



**Testimony of David J. Freed  
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**Before the House Judiciary Subcommittee on Family Law  
Regarding House Bill 30**

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Harrisburg, PA**

Good morning. My name is David Freed. I am the District Attorney of Cumberland County and President of the Pennsylvania District Attorneys Association. I am very pleased to be here today, and I appreciate the opportunity to speak to you about HB 30 and the issue of organ donation legislation generally.

From the outset, let me be clear. Pennsylvania's district attorneys support organ donation. I am an organ donor and know that organ donation saves lives. We appreciate that the organs from a single donor may save, or improve, the lives of many people. In fact, in their own ways, prosecutors and organ procurement organizations share a common goal – namely, saving lives. And many, if not most of us, have good working relations with the organ procurement organizations.

I am also mindful that my colleagues and I took an oath committing to pursue justice, hold offenders accountable, and protect the public. And these goals are entirely dependent upon the integrity of criminal investigations. We cannot do justice – for a case or for a victim – if the underlying investigation is incomplete or compromised. In this era of futuristic criminal justice TV shows, juries often have extraordinarily high – even unrealistic – expectations of criminal investigations. I also believe that we must be mindful of victim sensitivity and ensure that the worthy goal of organ donation does not get in the way of being sensitive to the families of victims who have just learned that their loved one has died or will die.

Since this legislation was first introduced, we have worked to try to reach some consensus on the concerns we have with this bill and its Senate companion. We understand other stakeholders have additional sets of issues, but we have tried to provide solutions to the issues we identified. While we have not reached a consensus yet, I can report we have made progress. There have been several in-depth discussions between Donate Life PA and PDAA legislative staff. In March, several of my colleagues and I met with representatives from Donate Life PA in Pittsburgh and I believe it was a productive meeting.

With that in mind, I would like to discuss the concerns we have and where we believe we can go from here.

### **Jurisdictional and Standing Concerns**

First, the bill is lacking guidance on jurisdictional issues. What happens if a crime occurs in one county, and the victim is taken to a hospital in another county? If that victim dies, who from a law enforcement and investigatory perspective should decide whether organ procurement does or does not irreparably harm the criminal case? This is not a theoretical issue. It has happened. Let me provide you the details.

On Friday, November 15, 2013, 2-year-old Sophia Hoffman was taken from her home in Clearfield County to a local hospital. Baby Sophia was barely clinging to life, a victim of traumatic injury believed to have resulted from intentional shaking.

Baby Sophia was airlifted to the University of Pittsburgh Medical Center (UPMC). Shortly thereafter, Sophia was declared brain dead. There were two suspects – her father and her stepmother. Given the baby’s impending death, CORE, the local organ procurement organization (OPO), sought consent to have Sophia’s organs harvested. Sophia’s father agreed.

The Clearfield County District Attorney objected on two grounds: first, he believed that the harvesting would compromise the investigation and prosecution of the person responsible for Sophia’s death. And second, there seemed an obvious conflict in having the prime suspect be the person who consented to the organ harvesting. CORE responded by locating and obtaining consent from Sophia’s mother – a woman who is drug-addicted and had not seen the baby for the preceding eight months.

Based on the disagreement over the organ harvesting, UPMC declared that baby Sophia’s remains would go to the first party to provide a court order.

Ultimately there were competing court orders. The first came from a Clearfield County judge, granting CYS temporary physical and legal custody of the child. This should have ended the matter. But unfortunately, CORE filed a subsequent emergency motion in Allegheny County, seeking to perform the harvesting. In this matter, the medical examiner of Allegheny County agreed with CORE. That night, the court –following an untranscribed telephonic hearing – granted CORE the right to proceed with the organ recovery.

We believe that no due process rights were afforded to baby Sophia. And we believe that since this potential criminal matter belonged to Clearfield County, Clearfield County officials should have had the final say.

The organ harvesting subsequently occurred. The investigation and prosecution may now be seriously jeopardized. Because of the forced organ “donation,” there is a very real possibility that the offender who “consented” to the donation could literally get away with murder. Time will tell, and we certainly hope this will not be the case.

Neither HB 30 nor its Senate companion addresses this situation. That fact is not problematic insofar as the Baby Sophia case occurred after the legislation had been introduced. But the pending legislation gives us an opportunity to address these jurisdictional issues.

To emphasize the importance of this issue and the fact that it is likely to re-occur, cases involving child deaths are particularly prone to such a scenario. When it is suspected that a child has died as a result of abuse or trauma, often a thorough autopsy is absolutely necessary. All other causes of death must be ruled out. The child must be examined for preexisting injuries and disease. Often this precludes organ harvesting, yet reasonable minds could differ on the extent of an autopsy that is necessary. And the question is highly fact-specific.

To compound the problem, when children are facing life-threatening injuries, they are often transported via helicopter to one of the state's three preeminent children's hospitals – in Hershey, Pittsburgh, or Philadelphia. And then, inevitably, there are multiple jurisdictions with an interest in the case, the county where the crime occurred and the county where death occurred.

From our perspective, we believe that law enforcement personnel – especially the coroner or medical examiner – in the county where the crime took place should have the final determination as to whether organ harvesting will impede the criminal investigation. If a homicide took place in my county, I do not think it appropriate that a coroner or medical examiner from a county where a victim may have been transported should be able to make the very critical decision about the impact of organ harvesting on the case. There are disagreements sometimes among coroners. That is fine. My colleagues and I sometimes disagree. Disagreement can be healthy. But in the end I believe the decision should be made by those in the county with jurisdiction over potential criminal matter.

This is not to say that every time a suspicious death occurs there is a battle over organ harvesting. Many, if not most, of my colleagues have a good working relationship with both their medical examiner and the local organ procurement organization. But our concern is that this type of collaboration is not present in every county, and when there is a difference of opinion, there must be a fair and efficient way to resolve the issue.

### **Process for Objecting to Organ Harvesting**

We also have practical concerns regarding the process for denying organ harvesting. As currently drafted, the legislation could be interpreted to effectively put the body in the hands of the OPO and shift the burden to the coroner or medical examiner to object. The coroner or medical examiner can attend the harvesting and object to, and stop, the harvesting at any point and must then issue a written explanation.

It is not clear that this is the intent of the legislation. And in fact the OPOs have told us that it is not. We should, therefore, draft clarifying language.

While we understand that most organ harvesting currently takes place in hospitals, organ procurement organizations themselves are equipped with sterile surgical rooms. Therefore, harvesting could take place at their offices. This is difficult from both a practical perspective – in terms of keeping track of the location of a body – and an evidentiary perspective – as it adds yet another destination, and potential chain of custody issues, before the autopsy finally takes place. Nor would we want a harvesting to begin if we know from the outset that the harvesting will compromise the investigation.

I realize that the chance of a harvesting to occur while a coroner is on his or her way to it may seem far-fetched and something out of an awful movie. And I realize this situation is not likely

to happen. But I want to be certain that not only *will* it not happen, but that it simply *cannot* happen as a matter of law.

Following our recent meeting, the OPOs have shared with us their protocols, and I am impressed by them. Under the protocols, the kind of situation I have just discussed would not happen. But protocols can change, and they are not binding. And we do not know who may be representing the interested parties decades from now who may be interpreting the protocols. Therefore, what I hope is that we can add language to the legislation codifying some of the protocols to make sure this kind of concern cannot happen. During our meeting with the OPOs, we all seemed amenable to attempting to do this.

I would also suggest that the bill include provisions for some state administrative oversight – perhaps through the Department of State or Department of Health. Oversight would help to track and resolve disputes between the organ procurement organizations and county medical examiners and coroners. It would also allow further discussions, updates and sharing of protocols among the stakeholders. One of the things we have learned during the process of analyzing these bills and meeting with our friends from the OPOs is that we did not really know a lot about each other and our practices. Oversight could and should diminish this unintended problem going forward.

Last, I think it is very important you understand why we have been so tuned in on this legislation and where we still lack some comfort. Unfortunately, fairly or not, we have heard too many complaints about the manner in which victim’s families are counseled about potential organ donations. We are very aware of the difficult job that organ procurement organizations have – and the fact that these conversations and decisions happen in the midst of families struggling with the loss of a loved one. But victims’ families and victim advocates have told us that in some situations, the OPOs can get pretty aggressive and lack some sensitivity.

This is not because the representative of the OPO has a bad motive or is trying to badger the family member. But these situations require an extra sensitivity to those who are grieving and forced to make another difficult decision while coping with the loss of a loved one. I am happy to report that language was added to SB 850 to try to help ensure sensitivity. Of course, mere words in a bill are not enough, and we may need to add more, but I was pleased to see the addition of this language.

We also believe that the bill has many laudable objectives, so we are firmly committed to working with other stakeholders to draft compromise language. Thank you for the opportunity to testify today and I am happy to answer any questions you might have.