

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Jennifer Leigh Mclean, and
Josh Francis Desjarlais O'Connor

Plaintiffs.

Case No. 1:22-cv-11003-NMG-1

v.

New England Donor Services,

Defendant.

**NEW ENGLAND DONOR SERVICES, INC'S MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO VACATE EMERGENCY RESTRAINING ORDER**

New England Donor Services, Inc. (hereinafter, NEDS), respectfully submits this Memorandum of Law in support of its *Motion to Vacate the Emergency Restraining Order* (Doc. 5). Given the fast-moving nature of the litigation, NEDS submits this document in advance of the hearing to assist the Court in reaching its decision today. The status quo in this case is not neutral – the status quo is likely deadly.

I. The Plaintiff Cannot Satisfy the Standard for a Temporary Restraining Order

“A preliminary injunction is an extraordinary and drastic remedy that is never awarded as of right.” Peoples Fed. Sav. Bank v. People's United Bank, 672 F.3d 1, 8–9 (1st Cir. 2012). Generally, the moving party must establish:

1. that he is likely to succeed on the merits,
2. that he is likely to suffer irreparable harm in the absence of preliminary relief,
3. that the balance of equities tips in his favor, and
4. that the injunction is in the public interest.

Id. Plaintiff cannot meet this burden.

a. The Plaintiff Cannot Succeed on the Merits

Massachusetts laws apply because the deceased is in Boston. See § 7. [Rights and Duties at Death], Unif. Anatomical Gift Act 1968 § 7 (apply law of state with authority to conduct autopsy). The Uniform Anatomical Gift Act states:

The real question is when have irreversible changes taken place that preclude return to normal brain activity and self sustaining bodily functions. No reasonable statutory definition is possible. The answer depends upon many variables, differing from case to case. Reliance must be placed upon the judgment of the physician in attendance. The Uniform Act so provides.

Id. at commentary. So too, in Massachusetts, the determination of brain death “shall be made in accordance with accepted medical standards.” 105 CMR 130.380 (Anatomical Donations). A person is brain dead they exhibit “irreversible cessation of all functions including the entire brain, including the brain stem, is dead.” *Id.*; see also *Commonwealth v. Golston*, 373 Mass. 249, 252-256 (1977), *cert. denied*, 434 U.S. 1039 (1978) (upholding finding of "brain death" before removal of respirator from murder victim).

Here, pursuant to its standard medical practices, two physicians at Boston Medical Center evaluated the Donor and determined that he was brain dead. NEDS intends to present testimony from a medical expert to support this conclusion. The Court should defer to the expert medical professionals. Given the overwhelming medical evidence in support of this determination, as required by law, the Plaintiff is not at all likely to satisfy her burden and the TRO must be vacated.

b. The Plaintiff Will Not Suffer Harm Absent the Preliminary Relief Because the Donor is Already Deceased

The Plaintiff has not, and cannot, establish that she will suffer harm if the donation continues. The donor is deceased and agreed during his life to donate his organs for transplantation

to help others in need. Now that the donor has passed, that life-saving gift must be honored. Although this is plainly a difficult time for the Plaintiff, as a legal matter, she will not suffer any harm if the donation is allowed to continue. On the other hand, lives literally are on the line if the donation is denied. The heart transplant recipient in Philadelphia, for example, may not receive any transplant if not this one. And given the delay, it is unclear if this transplant is still an option for that specific heart recipient. Other transplant recipients to whom the Donor's gifted organs gave been allocated are also critically ill and may die waiting for transplantation.

c. The balance of equities tips against the Plaintiff

Plaintiff cannot establish that the balance of equities tip in her favor because they do not. The equities strongly favor honoring the donative intent of the deceased by utilizing his organs to save and improve the lives of others. The donor is deceased – two doctors have reached conclusion more than one week ago.

d. The injunction is not in the public interest

Public interest favors donation of organs from willing donors. It is in the public interest to enable this process to flow freely – and quickly. Over 106,000 patients are current waiting for transplants in the U.S. and 18 die every day waiting. The Uniform Anatomical Gift Act in its preamble recognizes the public policy of encouraging organ donation and provides a clear legal framework for donation and medical professionals to rely on given the critically short time frames required for organ donation and transplantation to be successfully accomplished. The Court cannot and should not interpose itself into the process and convert any attempted donation into a potential emergency medical malpractice race to the courthouse.

II. The Plaintiff Lacks Standing to Challenge the Donor's Lawful Donation

Plaintiff has not alleged any facts supporting her standing to challenge this donation. Notwithstanding that Plaintiff presented this complaint as an emergency, the Court cannot and should not simply presume the Plaintiff has the legal standing to bring this controversy to this Court. If this emergency order is permitted to stand, anyone anywhere can effectively prevent organ donation by racing to the courthouse and filing an emergency petition. The results of this precedent may be far-ranging and catastrophic. Life-saving organ donation depends on medical judgment, speed and willing donors. This action threatens not only the lives of the organ transplant recipient beneficiaries in this case, but the lives of beneficiaries anywhere at any time in the future.

III. The Status Quo is Potentially Deadly

It bears repeating that the status quo can -- and likely will -- have catastrophic and fatal consequences.

IV. The Medical Decision is Sound and Credible

Plaintiff has put forth no evidence to corroborate or support a claim that Boston Medical Center, a highly respected professional medical institution, and its highly regarded medical staff, did not make the correct determination when they deemed the Donor brain dead. To the contrary, the evidence presented by the Defendant so far, to be supplemented live at a hearing, establish that appropriate medical decision-making occurred and should be respected.

V. The Donation is Valid

The Donor made a decision in 2012 to donate his organs should the opportunity arise. Unfortunately, that time has come. The donation is valid because it comports with the law of the

Commonwealth of Virginia, which is where it was made. See 2006 Code of Virginia § 32.1-290.

Under Virginia law:

[a]n anatomical gift or organ, tissue or eye donation, regardless of the document making such gift or donation, that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor's death for the eye enucleation, recovery of the brain or other organ or harvesting of skin or bones of the donor.

Id. Here, no revocation occurred and no such revocation has been plausibly alleged by the Plaintiff.

New England Donor Services is required by law to act in accordance with the Donor's anatomical gift and coordinate life-saving organ donation for transplantation. MGL ch 113A section 23 provides:

An individual's decision to make a donation of that individual's own organ or tissue after death shall be complied with and shall not require the consent or concurrence of any other individual after the donor's death. In the absence of a revocation or amendment, health care providers and procurement organizations shall act in accordance with the donor's decision and may take such appropriate actions as necessary to effect the anatomical gift.

Id. The Donor has made a valid anatomical gift of organs for transplant and New England Donor Services must take immediate action to effectuate this life-saving gift.

VI. Conclusion

WHEREFORE, NEDS respectfully requests the Court immediately rescind the emergency restraining order.

Dated: June 26, 2022

Respectfully,

/s David G. Lazarus
David G. Lazarus (BBO #624907)
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CERTIFICATE OF SERVICE

I certify that on June 26, 2022, I emailed a true and accurate copy of this filing, which was filed using the District of Massachusetts CM/ECF system, to the Plaintiff at the email address provided by the Plaintiff on the Complaint:

matthew.burt@yahoo.com

June 26, 2022

s/ David G. Lazarus
David G. Lazarus