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NO.
STATE OF NEBRASKA
OFFICIAL
JAN 12 1998
DEPT. OF JUSTICE

DATE: January 12, 1998

SUBJECT: Whether Legislation That Would Waive a Motor Vehicle Operator's License Fee for an Individual Agreeing to Become an Organ Donor is Permissible Under the Nebraska Revised Statutes and the United States Constitution.

REQUESTED BY: Senator Jim Cudaback
District No. 36

WRITTEN BY: Don Stenberg, Attorney General
Paul N. Potadle, Assistant Attorney General

ANSWER:

A law providing for the waiver of motor vehicle licensing fees for organ donors should be permissible depending on the final language of the statute. Careful drafting of the proposed statute should include consideration of potential free exercise of religion and equal protection arguments and liability questions, such as informed consent.

Discussion

The guiding premise that must be acknowledged when addressing whether the state can waive licensing fees for individuals who elect to become organ donors is that there is no right to operate a motor vehicle guaranteed by the United States Constitution or the laws of Nebraska. In fact, the Nebraska Supreme Court has stated that, "[a] license to operate a motor vehicle is . . . a mere privilege." ***Hadden v. Aitken***, 156 Neb. 215, 222 (1952). Since driving is a privilege granted by the state, and since Nebraska has

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no constitutional or statutory provision concerning how motor vehicle operators' license fees must be set, the legislature has plenary constitutional authority to set the cost of obtaining a state motor vehicle operators' license.

The state may not charge an unreasonable fee. However, generally speaking, courts have been reluctant to find licensing fees "unreasonable" when the State charges too little or nothing for a license. The case law tends to focus on instances where a state charges too much for a fee, there is no rational basis for the fee, or where the fee somehow violates interstate commerce. ***See Ingels v. Morf***, 57 S.Ct. 439 (1937), and ***Checker Cab Co. v. Romulus***, 123 N.W.2d 772, 371 Mich. 232 (1963). Furthermore, there is no case addressing the issue of whether a state may waive the fee for organ donors.

A foreseeable constitutional argument might be made by a person whose religion does not allow organ donation. In ***Quering v. Peterson***, 728 F.2d 1121 (1984), aff'd ***Jensen v. Quering***, 472 U.S. 478 (1985), a Nebraska citizen objected on religious grounds to the statutory requirement that driver's licenses include photographs. The U.S. Court of Appeals for the Eighth Circuit held that the statutory requirement placed an "unmistakable burden" on Quering's religious beliefs and that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." ***Quering***, 728 F.2d 1125-1126. It is doubtful that the fee for a license would be considered an "unmistakable burden" on a religious belief. Even if it were, the state's interest in promoting organ donation might be viewed as an interest of the "highest order", justifying the "burden." Any constitutional challenge to the legislation would be more likely to be raised as an equal protection argument. The legislation should withstand such a challenge as long as the classification drawn by the statute -- those who pay for the licenses and those who do not -- is rationally related to a legitimate governmental purpose. ***See, e.g., Cleburne v. Cleburne Living Center***, 473 U.S. 432 (1985). The promotion of organ donation should satisfy the rational basis requirement.

An additional consideration is whether the proposed statute would create a liability risk for the state. The question is basically whether the state would be liable for lack of informed consent, or similarly, whether the incentive of not having to pay licensing fees would affect the legitimacy of the donor's decision. The informed consent issue could be addressed through a provision in the law that would require that the individual be advised of the consequences of the decision to become an organ donor.

Finally, depending on the final language of the statute, there may be a conflict with the Uniform Anatomical Gift Act unless there is a provision that would allow the donor to revoke the gift. ***See*** Neb. Rev. Stat. §71-4806 (1996). The proposed statute should offer the donor some means of revocation, although the legislature could include a provision whereby an individual would pay for the license if the gift were revoked.

Conclusion

The proposed statute to allow the waiver of motor vehicle licensing fees to individuals who agree to become organ donors would appear to be permissible and constitutional under the Nebraska Revised Statutes and the Constitution of the United States. Consideration should be given to free exercise of religion and equal protection arguments in the drafting process. The language of the statute should also provide that potential donors be given adequate information about organ donation before they consent to donation, and some means to revoke the donation, to avoid possible state liability. If these issues are addressed prior to enactment of the law, the statute should be permissible and constitutional.

Sincerely,

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