
MEMORANDUM

DATE: 6/06/2006
TO: UAGA DRAFTING COMMITTEE AND OBSERVERS
FROM: SHELDON F. KURTZ, NATIONAL CONFERENCE REPORTER
RE: FOR COMMITTEE CONSIDERATION

1. Background:

One of the innovations of this act is the creation of default rules to guide the interpretation of documents of gift (such as drivers' licenses) that state nothing more than an intent to be an "organ donor" or "donor." Early on the Committee made the policy choice that an expression of a general intent would only result in a gift of parts, not the whole body. The idea was that donors who expressed a general intent would likely want their parts used for transplantation or therapy only, not their whole body used for research or education.

In April, we also approved a nuance to the general intent rule providing that if there was only a general intent to be a "organ donor," parts could be used for transplantation, therapy, research, or education with priority given to the first two. Thus, if a part could not be used for transplantation or therapy, it would be used for research or education. That works well when the determination is made that a part cannot be used for transplantation or therapy after the part is removed from the body, as it would be pointless to return it.

However, in some cases a decision is made that a donor's parts cannot be used for transplantation or therapy before the parts are recovered from the body. In this case, the [act] as drafted would say that the part must be used for research and education. Now, since we have been told that the entire body is nothing but the sum of organs, eyes, and tissue, the possible effect of a judgment that all parts cannot be used for transplantation and therapy prior to their recovery is that all parts (i.e., the entire body) can be used for research or education. Thus, it is possible that the statute as written does what we did not want it to do, that is, to allow a general statement of donative intent to result in the use of the whole body for research or education when none of its parts can be used for transplantation and therapy.

Another way of thinking about this issue is to ask the question: Should parts be used for research and education absent an express consent by a donor? This issue, by the way, should not arise when a gift is made under Section 9 by surviving family members because the procurement organizations can always make clear what the purpose of the gift is and obtain the necessary consents when dealing with families. The ability to do that does not exist when donors have made gifts before death.

I believe that Committee must discuss this issue and hear as much as possible from our observers at the Saturday morning meeting in Hilton Head. I have offered to the observers what I think is a viable fix (see 2 below).

Here is how the changes would work. Under revised section 11 when there is no named person to receive a gift under subsection (a), there are three distinct classes of donors. Under 11(b) are donors who have specified parts and purposes; under 11(c) are donors who have specified parts but no purpose; and under 11(d) are donors who have not specified parts or purposes. (No provision is made for donors who specified purposes but not parts).

Section 11(b) provides that if both parts and purposes are specified, the parts go to the appropriate procurement organization but, it includes the priority rule contained in section 11(d) of the annual meeting draft, so that, if all four purposes (transplantation, therapy, research, and education) are specified, transplantation and therapy have the priority.

Under both 11(c) and 11(d) if no purposes are specified, the gift can only be used for transplantation or therapy. However, if the document of gift specifies less than all four purposes or, as a result of the application of subsections (c) and (d), the gift is limited to transplantation and therapy only, then the appropriate procurement organization could seek the consent of the family member under Section 9 to expand the purpose of the gift. The family member would not be barred under Section 8 because the bar provision in Section 8(a) is made subject to the provisions of both subsection (g) and (h). For example, suppose a donor's driver's license states only that the donor is an "organ donor." Under section 11(c), the donor's parts can only be used for transplantation or therapy. If, however, a procurement organization wanted to use the parts for research or education, family members would not be barred by Section 8 from consenting to the use of the parts for either of these purposes.

2. Possible revisions to sections 4, 8, and 11

SECTION 4. WHO MAY MAKE ANATOMICAL GIFT BEFORE DONOR'S

DEATH. Subject to Section 8, an anatomical gift of a donor's body or part may be made during the life of the donor for the purpose of transplantation, therapy, research, or education in the manner provided in Section 5 by:

(1) the donor, if the donor is at least [18] years of age or is under [18] years of age and is:

(A) an emancipated minor; or

(B) authorized under state law to apply for a driver's license because the donor is at

least [insert the youngest age at which, without regard to other factors, an individual may apply for any type of driver's license or permit] years of age;

(2) an agent of the donor, unless the power of attorney for health care or other record prohibits the agent from making an anatomical gift;

(3) a parent of the donor, if the donor is under [18] years or age and not emancipated; or

(4) the donor's guardian.

**SECTION 8. PRECLUSIVE EFFECT OF ANATOMICAL GIFT,
AMENDMENT, REVOCATION, OR REFUSAL.**

(a) Except as otherwise provided in subsections ~~(g)~~ and ~~(h)~~, in the absence of an express, contrary indication by the donor, a person other than the donor is barred from making, amending, or revoking an anatomical gift of a donor's body or a part if the donor made an anatomical gift of the donor's body or the part under Section 5 or an amendment to an anatomical gift of the donor's body or the part under Section 6.

(b) A donor's revocation of an anatomical gift of the donor's body or a part under Section 6 is not a refusal and does not bar another person specified in Section 4 or 9 from making an anatomical gift of the donor's body or a part under Section 5 or 10.

(c) Except as otherwise provided in subsections ~~(h)~~ ~~(i)~~, in the absence of an express, contrary indication by the individual set forth in the refusal, an individual's unrevoked refusal to make an anatomical gift of the individual's body or a part under Section 7 bars all other persons from making an anatomical gift of the individual's body or the part.

(d) If a person other than the donor makes an unrevoked anatomical gift of the donor's body or a part under Section 5 or an amendment to an anatomical gift of the donor's body or a part under Section 6, another person may not make, amend, or revoke the gift of the donor's body or part under Section 10.

(e) A revocation of an anatomical gift of the donor's body or a part under Section 6 by a person other than the donor does not bar another person from making an anatomical gift of the body or a part under Section 5 or 10.

(f) In the absence of an express, contrary indication by the donor or other person authorized to make an anatomical gift under Section 4, an anatomical gift of a part is neither a refusal to give another part nor a limitation on the making of an anatomical gift of another part at a later time by the donor or another person.

(g) In the absence of an express, contrary indication by the donor or other person authorized to make an anatomical gift under Section 4, an anatomical gift of a part for one or more of the purposes set forth in Section 4 of this [act] is not a limitation on the making of an anatomical gift of the part for any of the other purposes by the donor or any other person.

(gh) If a donor who is an unemancipated minor dies under [18] years of age, a parent of the donor who is reasonably available may revoke or amend an anatomical gift of the donor's body or part.

(hi) If an unemancipated minor who signed a refusal dies under [18] years of age, a parent of the individual who is reasonably available may revoke the individual's refusal.

SECTION 11. PERSONS THAT MAY RECEIVE ANATOMICAL GIFT.

(a) An anatomical gift of a body or part may be made to the following named persons:

- (1) a hospital, accredited medical or dental school, college, university, organ procurement organization, or other appropriate person for research or education;
- (2) an individual designated by the person making the anatomical gift if the individual is the recipient of the part; or
- (3) an eye bank or tissue bank.

~~(b) If an anatomical gift of one or more specific parts or of all parts is made in a document of gift that does not name a person described in subsection (a) but identified the purpose for which an anatomical gift may be used, the following rules apply:~~

- ~~————— (1) If the part is an eye and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate eye bank.~~
- ~~————— (2) If the part is tissue and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate tissue bank.~~

~~_____ (3) If the part is an organ and the gift is for the purpose of transplantation or therapy, the gift passes to the organ procurement organization as custodian of the organ to be allocated in accordance with subsection (h).~~

~~_____ (4) If the part is an organ, an eye, or tissue and the gift is for the purpose of research or education, the gift passes to the appropriate procurement organization.~~

~~_____ (c) If a document of gift specifies only a general intent to make an anatomical gift by words such as "donor", "organ donor", or "body donor", or by a symbol or statement of similar import, the decedent's parts may be used for transplantation, therapy, research, or education. In this case, the following rules apply:~~

~~_____ (1) If the part is an eye, the gift passes to the appropriate eye bank.~~

~~_____ (2) If the part is tissue, the gift passes to the appropriate tissue bank.~~

~~_____ (3) If the part is an organ, the gift passes to the organ procurement organization as custodian of the organ to be allocated in accordance with subsection (h).~~

~~_____ (d) For purposes of subsection (b) and (c), if the purpose of an anatomical gift of a part is not expressly set forth in the document of gift or the purposes are not set forth in any priority in the document of gift, the gift must first be used for transplantation or therapy and, if the gift cannot be used for transplantation or therapy, the gift must be used for research or education.~~

(b) If an anatomical gift of one or more specific parts or of all parts is made in a document of gift that does not name a person described in subsection (a) but identifies the purpose for which an anatomical gift may be used, the following rules apply:

(1) If the part is an eye and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate eye bank.

(2) If the part is tissue and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate tissue bank.

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(3) If the part is an organ and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate organ procurement organization as custodian of the organ to be allocated in accordance with subsection (i).

(4) If the part is an organ, an eye, or tissue and the gift is for the purpose of research or education, the gift passes to the appropriate procurement organization.

For the purpose of this subsection, in the absence of an express, contrary indication in the document of gift, if there is more than one purpose of an anatomical gift set forth in the document of gift but the purposes are not set forth in any priority, the gift must first be used for transplantation or therapy and, if the gift cannot be used for transplantation and therapy, the gift must be used for research or education.

(c) If an anatomical gift of one or more specific parts is made in a document of gift that does not name a person described in subsection (a) and does not identify the purpose of the gift, the decedent's parts may be used only for transplantation or therapy, and the gift passes in accordance with subsection (e).

(d) If a document of gift specifies only a general intent to make an anatomical gift by words such as "donor", "organ donor", or "body donor", or by a symbol or statement of similar import, the decedent's parts may be used only for transplantation or therapy, and the gift passes in accordance with subsection (e).

(e) For purposes of subsection (c) and (d), the following rules apply:

(1) If the part is an eye, the gift passes to the appropriate eye bank.

(2) If the part is tissue, the gift passes to the appropriate tissue bank.

(3) If the part is an organ, the gift passes to the appropriate organ procurement organization as custodian of the organ to be allocated in accordance with subsection (i).

(f) An anatomical gift of an organ for transplantation or therapy, other than an anatomical gift under subsection (a)(2), passes to the organ procurement organization or transplant hospital as custodian of the organ to be allocated in accordance with subsection (i).

(g) If an anatomical gift does not pass pursuant to subsections (a) through (e) or the decedent's body or part is not used for transplantation, therapy, research, or education, custody of the body or part passes to the person under obligation to dispose of the body or part.

(h) A person may not accept an anatomical gift if the person knows that the gift was not effectively made under Section 5 or 10 or if the person knows that the decedent made a refusal under Section 7 that was not revoked. For purposes of this subsection, if a person knows that an anatomical gift was made on a document of gift, the person is deemed to know of any amendment or revocation of the gift or any refusal to make an anatomical gift on the same document of gift.

(i) If an organ passes to an organ procurement organization or transplant hospital for transplantation or therapy, the organ must be allocated in accordance with the contractual obligations between the organ procurement organization or transplant hospital and the Organ Procurement Transplantation Network established by the National Organ Transplant Act, 42 U.S.C. Section 243 et. seq.

3. Other Matters:

In Section 4, we permit a parent of a minor child to make an anatomical gift for that child. At a recent meeting I attended I was asked why a parent of a minor child should be able to make a gift if the minor did not consent. The questioner argued that our provision treats the child as the parent's property. While I don't necessarily agree, I thought I promised I'd raise this with the committee. A possible solution might be to limit the parents ability to cases where the minor was not of the age to apply for a license.

In Section 7 I have added language allowing third party signing for a refuser who is unable to actually sign a record. The language parallels the language in Section 6.

Some Commissioners have sent me style suggestions which I've not included on the theory that style committee is responsible for those decisions. I have also received some policy suggestions. These are:

1. A suggestion that the definition of "reasonably available" be changed to "Reasonably available" means an individual able to be contacted without undue effort and willing and able to act within a time period compatible with effecting an anatomical gift." The reason given was "I have a concern that the person who is making the determination of reasonably available would not necessarily know the "medical criteria.".

2. In "Section 5(d) the second sentence is confusing. I would change it to "If the will is declared invalid for testamentary purposes, the gift is nevertheless valid and effective".

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I also think that the term "whether or not the will is probated" implies that a decision has to be made. Also you cannot probate until 10 days after death under the UPC. I suggest removing the language and inserting "without waiting for probate."

3. Section 9(5) and 9(6) I would suggest that an adult grandchild has priority over a sibling. This would be consistent with the next of kin and intestacy statutes that treat descendants ahead of siblings. Also the siblings may be quite old when there are adult grandchildren.

4. Section 9(10) add the words "or under obligation" after "authority" some states look at it differently. I am also thinking that anyone who has "assumed the responsibility" should also be included.

5. Section 23(i) change the word "additional costs" to "out of pocket expenses."