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Civil proceedings in transplantation cases

SUMMARY

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The following doctoral dissertation elaborates on civil proceedings regulated in the Cell, Tissue, and Organ Recovery, Storage, and Transplantation Act of July 1, 2005 (hereinafter referred to as: T.A. or the Transplantation Act).

This doctoral dissertation consists of seven chapters, an introduction and a summary.

Its first chapter focuses on general issues. The explanation of the basic concepts that identify the subject of the transplant as well as the definitions of 'transplant recipient,' 'donor,' 'living person,' and 'the deceased' can be found there. In addition, the prerequisites for transplantation, including those specific for transplantation from minors, adults and the deceased are discussed in this part of the dissertation. Then, the legal nature of court cases in the field of transplantation *ex vivo* and *ex mortuo* is clarified.

The second chapter of the doctoral dissertation delineates the legal regulation of civil proceedings in the field of transplantation in foreign legal systems, i.e. in Austrian, German and Swiss law. The method of regulating the indicated civil proceedings in the aforementioned legislation has been subjected to a detailed analysis. Furthermore, the chapter discusses the issue of transplantation in the eyes of the European and international laws. This chapter presents also the historical background of the legal regulation of transplantation in Poland and in the world, in particular the evolution and development of civil proceedings in this field. In Poland, regulations dispersed in numerous legal acts were in force for many years and the first document which to some extent cleared the existing legal status was the Act of August 30, 1991 on Healthcare Facilities.

The third chapter is devoted to the issue of consent for the recovery of cells, tissues, and organs. It depicts the legal nature of the patient's consent to a medical procedure, assuming it to be a substantive declaration of will. The consent to the recovery of cells, tissues, and organs, which embraces the subject of chapter four, has been specifically regulated in the provisions of the Transplantation Act. Nevertheless, the provisions of the Act indicate the consent of several entities, i.e. donor, recipient, legal representative, and court. Consequently, the chapter discusses the consent of the abovementioned entities separately. The results of the absence of consent of the donor, recipient, legal representative, and court are also demonstrated in this part.

Chapter fourth describes the procedure for granting consent by the Guardianship Court to recover bone marrow or peripheral blood hematopoietic cells from a minor [art.

12 (2-5) of T.A.J. It presents the issues regarding the body of the above mentioned proceedings, its composition, jurisdiction and the national jurisdiction of Polish courts to examine the cases regarding receiving the approval of the guardianship court for recovering bone marrow or peripheral blood hematopoietic cells from a minor.

Then, the analysis of the issues related to proceedings' participants takes place. It involves in particular:

- legal status of the legal representatives of the minor donor candidate,
- consequence of the disagreement of both parents in a matter referring to the submission of the application to commence the analysed proceeding,
- relationship between the entitlement of the minor above 16 years old to independently submit an application to commence the proceeding and the entitlement of the legal representatives of that minor to submit the indicated application,
- locus standi of the entities referred to in art. 12 (4) of T. A., including substitution of legal representatives in place of a minor donor,
- legal status of a minor candidate for a donor depending on their age, i.e. with the adoption of the age limit of 13 and 16,
- admissibility of representing a minor under the age of 13 by their parents as statutory representatives in a situation where these parents initiated the analysed proceeding, and therefore the decision whether it is necessary to appoint a guardian to represent a minor donor under 13 years of age or not has already been made,
- recipient's legal status, especially whether they constitute the party interested in the case.

Further observations concern the issue of instituting proceedings. As part of this issue, the formal conditions of the application are indicated, in particular the requirement to annex to the application an expert medical opinion stating that a recovery of bone marrow shall not result in predictable impairments of the donor's organism.

The following part is devoted to the proceedings. In the course of conducting these proceedings the hearing of the participants in the proceedings was discussed, with particular emphasis on hearing the minor, and evidence, in particular the opinion of an expert psychologist, the hearing of witnesses and experts, as well as an expert medical opinion stating that a recovery of bone marrow shall not result in predictable

impairments of the donor's organism. Then, the decision of the guardianship court was analysed, including the division into judgements on the merits of the case and procedural decisions. The next part comprises the means of appealing against the decision issued in the analysed proceedings.

Chapter five regards the proceedings related to the consent of the court to perform a recovery of cells, tissues or an organ for the benefit of a non-related donor (i.e. a person who is not a linear relative, a sibling, an adopted person, or a spouse). It defines the bodies of judicial procedures, including their jurisdiction, composition of the court and the national jurisdiction of Polish courts together with the connecting factors determining this jurisdiction. The following part offers the analysis of the group of participants in the proceedings, in particular the status of the applicant, and the possibility of participation of a prosecutor, and other bodies subject to the same rules as the prosecutor, in the proceedings.

The further part of the chapter identifies the issues related to instituting the proceedings. Specific formal conditions of the application are indicated, i.e. the requirement to attach the written recipient's consent to recover cells, tissues or an organ from a specified donor, an opinion of the Committee of Ethics of the National Transplantation Council and an opinion on the justification and usefulness of the procedure given by the head of the team of physicians, which has to perform the transplantation. Attention is also paid to the nature of the proceedings before the Committee of Ethics of the National Transplantation Council aimed at obtaining the abovementioned opinion.

The proceedings are then described. Particular interest is drawn to the purpose of the evidence proceeding, i.e. to determine the existence of premises justifying the issuance of a decision granting the application, and in particular to determine the existence of special personal reasons between the donor and the recipient. The court must be convinced that transplantation is admissible due to special personal reasons in order to exclude the danger of consenting to the recovery of transplantable material on the basis of commercial reasons. Then, the court's decision was analysed with emphasis put on its content, form, features and consequences. The final part of the section discusses the means of appealing against the decision of the district court issued in the analysed proceedings.

Chapter six analyses the course of proceedings concerning the opinion of the Family Court regarding the recovery of cells, tissues and organs in case of reasonable

suspicion of a death resulting from of an illicit act that is a crime and the legal proceedings are conducted against a minor (transplantation *ex mortuo*). The said chapter concerns in particular the Regulation of the Minister of Justice of October 30, 2007 on the manner and procedure of obtaining information from the prosecutor or the Family Court opinion on the absence of any objection to the recovery of cells, tissues and organs from cadavers.

The issues of the legal nature of the proceedings in question were presented in the first instance. The analysed procedure involving the opinion of the Family Court was decided to be incidental to the ongoing proceedings regarding the responsibility of the minor rather than an independent proceeding as to the substance of the case or a secondary proceeding. Mode of proceeding was further defined. Next, the bodies of judicial procedures, their jurisdiction, composition of the court and the national jurisdiction of Polish courts to adjudicate in the relevant proceedings were discussed. The succeeding part offers the analysis of the issues related to the participants in the proceedings, i.e. procedural status and rights of each of them, with particular emphasis on the possibility of a prosecutor's participation in the proceedings. Then, the focus shifts to instituting the proceedings in particular with respect to the entities authorised to submit the application to commence the analysed proceeding and the formal conditions of the said application.

The further part of the chapter involves the analysis of the proceedings related to issuing the opinion of the Family Court. In this section, particular attention is paid to the evidence proceeding. Evidence that can be carried out by the district court in order to express its opinion regarding the collection of transplantable material from human cadaver has been included here.

Further observations regard the issue of a court decision classified as procedural – its content and legal nature are also indicated. The final part of the section discusses the means of challenging the decision of the district court.

Chapter seven presents the issues related to court proceeding costs. It delineates their specific components and principles of their settlement.

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