

The 2006 Revised Uniform Anatomical Gift Act—A Law to Save Lives

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At its July 2006 Annual Meeting, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved a Revised Uniform Anatomical Gift Act, a revision that was three years in the making, and involved the active participation of numerous stakeholders, lawyers, judges, physicians, and others. Given the life-saving goals of this effort, NCCUSL hopes to see this act adopted by all state legislatures within the next two years. As Howard J. Swibel, President of NCCUSL, stated: “Rarely do we as virtual legislators have the opportunity to literally save people’s lives. This is such an opportunity, and we must seize it in earnest, since thousands are waiting for life-saving organ transplants.”

THE ORGAN DONATION CRISIS

As of November 2006, over 94,000 Americans were awaiting life-saving organ transplants.¹ Approximately nineteen of these patients die every day while still waiting.² No longer merely a tragedy, the growing divide between the number of people awaiting transplants and the number of available organs has become a national health crisis.³

The vast majority of organs available for transplant in the United States come from deceased donors (“anatomical donors” or “UAGA donors”).⁴ Each deceased donor may

give as many as seven solid organs for transplantation,⁵ in addition to eyes and numerous tissues (including bone) for treatment of burns, cancers, blindness, spinal injuries, among many other conditions. Thus, for each potential donor lost—whether due to legal ambiguity, system error, inefficiency, family dynamics, or simple delay—it is highly likely that a number of lives will be lost and that at least fifty people will lose the opportunity to benefit from tissue and eye donation. Research indicates that nearly nine in ten Americans support organ donation generally,⁶ yet more than 40% of potentially transplantable organs are buried or cremated,⁷ by conservative estimates.⁸ It is apparent that much of the failure to save lives on this transplant list can be attributed to factors other than the generosity of the American people, which appears to be going strong.⁹

THE SHORTCOMINGS OF THE UNIFORM ANATOMICAL GIFT ACTS OF 1968 AND 1987

It was against this bleak backdrop that the Association of Organ Procurement Organizations (AOPO) reviewed the anatomical gift laws of fifty-four different jurisdictions,¹⁰ all of which have in place either the original 1968 UAGA or its 1987 revision, often with additional jurisdic-

tion-specific modifications. AOPO is a nonprofit organization that represents all federally designated organ procurement organizations (OPOs).¹¹ After it had identified numerous problems, discussed below, AOPO approached NCCUSL, the group that had promulgated both versions of the UAGA, to see if it would be willing to work on yet another revision.¹²

NCCUSL has worked for the uniformity of state laws since 1892.¹³ It is a nonprofit, unincorporated association comprised of commissions, one from each of the fifty states and also from the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. Each jurisdiction determines the method of appointment for its commission, as well as the number of individuals appointed. These individuals, called commissioners, come together as the National Conference to study and review the law of the states and to determine those areas that should be uniform. After identifying such areas, the commissioners propose and draft statutes specifically addressing them.

AOPO found the following problems among the current anatomical gift laws:

- The anatomical gift laws are hardly uniform, even though every jurisdiction had adopted the original

UAGA within two years of its 1968 promulgation by NCCUSL. The 1987 revision was adopted only sporadically, and often only in part.¹⁴ Moreover, many states, such as Texas, New Jersey, California, Iowa, Wisconsin, Michigan, and New York, enacted unique versions, touching upon such diverse issues as donor-card signatures, death-record reviews, medical-examiner cooperation, tax incentives, and drivers' license donor registries. Non-uniformity is exacerbated by the fact that many states' anatomical gift acts fail to resolve choice-of-law and conflicts issues, such as how to deal with a document of gift drafted in a state other than the one in which the donor dies.

- Since the late 1980s, federally designated OPOs have administered the process of assessing and obtaining authorization for anatomical gifts.¹⁵ Under federal law, OPOs also are responsible for assuring that anatomical gifts are properly managed, recovered, and allocated according to the national waiting list maintained by the federally mandated Organ Procurement and Transplantation Network (OPTN). The nonprofit United Network for Organ Sharing (UNOS) currently runs the OPTN under contract with the federal government. The 1968 and 1987 versions of the UAGA fail to address the roles of these entities. In fact, some provisions of existing anatomical gift acts flatly contradict federal law, regulation, or policy. For example, since 1998, the Medicare Conditions of Participation (COPs)¹⁶ have required Medicare-participating hospitals to maintain affiliation agreements with OPOs. Furthermore, the COPs permit only specially trained personnel to approach families with requests for donation. Yet the anatomical gift acts in many states imply that hospitals bear the sole responsibility for interacting with donor families, and many still require hospitals to seek organ donation preferences upon

admission. Some states ameliorated conflicts such as these by drafting amendments reflecting the federal regulatory scheme, either to their anatomical gift act or to their hospital-licensing regulations. In more than a few cases, such amendments were "tacked on" to existing acts, creating internal statutory conflict.¹⁷

- Increasingly, motor-vehicle licenses and Internet-based donor registries are being used as means to permanently and accessibly record documents of gift. Yet there is no standard definition of a donor registry, and no core requirements for their establishment or function.
- Healthcare agents or proxy holders under a durable healthcare power of attorney are not entitled to authorize post-mortem organ donation under the 1968 and 1987 UAGAs. Multiple decision-makers therefore are potentially involved in end-of-life decisions about treatment, ventilation withdrawal, and post-mortem donation. Moreover, individuals who want a partner or other individual to make post-mortem donation decisions on their behalf cannot effectuate this wish under prior UAGAs.
- The 1987 UAGA explicitly provides that no other person may revoke a document of gift and that the assent of no other person is required for a gift to be valid.¹⁸ This arguably had been the implicit intent of the 1968 UAGA. Yet some OPOs and hospitals fail to follow the existing law, causing AOPO and others to seek stronger and clearer language to further reinforce the legal finality of a document of gift.
- Most importantly, AOPO sought changes to provisions that frequently and unfairly thwart a family's wish to donate. Specifically, under both the 1968 and 1987 UAGAs, a single member of a class may veto an anatomical gift, irrespective of the number of other members in the same class that favor the making of

a gift.¹⁹ Thus, if a decedent has no surviving spouse but has ten children, the "No" vote of one child trumps the "Yes" votes of the remaining nine. The prior UAGAs sanction a failure of majority rule that likely contravenes the decedent's wishes and that, more striking, also leads almost invariably to waiting-list deaths. This imbalance serves neither autonomy, nor altruism, nor the public good.

In light of these problems, NCCUSL decided to go forward with another revision that builds upon the concepts found in earlier versions, but that also includes a number of significant changes addressing the problems noted above. In addition to other improvements, the 2006 Revised Uniform Anatomical Gift Act warrants the careful and serious consideration of every jurisdiction for complete and uniform enactment.

THE 2006 REVISED UNIFORM ANATOMICAL GIFT ACT

The Revised Uniform Anatomical Gift Act of 2006 (2006 UAGA) relates only to the recovery of parts (organs, eyes, and tissues) from deceased donors, although anatomical gifts from living donors are becoming increasingly common.²⁰ Furthermore, the 2006 UAGA continues to adhere to the so-called "opt-in" system under which no individual is a donor absent an affirmative gift of his or her parts.

Like prior versions, the centerpiece of the 2006 UAGA is the concept of "first-person" consent, under which no other person can alter the individual's decision to donate his or her parts after death. The 1987 UAGA purported to adopt that concept through language making an individual's gift "irrevocable," but, in practice, some procurement organizations reportedly ignored the wishes of a donor if surviving family members objected. While the 2006 UAGA does not use the language of irrevocability, it nonetheless accomplishes that goal

by its strengthened language expressly barring a person from “making, amending, or revoking” an anatomical gift of the donor’s parts if the donor made a gift of them.²¹ It would be unlawful for a procurement organization to act upon an attempted revocation by surviving family members.

The 2006 UAGA facilitates donation by expanding the list of individuals who may make an anatomical gift on a donor’s behalf both during the donor’s life and thereafter. For example, it explicitly authorizes a parent of a minor, a guardian of an individual, and, most importantly, an agent acting under a healthcare power of attorney to make an anatomical gift during the life of the child, ward, or principal.²² Such a gift then bars others from revoking the gift after the child, ward, or principal dies.²³ The 2006 UAGA also authorizes a minor who is eligible to obtain a driver’s license or permit to make a gift without parental consent,²⁴ although a parent of the minor can revoke the gift if the minor dies under the age of 18.²⁵ The minor can make that gift on any type of document of gift, not only on a driver’s license or permit.²⁶

The 2006 UAGA also expressly provides for the making of an anatomical gift on a donor registry, in addition to donor cards and driver’s licenses.²⁷ In time, donor registries may become the primary device used to make anatomical gifts. The 2006 UAGA allows the appropriate state agency to establish, or contract for the establishment of, a donor registry.²⁸ It also sets forth three criteria for a well-designed donor registry: (1) that it allow a donor or other authorized persons to make a gift on the registry by way of statement or symbol, (2) that it be accessible to all procurement organizations to determine whether an individual at or near death has made, amended, or revoked an anatomical gift, and (3)

that it be accessible to donors, authorized persons acting on their behalf, and procurement organizations on a 24/7 basis.²⁹ Private organizations may create donor registries without a contract from the state, but they must still satisfy the same three criteria.³⁰

If a decedent dies without having made an anatomical gift during life, the 2006 UAGA provides that a gift can be made on the decedent’s behalf by his or her spouse, adult children, parents, adult siblings, and grandparents.³¹ The previous versions of the UAGA also empowered these classes,³² but the 2006 UAGA expands upon the list by adding the decedent’s adult grandchildren,³³ as well as any adult who exhibited special care and concern for the decedent.³⁴ It also adds the individual who had been acting as the decedent’s agent under a healthcare power of attorney at the time of the decedent’s death.³⁵ The 2006 UAGA accords first priority to such an agent.³⁶ If none of these persons is reasonably available to make an anatomical gift, the gift can be made by the person having the authority to dispose of the decedent’s body.³⁷ This individual could be a coroner or medical examiner, hospital administrator, or government official.

The 2006 UAGA also changes prior law regarding anatomical gifts from classes consisting of multiple members, such as children. Under the 2006 UAGA, any member of a class may make a gift if he or she is unaware of any objections by other members of the class.³⁸ If an objection is known, then the gift can only be made by a majority of the class members who are reasonably available.³⁹ If, for example, a decedent has three children, any one of them can make a gift on the decedent’s behalf, unless that child knows that one of his or her siblings objects. If such an objection is known, then the

gift can be made only by the majority of those children who are reasonably available. Thus, if all three children are reasonably available and an objection is known, two of them must agree to donate before a gift is made. If only two of them are reasonably available and an objection is known, they must agree, and the gift is made despite the objections of the third child, who is not reasonably available. Class members who are not reasonably available do not get to participate in the decision whether to make an anatomical gift.⁴⁰ This was a purposeful choice because a known objection by a person who is not reasonably available may be based upon faulty information about the effects of a gift or other concerns that could have been ameliorated had that person been reasonably available to discuss the matter with the relevant procurement organization.

Anatomical gifts can be made for the purposes of transplantation, therapy, research, or education. Prior law, unlike the 2006 UAGA, made no attempt to prioritize these purposes, either when the donor authorized all four, when the donor authorized some, or when the donor failed to specify any. Also, under the prior UAGAs, it was unclear which purposes a donor intended when he or she manifested his or her intent merely by checking a box marked “organ donor” or by placing a symbol or statement on his or her driver’s license. Anecdotal evidence suggests that these donors contemplated only transplantation and therapy, not research or education. Lastly, prior law did not specifically identify the persons to which gifts pass. The 2006 UAGA resolves these issues by setting forth a number of default rules to guide the interpretation of ambiguous documents of gift (*See Table*).⁴¹

The 2006 UAGA creates a number of rights and duties for procurement organizations,⁴² many of which were

Table: Rules Governing the Interpretation of Ambiguous Documents of Gift

<i>Gift of</i>	<i>Purpose</i>	<i>Named donee or custodian</i>	<i>Gift passes to:</i>
Whole body specified or specified part	Research or education	Named hospital, accredited medical school, dental school, college or university	Hospital, accredited medical school, dental school, college or university as named.
Specified part	Transplantation	Named individual who is also the recipient of the gift	Named individual, unless the part specified cannot be transplanted into the named individual, in which case, the specified part passes to the appropriate OPO as custodian, or to the appropriate eye bank or tissue bank.
Specified part	One or more specified purposes, prioritized	None named	Follow the specified priority, changing the purpose if higher purposes are not possible. If the gift is for the purpose of transplantation or therapy, the part passes to the appropriate OPO as custodian, or to the appropriate eye bank or tissue bank. If the gift is for the purpose of research or education, to the appropriate eye bank, tissue bank or organ procurement organization.
Specified part	One or more specified purposes, not prioritized	None named	If multiple purposes, the following priority applies: transplantation or therapy, and then research or education.
Specified part	None specified	None named	The part may be used only for transplantation or therapy, and the part passes to the appropriate OPO as custodian, or to the appropriate eye bank or tissue bank. Then follow the rules for passage of the gift where the purposes are prioritized.
No parts specified	One or more specified purposes, prioritized	None named	Follow the specified priority, changing the purpose if higher purposes are not possible. If the gift is for the purpose of transplantation or therapy, the parts pass to the appropriate OPO as custodian, or to the appropriate eye bank or tissue bank. If the gift is for the purpose of research or education, the parts pass to the appropriate eye bank, tissue bank or organ procurement organization.

Table: Rules Governing the Interpretation of Ambiguous Documents of Gift

<i>Gift of</i>	<i>Purpose</i>	<i>Named donee or custodian</i>	<i>Gift passes to:</i>
No parts specified	One or more specified purposes, not prioritized	None named	If multiple purposes, the following priority applies: transplantation or therapy, and then research or education. Then follow the rules for passage of the parts where the purposes are prioritized.
No parts specified*	None specified	None named	The whole body may not be donated. The part may be used only for transplantation or therapy, and the part passes to the appropriate OPO as custodian, or to the appropriate eye bank or tissue bank.

*A mere “general intent” to be either a “donor” or “organ donor,” either expressly or by symbol.

incorporated in prior versions.⁴³ But, some additional ones have been added. For example, if a hospitalized patient is referred to a procurement organization to determine whether that patient is a prospective donor, measures necessary to ensure the medical suitability of the patient’s parts may not be withdrawn, unless it is known that the patient had expressed a contrary intent.⁴⁴ The 2006 UAGA imposes upon procurement organizations the affirmative obligation to conduct a reasonable search for the parents of a minor donor to provide them with an opportunity to revoke the minor’s anatomical gift.⁴⁵ Similarly, if a prospective donor has not made an anatomical gift, the procurement organization must conduct a reasonable search for any person having priority to make an anatomical gift upon the prospective donor’s death.⁴⁶

The 2006 UAGA provides that a document of gift is valid if executed in accordance with the laws of the state in which the gift is made or the laws

of the state where the person making the gift is domiciled, has a place of residence, or is a national.⁴⁷ Procurement organizations and other persons can presume individuals who sign a document of gift are who they say they are, unless it has actual knowledge that they are not.⁴⁸

Even if a prospective donor has a declaration or advance healthcare directive instructing the withdrawal or withholding of life-support systems, measures necessary to ensure the medical suitability of organs for transplantation or therapy will not be withdrawn or withheld, unless the declaration or advance healthcare directive expressly so provides.⁴⁹ Thus, the 2006 UAGA adjusts the potential tension between the desires of individuals to donate organs, and the desires of individuals not to have their lives unduly prolonged.

Lastly, the 2006 UAGA includes two comprehensive sections relating to the interactions between procurement organizations on the one hand,

and coroners and medical examiners on the other.⁵⁰ It eliminates provisions found in the previous versions that allow coroners and medical examiners to donate parts under certain circumstances. These provisions have run into legal difficulties in the courts.⁵¹ Under the 2006 UAGA, coroners and medical examiners cannot make an anatomical gift on the behalf of an individual under their jurisdiction unless the individual, or other authorized persons, such as agents, family members, guardians, and close friends, have made such a gift. However, if the individual did not make a gift, and if other authorized persons did not make a gift because they were not reasonably available, then the coroner or medical examiner has the authority to make the gift. The 2006 UAGA, through a number of rules, also directs procurement organizations and coroners and medical examiner to cooperate in maximizing donation opportunities.

In sum, the 2006 UAGA incorporates a number of important new features

that will increase organ, tissue, and eye donation. It addresses and resolves the shortcomings of its previous versions, while taking into account medical and legal advances that have occurred since the last revision. As the organ donation crisis continues to grow, the 2006 UAGA will play a significant role in any solution, but only if adopted by most, if not all, state legislatures.

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END NOTES

- 1 United Network for Organ Sharing (UNOS), www.unos.org (last visited Nov. 21, 2006).
- 2 U.S. Dep't of Health and Human Servs., Health Resources and Servs. Admin., Healthcare Sys. Bureau, Div. of Transplantation (HHS/HRSA/HSB/DOT), www.organdonor.gov (last visited Nov. 21, 2006).
- 3 The difference between the number of individuals on the national waiting list at year end and the number of individuals who annually received organs increased from 22,185 individuals in 1995 to 59,347 in 2004. HHS/HRSA/HSB/DOT, 2005 ANNUAL REPORT OF THE U.S. ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK AND THE SCIENTIFIC REGISTRY OF TRANSPLANT RECIPIENTS: TRANSPLANT DATA 1995-2004 tbls.1.4 & 1.10 (2005), available at www.optn.org/data/annualReport.asp [hereinafter 2005 OPTN/SRTR ANNUAL REPORT 1995-2004].
- 4 In 2004, about three out of every four transplanted organs came from a deceased donor. *Id.* at tbl.1.7.
- 5 These organs are the heart, lungs, liver, pancreas, two kidneys, and small intestine.
- 6 GALLUP ORG., INC., THE AMERICAN PUBLIC'S ATTITUDES TOWARD ORGAN DONATION AND TRANSPLANTATION: A SURVEY (1993), available at www.transweb.org/reference/articles/gallup_survey/gallup_index.html.
- 7 2005 OPTN/SRTR ANNUAL REPORT 1995-2004, *supra* note 3, at tbl.II-2 (showing that, in the first four months of 2005, 57.2% of potential donors actually became donors).
- 8 While UNOS states that about 40% of organs go unused, some scholars estimate that number to be closer to 60%. See NAT'L ACADEMIES, INST. OF MED., BD. ON HEALTH SCIS. POLICY, COMM. ON INCREASING RATES OF ORGAN DONATION, ORGAN DONATION: OPPORTUNITIES FOR ACTION 127 (2006), available at Nat'l Academies Press, www.nap.edu (search for "Organ Donation: Opportunities for Action").
- 9 See GALLUP ORG., INC., *supra* note 6. The same survey showed that 37% and 32% of respondents were "very likely" or "somewhat likely," respectively, to donate their own organs. *Id.*
- 10 AOPO surveyed the following jurisdictions: all fifty states, the District of Columbia, Guam, and the U.S. Virgin Islands.
- 11 See www.aopo.org (last visited Nov. 21, 2006) for more information on AOPO.
- 12 It should be noted that AOPO was not alone in identifying the need for statutory revision. The U.S. Department of Health and Human Services Advisory Committee on Organ Transplantation issued recommendations in May of 2003, which called for an update after recognizing the non-uniformity among the states with regard to the UAGA.
- 13 See www.nccusl.org (last visited Nov. 21, 2006) for more information on NCCUSL.
- 14 By 2003, it had become difficult to separate those states that had adopted the 1987 changes from those that were non-uniform, due to the variety of amendments in the sixteen years since the 1987 promulgation.
- 15 National Organ Transplant Act of 1984, Pub. L. No. 98-507 (codified at 42 U.S.C. §§ 273-74).
- 16 42 C.F.R. § 482.45.
- 17 Compare N.Y. PUB. HEALTH LAW art. 43 with N.Y. COMP. CODES R. & REGS. tit. 10, § 405.25.
- 18 UNIF. ANATOMICAL GIFT ACT § 2(h) (1987) [hereinafter 1987 UAGA].
- 19 1987 UAGA § 3(d), § 6(c).
- 20 Living donations raise distinct issues best left to other law.
- 21 UNIF. ANATOMICAL GIFT ACT § 8 (2006) [hereinafter 2006 UAGA].
- 22 2006 UAGA §§ 4, 5.
- 23 2006 UAGA § 8(c).
- 24 2006 UAGA § 4(1)(b).
- 25 2006 UAGA § 8(g), (h).
- 26 2006 UAGA §§ 4(1)(b), 5.
- 27 2006 UAGA § 5.
- 28 2006 UAGA § 20(a).
- 29 2006 UAGA § 20(c).
- 30 2006 UAGA § 20(e).
- 31 2006 UAGA § 9(a)(2)-(5), (7).
- 32 1987 UAGA § 3.
- 33 2006 UAGA § 9(a)(6).
- 34 2006 UAGA § 9(a)(8).
- 35 2006 UAGA § 9(a)(1).
- 36 *Id.*
- 37 2006 UAGA § 9(a)(10).
- 38 2006 UAGA § 9(b).
- 39 *Id.*
- 40 *Id.*
- 41 2006 UAGA § 11.
- 42 2006 UAGA § 14.
- 43 1969, 1987 UAGA *passim*.
- 44 2006 UAGA § 14(c).
- 45 2006 UAGA § 14(f).
- 46 2006 UAGA § 14(g).
- 47 2006 UAGA § 19(a).
- 48 2006 UAGA § 18(c).
- 49 2006 UAGA § 21(b).
- 50 2006 UAGA §§ 22, 23.
- 51 See, e.g., *Newman v. Sathyavagiswaran*, 287 F.3d 786 (9th Cir. 2002); *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991).