

ryoPreservation Case Report: *The Cryopreservation of Patient A-1099*

by Tanya Jones

This cryopreservation proves that even when an individual does everything right (according to the Alcor membership requirements), things can still go wrong.

Alcor's 66th patient became a member in 1985 and was one of the first 100 people formalizing cryonics arrangements with Alcor. He signed all the paperwork, had his family execute Relative's Affidavits, and arranged his funding through a personal trust. The trust itself was crafted with several pages devoted to his cryonics arrangements, and all annual membership dues were paid with only one tiny interruption in nearly twenty years. The member drafted a will that contained detailed instructions on the cryopreservation arrangements; and though it was occasionally re-written, it always included those same pages regarding Alcor.

We got a call on the morning of October 11, 2004, from the member's Trust attorney, informing us of the pronouncement of legal death. Death had been pronounced on the morning of October 10th in Florida, and we were given the name of a hospital. No other information was available, despite the member having been deceased for more than 24 hours. We got on the phone right away to track down the location of the patient.

It took about a half hour to locate our patient, after going through the hospital, the nursing station, the morgue and finally, to the actual funeral home to which the patient had been removed. When we got the local funeral director on the phone, we received some bad news. As of earlier that morning, the patient had been embalmed and was scheduled for cremation that day. All of this was done at the request of the patient's daughters, and was in direct contradiction to the patient's Last Will and Testament.

We explained the cryonics arrangements to the Florida funeral director, stating that the daughters had no authority to make final disposition arrangements, because as of the moment of pronouncement, custody of the human remains belonged to Alcor. The funeral director asserted that the daughters knew nothing about the cryonics arrangements, and that he wanted to see the relevant paperwork. The paperwork was immediately faxed to him; and we became more concerned, because there was falsehood or forgetfulness at work. (The daughters had been among family members who had executed Relative's Affidavits agreeing to inform Alcor if the member died suddenly and to not interfere with the cryopreservation.) The funeral director agreed to place a hold on the cremation order and to refrigerate the patient, while we worked out the details.

Once the cremation was stopped, we contacted the patient's

attorney to learn more about the circumstances of death. We discovered the member was admitted to the hospital less than two weeks prior and that he had been diagnosed with esophageal cancer and received a prognosis of 6-8 months. The Trust attorney was dismissive of the idea that the daughters were unaware of the cryonics arrangements, and he assured us that the trust was still in force. When asked directly if he knew of any reason we should not proceed as the paperwork directed, he responded that cryopreservation was still something the member very much wanted. Since the paperwork also required that any remains be recovered and cryopreserved, we were committed to moving forward with the recovery.

With the member's written directives and the assurances of his attorney, who had been representing the member since before the original cryonics arrangements had been set in place, we proceeded to contact our Arizona funeral director, Steve Rude, to have him begin processing the paperwork that would allow the transfer of the patient to Alcor. Steve contacted the Florida funeral home to discuss the transport and learned that they intended to proceed with the cremation over our objections. We immediately called the funeral home to advise them that if they were serious about continuing with the cremation, we would be forced to pursue legal action against them.

Working under the assumption that perhaps the funeral home was unfamiliar with anatomical donations, we informed them that the state anatomical gift laws prevent family members from overturning an anatomical gift, once pronouncement of legal death occurred. The funeral director assured us that they would be contacting their lawyers. We began to immediately search for a Florida attorney.

While the search for an attorney was underway, we also did a little looking into the anatomical gift laws specific to the state of Florida. Alcor Board member Michael Seidl found that the Florida Anatomical Gift Act is title XLIV, chapter 765 of the Florida code, Section 765.512(7) does make clear that once the gift has been made, the rights of the donee are paramount. He was unable to find anything that requires funeral homes to cooperate in the making of a gift. Pertinent to our situation was Section 765.512(2), which states:

"If the decedent has executed an agreement concerning an anatomical gift, by signing an organ and tissue donor card, by expressing his or her wish to donate in a living will or advance directive, or by signifying his or her intent to donate on his or her driver's license or in some other

written form has indicated his or her wish to make an anatomical gift, and in the absence of actual notice of contrary indications by the decedent, the document is evidence of legally sufficient informed consent to donate an anatomical gift and is legally binding.”

A couple hours later, we found and retained Florida attorney Kenneth Hemmerle, thanks largely to the recommendation of Alcor Board member Saul Kent. Joe Waynick and I briefed our new attorney on the situation and its urgency; and he agreed to begin immediately reviewing the Florida anatomical gift statutes and to draft a letter enjoining the funeral home from performing the cremation. The member’s attorney was also strongly interested in seeing the cryopreservation carried out and was drafting a similar letter with clauses from the patient’s will that expressly forbade both embalming and cremation. Anticipating the patient’s release to Alcor personnel, we contacted another Florida funeral home to arrange shipment of the remains to Arizona. Unfortunately, we were told that no funeral home would release remains without either a signature from the next of kin or a court order. This boded poorly for a quick resolution, because it was the patient’s next of kin — specifically his two daughters — who were objecting to the cryonics arrangements. On that less-than-pleasing note, the days efforts were concluded.

Early the next morning, we learned that one of the daughters was claiming the member rescinded his cryopreservation arrangements while on his deathbed. This revocation was reportedly done in front of both daughters and a hospital physician. When we contacted him, the physician confirmed the sentiment of revocation and apparently witnessed the patient signing a new will. The doctor’s details were sketchy, and he placed the date of these actions as October 1, 2004.

We were skeptical about this sudden revocation. The member’s intention to continue with his arrangements — despite (or more certainly because of) his recent diagnosis of esophageal cancer — were reaffirmed just prior to his death. We opened our mail that very Monday, and we found a check for the member’s 2005 Membership Dues in the pile. With a date of October 4, 2004, and bearing the member’s signature, this check was written after he was diagnosed with cancer and during the early part of his hospital stay, indicating that he still wished to maintain his arrangements. It has been our experience that none of our members have ever changed their minds while on their deathbeds. Lying in the hospital in an agonal condition has proven to be a time where cryonics arrangements typically provide a great source of comfort to a dying individual.

Nearly 20 years ago, this gentleman decided to have his human remains cryopreserved by Alcor. He documented his wishes extensively through the execution of an anatomical donation designation, a contract, and the provision of a will that clearly dictated his wishes. He maintained his involvement with our organization throughout the decades, promptly paying his annual membership dues and never once indicating reluctance or wavering of any kind. Supporting our belief that the patient still intended to

be cryopreserved, there were additional witnesses who were willing to come forward and swear they had heard our patient say, “I’m going to be frozen,” during this same hospital stay. But with this assertion of revocation and the emergence of a new will (which no one had yet seen), we were now committed to a court battle.

While the lawyers were circling, the patient was being held at the local funeral home. Alcor personnel were not allowed access to the patient, but in the interest of avoiding future legal entanglements, our Florida transport team members were allowed to periodically deliver dry ice. We had decided to hold the patient on dry ice, despite his having been embalmed, because it was the more conservative course for care. We were concerned about the quality of the embalming because the funeral director who performed the procedure informed us that the patient had been quite edematous during the procedure. Placing the patient on dry ice was done by the afternoon of October 13th. It was also an unfortunate acknowledgement of the amount of time it would certainly take to resolve the matter of disposition.

To Court

During our pre-hearing brainstorming, our Florida attorney suggested a new strategy; one that had never before been tested on a cryonics case. After extensive discussion with other Alcor attorneys, his recommendation was that we obtain a *writ of replevin* to ensure the release of the patient to Alcor. A *writ of replevin* is a prejudgment process ordering the seizure or attachment of alleged illegally taken or wrongfully withheld property, under order and supervision of the court, until the court determines otherwise. This type of writ is commonly used to take property from an individual wrongfully in possession of it and return it to its rightful owner.

Historically, this strategy had never been used in a cryonics case because human remains were not considered property in the conventional sense. However, Mr. Hemmerle found precedents had been set in this matter that could be used to support our case. Some of those include:

Stahl v. Necker, Inc., 184 A.D. 85 90; Matter of Forrissi, 170 Misc. 649; Apostle v. Pappas, 154 Misc. 497

These cases established that a surviving spouse or next of kin has the right to the possession of the body of a deceased person for the purpose of burial, sepulture or other lawful disposition, in the absence of testamentary disposition to the contrary.

Lubin v. Sydenham Hospital, 181 Misc. 870 (1943)

This complaint alleged two causes of action. The first was for damages for mental anguish revolving around the disposition of a deceased child and the hospital’s interference with the plaintiff’s right to burial. The second cause of action was a replevin for the possession of the child, which was withheld by the defendant (the hospital). Initially, this replevin was dismissed, but the dismissal was overturned on appeal.

Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991)

This case involved a 1983 action involving a potential property interest in a deceased individual's remains. The court in *Brotherton* noted that, "*a majority of the courts confronted with the issue of whether a property interest can exist in a dead body have found that a property right of some kind does exist and often refer to it as a quasi-property right.*" This quasi-property right acknowledges the right of the next of kin to possess a body for burial and allow for claims against those who disturb human remains.

Four years after *Brotherton*, the Sixth Circuit Court reached the same conclusion in a case arising under Michigan law. See **Whaley v. County of Tuscola, 58 F.3d 111 (6th Cir. 1995)**. In finding a legitimate claim of entitlement in this case, the Sixth Circuit relied on case law surrounding possession of a deceased body for disposition of the remains and also touched on Michigan's Anatomical Gift Act.

Additional case law existed to support the lawful disposition of the member's remains, and one of the strengths of the various Anatomical Gift Acts is that a donation may not be overturned after death. A donation may be revoked prior to death, but only by firmly established means.

With strong supporting case law, we submitted our complaint. Part one of our offense was an action for a *writ of replevin* to recover possession of Alcor's property (the human remains of the deceased member); part two was an action for injunctive relief requiring the funeral home to immediately release the patient to Alcor pending final determination of who was entitled to the body; and part three was an action for declaratory relief. The court issued an order to each defendant (the daughters and the Florida funeral home) to show cause why the body should not be released to Alcor.

The counterclaim of the daughters was that the anatomical gift had been revoked and that Alcor was not an authorized recipient of anatomical gifts in the state of Florida. They also filed for declaratory relief, which is a judge's determination of the parties' rights under a contract or a statute often requested (or prayed for) in a lawsuit over a contract. The theory is that an early resolution of legal rights will resolve some or all of the other issues in the matter. In this case, it would establish whether or not the Alcor contract with the member would remain valid.

Joe Waynick and I flew out to Florida for the evidentiary hearing, arriving early at the door to courtroom #540 on October 28, 2004. When we arrived, the corridor outside the courtroom was full. Many people were there on other business, but when we filed in, we found that the seats on our side of the courtroom were nearly filled. Sitting on the daughters' side of the courtroom were the two daughters, their legal counsel and the legal counsel for the funeral home (who apologized for being stuck in the middle of this dispute). In addition, the physician who had sworn he had heard the anatomical gift revoked was in attendance.

Opening arguments were made, and the witnesses (me

included) were asked to leave the room. Witnesses are not allowed to hear the testimony of other witnesses, so as not to prejudice the proceedings, but the excused witnesses received occasional reports from the courtroom.

The first order of business was examination of the affidavits on the revocation of the anatomical gift. Two witnesses are required by law, one of whom may not be a family member, and those witnesses were both present. The younger daughter filed her affidavit; an affidavit that was ultimately dismissed by the judge because she stood to gain financially in the event the gift did not take place. Florida statutes address this matter of gain in Title VII, Chapter 90 § 90.602, which states:

"(1) No person interested in an action or proceeding against the personal representative, heir at law, assignee, legatee, devisee, or survivor of a deceased person, or against the assignee, committee, or guardian of a mentally incompetent person, shall be examined as a witness regarding any oral communication between the interested person and the person who is deceased or mentally incompetent at the time of the examination."

A second affidavit of revocation was submitted by a doctor of osteopathy, whom we learned was romantically involved with the elder daughter. Though it appeared they had done their homework on how a gift may be legally revoked, the dismissal of one of the affidavits meant that the requirements for revocation were not met.

During the hearing, the new will referenced earlier was produced. This will made no mention of Alcor or cryonics, and distributed the member's estate among several individuals, including the daughters and one person already deceased. The will was drafted by an acquaintance of the daughters and was allegedly signed on the day of the patient's death. Procurement of this new will made it certain that more legal wrangling would be required, as both versions would be argued in probate court.

Later testimony included graphic depictions of embalming procedures by the funeral home personnel. This was presented in an attempt to argue that cryopreservation should not continue because there was no point in completing the procedure. While it is true that the embalming precluded any cryoprotection, the actual cryopreservation could still continue as long as there were remains to submerge in liquid nitrogen as directed by the member. An independent expert testified on our behalf that the embalming did not necessarily preclude future revival.

Alcor CEO Joe Waynick testified on Alcor's behalf. The opposing counsel challenged the scientific validity of cryonics, asserting that the embalming prevented preservation. Joe responded that under these particular circumstances, the embalming almost certainly helped the patient. Because of the length of time it was taking to resolve the custody dispute, the patient would have certainly suffered more physical damage had the embalming not taken place.

Opposing counsel also implied that our retrieval capability

was designed to rescue the patients from members of their own families. Joe pointed out that our stabilization and transport protocols are in fact designed around conventional emergency medical response procedures.

Finally, opposing counsel questioned Alcor's legitimacy as an organ procurement agency authorized to accept human remains in the state of Florida. This issue was rapidly resolved by citing Alcor's previous California legal cases and by reading the Florida Anatomical Gift Act provisions for reciprocity into the record.

Further testimony was dispensed with by the judge, because by this time it was quite late; and the judge determined that he had heard enough to deliver a ruling. The judge then ruled that the patient's anatomical gift was to be upheld and that Alcor would be allowed to take possession of the remains after providing a bond sufficient to cover any damages the daughters might win upon appeal. Although the case was decided in our favor, there is the possibility that it may yet be overturned when the probate proceedings are concluded. However, in a parting statement, the judge commented that upon the daughters' expected appeal, Alcor has a "high probability of success." This order was entered on November 1, 2004.

The daughters have also filed a counterclaim for rescission of contract and declaratory relief essentially arguing that the member revoked the anatomical gift and as such the contract with Alcor was rescinded and that the Court should declare that the contract with Alcor was terminated during the members lifetime. Alcor has filed a Motion to Dismiss the Counterclaim arguing that the daughters have failed to state a cause of action against Alcor. The details are set forth in the motion to dismiss. The daughters' motion to dismiss the claim and Alcor's motion to dismiss the counterclaim will be set for hearing in early 2005. Alcor will also file a claim in the Probate Court as a creditor to recover the debt owed to it as well as the costs and attorney's fees it has incurred in this matter.

Patient Care Aspects

This report has yet to seriously address the quality of patient care provided in this case, because the majority of our standard protocol was not applied. We have little data. Deviation from the typical case started immediately, with a lack of notification of death. The cryopreservation was further compromised by the family instigating an embalming of the body, which impeded our ability to stabilize, transport and cryoprotect this patient. We were fortunate to be able to prevent the cremation, but the sequence of events ensured simple cooling to liquid nitrogen temperatures and long-term care would be all we could provide.

With the date of pronouncement being October 10, 2004, we did not gain custody of the remains until 23 days had passed -- the patient was flown into Phoenix during the late evening on November 2nd. He had been placed on dry ice as of October 13th, but we have no way to verify that the dry ice was well-

maintained or properly positioned. Because of the legal entanglements, Alcor personnel were not allowed access to the patient prior to the court-ordered release of the remains. We do know that when the patient arrived at the Scottsdale facility, his temperature had warmed to -4 degrees C. Our temperature data picks up shortly after his arrival. The patient was cooled to -79 degrees C in 68 hours.

Cooling beyond dry ice temperatures was delayed somewhat, due to anatomical peculiarities. The gentleman was the first patient we've had that was too large to be accommodated by our whole-body pods. During his mortuary preparation, his left hand was placed in a position that proved to interfere with the closing of the conventional pod. We had been warned about his generally large size by members of the Florida transport team, and as a result, were able to design a pair of new pods for larger patients. Because we needed precise measurements to see which design would best suit this case, we had to wait until the patient was in Scottsdale before manufacturing the new pods. We will be having another over-sized pod made, so that patient care is not hampered for the same reason in the future.

Final stage cooling was begun on November 30th, after the patient was transferred into his new pod and into the vapor cooling dewar. (This pod is large enough to consume nearly two whole-body slots in the conventional Bigfoot dewar.) Cooling to liquid nitrogen temperatures took place over 122 hours.

Why This Happened

For all outward appearances, this member did just about everything right. His paperwork was properly executed and in place. He made certain every new version of his Last Will and Testament contained language reaffirming his cryopreservation arrangements. He faithfully paid his Membership Dues for nearly twenty years, and he informed his family of his intentions. Where did he go wrong? The mistake was in providing a financial interest in his trust document for heirs to prevent his cryopreservation. How could this entanglement have been avoided?

Because this member made financial arrangements through a private trust and because that trust contained provisions for the assets to be transferred to the daughters or other heirs if the cryonic suspension was not performed, the next-of-kin stood to gain a great deal from the cremation of this member. All the scientific testimony presented by opposing counsel in this case was to establish that a cryopreservation was impossible after embalming. Perhaps other funding arrangements should be considered by our members and potential members, with such trusts acting as a secondary line of financial defense.

This entire affair makes an even stronger argument for using a separate life insurance policy as a method for funding cryonics and not leaving any of the proceeds to heirs should the cryopreservation not take place. Life insurance proceeds only require a death certificate to be processed, and they cannot be

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attached by an estate during probate proceedings, as long as Alcor is the owner of the policy. Removing the financial incentive to interfere with a members cryopreservation also strengthens the likelihood of a smoother transport.

This case also makes it clear that members who are open about their arrangements stand a better chance of being cryopreserved when faced with relatives contesting the disposition. The judge was strongly influenced by the fact that there were so many witnesses stepping forward to affirm the member's intent and few witnesses to his alleged revocation of his anatomical gift.

Cryonics is still a young industry, and when a person who has been involved since nearly the beginning almost fails to be cryopreserved, it gives us all reason to pause. The lessons of this case are: 1) Be open about your arrangements, and 2) Make sure that no one who might legally stop your cryopreservation benefits if your remains are destroyed.