initially resolved the question in favor of the plaintiff. On appeal, the Sixth Circuit reversed and ordered the Eastern District to certify the question to the Michigan Supreme Court.

The Michigan Supreme Court reasoned that the issue was controlled by MCL § 52.205(5) which for the time relevant to the litigation provided that all times relevant to the litigation that after an autopsy, the county medical examiner shall promptly return the body to the decedent's next of kin. The statute further provided that a medical examiner may retain portions of the body to detect a crime. The Court concluded that because the statute requires the prompt return of the "body" and permits the medical examiner to retain parts of the body, the statute does not create a possessory right for the next of kin in the brain.

Interestingly, the plaintiff's counsel in this suit brought (and lost) a similar suit in Ohio.