

MEMORANDUM

To: UAGA Drafting Committee
From: Sheldon F. Kurtz
Date: February 14, 2005
Subject: Comments to Draft for March, 2005 meeting

The following comments are not exhaustive of all changes in this draft. Where I believe I've done nothing more than restate or tinker with existing law, I've likely made no further comments. Of course, everything is open to discussion.

Section 2 Definitions

1. The word "agent" is defined to be the person designated in a power of attorney to make or refuse to make an anatomical gift on behalf of the principal. The language would allow that authority to be expressed in either a health care power or a financial power. The definition does not attempt to sort out what would happen if each power named a different agent to make or refuse to make an anatomical gift. **Is this something that should be addressed?**

I spoke with Linda Whitten and Jack Burton about the possibility of incorporating the idea of empowering an agent to make an anatomical gift into the new durable power of attorney act. Linda indicated that her committee had previously rejected that idea as not relevant to financial matters. She said she'd raise it again. Perhaps, because David English suggested I raise this with her and he is on both committees, he'll pursue it with that committee.

2. For "document of gift" I've added state-issued identification cards which are now issued to persons over 18 who, for one reason or another, don't want and cannot get a driver's licence. I've also treated the donor registry (defined in subsection (7)) as a document of gift. While I assume the word "record" is broad enough to include donor cards, drivers' licenses, and the like, I continue to specifically mention them because of their broad public acceptance as devices for making anatomical gifts.

3. “Donor” means the person who makes an anatomical gift under either section 3 or 7. It might include the decedent from whom organs are taken, but it can include many others. Thus, the definition of donor is broader than the popular understanding of who an organ donor is.

The word “donee” also is defined in a manner somewhat inconsistent with its popular understanding. While it could be the person who receives the organ (such person being defined in Section 7 as the “recipient”), in Section 1 and throughout the draft it means the person to whom the anatomical gift has been made. In most cases this will actually be a procurement organization. (See section 10).

Where the donor of an anatomical gift is the person from whom the organs could be removed at death, that individual may have certain rights under the act that trump the options of others to make or refuse to make an anatomical gift both during his/her life or thereafter. (This possibility didn’t exist under the prior act where only such individual could have made a gift during his/her life). Thus, I thought it necessary to specifically define such individual and have done so by calling this person an “organ owner.” I had thought of possibly calling this individual an “organ donor” but rejected that idea because as the act develops it appears that this individual may be either a donor or an individual who refuses to make a donation and calling an individual who refuses to make a donation seems incongruous.

However, I am not entirely satisfied with the phrase “organ owner” because at some level it suggests property rights beyond the limited rights under this Act. Thus, I hope the committee can suggest a suitable alternative.

4. I have included alternative definitions of an organ procurement organization in subsection (12). The second seems more in tune with the definition I used for the eye bank which the eye bank suggested and which I have also used for the tissue bank. It also has the advantage of eliminating reference to HHS which might cause a problem with some state’s non-delegation rules.

5. There are three alternatives to the definition of “physician.” Alternative 1 is in the current act except I’ve added the brackets.

6. The definition of “reasonably available” is modified from a similar definition used in the Uniform Health Care Decisions Act.

Section 3 Making Anatomical Gifts

SCOPE: The 87’ Act had one section dealing with the making, amending, revoking and refusing to make an anatomical gift. I have broken these topics into three sections and then added a new section (modified from the prior act)

dealing with “Finality.” Thus, section 3 relates to the making of anatomical gifts, section 4 relates to the amending and revoking of anatomical gifts, section 5 relates to the refusal to make an anatomical gift, and section 6 relates to finality.

Section 3 provides for the making of an anatomical gift by the individual whose body or part is the subject of the gift and by that individual’s agent, if authorized by a power to make a gift, parent (if the individual is under age 18) or guardian (if one has been appointed by the court). I have not defined “guardian.” **Do I need to do so?** In common with current law the gift can be made by the signing a document of gift, which includes a donor registry, or by an imprint on the driver’s licence of the individual whose body or part is the subject of the gift. (Section 11 provides that the gift is effective even though the document of gift is not delivered to a donee).

1. Subsection (a) expands on the current version to permit gifts by the individual whose body or part is the subject of the gift, as well as by that individual’s agent, parent, or guardian.

2. If the gift is made by notation on a license or state-issued ID card, a signature of the organ owner is required. The prior version seemed to permit either his/her signature alone or the third party/witnessing in lieu thereof. I doubt there is any state that permits a license to be signed by someone other than the driver, let alone then permit that individual’s signature to be witnessed by two other persons? On the other hand, are there states that don’t require a signature on a license? If so, then as amended this section may be too restrictive. However, it seems some signature evidencing the donor’s intent to make a gift should be required, thus the signature requirement.

3. Is subsection (d) necessary or even advisable? I have retained it from the prior act but perhaps it is now obsolete. Even as retained, however, I have deleted the phrase “or other person authorized to accept the anatomical gift” because as this draft is structured, under section 10 there will always be a donee of an anatomical gift. There will be a donee named either in the document or by the statute’s default rule. Thus, there is no need for this other person.

4. Section 3(e) reflects the fact that only the organ owner can make an anatomical gift by will. This follows from the fact that no law permits a third party to make a will on behalf of another.

5. Subsection (c)’s last sentence provides that an expiration of a license does not invalidate an anatomical gift. Suppose my license on which I have expressed the intent to be an organ donor expires and my new license is silent. Am I an organ donor, assuming these facts become known? I think so. Under this sentence the expiration of the old is not an invalidation of the gift; under Section 4(a) (2) there is no document of gift

since silence on a document is not the making of a gift as required by the definitional section. **Is my reading right? Is the policy right?**

Section 4. Amending or Revoking Anatomical Gifts

1. Section 4(a)(2) conceptually is borrowed from revocation statutes under wills acts.

2. The role of former subsection (f)(4) is unclear. The current law permits revocation both by a signed statement and a signed statement delivered to a specified donee to whom a document of gift had been delivered. Why both? I think the current structure results from the fact that the 87' version built upon the 68' version which began the amendment and revocation section with something akin to current subsection (4). I have proposed in this version that former subsection (f)(4) be deleted but that a new subsection (c) be included to provide that, if a document of gift has been delivered to a donee, then as respects that donee no revocation or amendment is effective absent actual knowledge of the amendment or revocation.

3. Section 4(b) applies only to organ owners as only an organ owner can make an anatomical gift by will.

4. New Section 4(d) is designed in anticipation of the growing popularity of the donor registry. This section reflects the fact that in time it is expected that the standard will be to check the donor registry in order to determine whether a patient intended to be an organ donor or not, and that, if the registry reflects an intent to be a donor, amendments or revocations not reflected on the registry should not bind any person having no actual knowledge of them.

The subsection provides that if the document of gift is the donor registry, any amendment or revocation is ineffective with respect to a person without actual knowledge unless that revocation or amendment is reflected on the registry. **Is this practical? Will donor registries be able to reflect both gifts, revocations, and refusals?** The concept here, however, was not talked about at our last meeting.

5. Former subsection h is removed. The substance of it, hopefully tightened up, is now in Section 6 on Finality.

Section 5. Refusal to Make an Anatomical Gift

Only organ owners can refuse to make an anatomical gift. The policy here is that there is no need to provide for refusals by agents, parents, or guardians because if they make a gift under Section 3 they may continue to have a role to play under Section 7.

Section 5 permits an organ owner to refuse to make an anatomical gift and provides for the formalities necessary to make that refusal.

Section 6. Finality

1. Section 6(a) is intended to be a strengthened version of current Section 2(h). If an organ owner has made, amended, revoked, or refused to make an anatomical gift and that action has not been revoked by the organ owner, all other persons are precluded from making, revoking or amending the gift. Refusal is not mentioned as only an organ owner has refusal rights under the act. This section reflects the fact that it is appropriate that on all matters the organ owner's intent controls. Note that this section bars agents and guardians from acting under Section 3 as well as others under Section 7.

2. Section 6(b) adds finality to the actions of agents, parents, and guardians who donate organs or amend or revoke donations. Their actions never bind the organ owner or themselves but do bind others under Section 7.

3. The last sentence of old Section 2(j)(2) is deleted as its essence is reflected in Section 6(a).

Section 7. Making, Revoking, and Objecting to Anatomical Gifts, By Others.

SCOPE: Section 7 relates to the making (subsections (a)-(c), revoking (subsection (d), and objecting (subsection (e) to an anatomical gift by others.

1. Subsection (a) was amended to insert agent with the first priority to make a gift under section 7. In addition, close friend was added and is specifically defined in this subsection which is the only place the phrase appears in the act. I believe I borrowed language from Section 5 of the Health Care Decisions Act. **Is "close friend" in the right place as far as priorities go? Is guardian in the right place?**

2. Subsection (b) is really not new. It used to be old (c).

3. Subsection (c) again reflects the fact that a person cannot make a gift under section 7 when precluded by Section 6. Dis-empowering such persons from making the gift should have the effect of not asking them for one when a gift has been made under section 3.

4. Subsection (c) also adds a majority notion to the objection to a gift. Thus, while under current law, if any child objects no gift can be made, under this draft, if there are multiple children and one wants to gift, the gift goes forward unless a majority of the

children object to the making of the gift. Furthermore, a person in a lower priority can make a gift if a person with a higher priority is not reasonably available, a phrase that is defined in section 1. The “reasonably available” concept is new.

5. Revocation of a gift under section 4(d) also follows a majority rule principle unlike the current act. While the current act allows revocations up until the time procedures to remove the organ have begun, this draft expands this to preclude revocations once procedures to remove the organ have begun or procedures to surgically prepare the recipient have begun. The notion here is that once preparations on the recipient have begun the equities run in favor of going forward even if there has been a faulty consent.

Section 8 Authorization by [Coroner] [Medical Examiner] or [Local Public Health Official]

The section incorporates a dramatic change from prior law which would have allowed the public official to donate a body for transplantation following an unsuccessful but reasonable effort to search for family members who could object to the making of the gift.

This draft (consistent with the commissioners’ judgement at our last meeting) permits the public official to release a body for transplant if the official knows that a gift was made under section 2 or 7. While facially this could mean fewer organs, in light of recent 1983 cases faulting coroners under the current act for taking organs without family consent and the reluctance of many coroners to now go forward without that consent, it is unlikely this change, that reflects current realities, will have significant effect on the number of available organs.

Section 9 Routine Inquiry and Required Request; Search and Notification.

SCOPE: This section mandates that hospitals inquire of patients regarding their donative status and advise non-donors of the opportunity to donate their organs. It substantially revises existing laws in ways that hopefully conform to current practice and UNOS/federal guidelines. It also includes some bare-bones requirements for obtaining a donation from patients under Section 3 or the persons named in Section 7.

As a general question here, is the section as revised consistent with current practice and federal policies?

Should we separate out inquiry and request from search and notification and have separate sections?

1. Subsections (b)-(f) were re-written to reflect what the reporter's current understanding of the practice is. **Did he get it right?** The reporter is suspicious that he has not. **Also, does this subsection (or all of section 9) read too much like a regulation rather than a statute? If so, should we retain that approach rather than expect states to develop regulations that don't conflict with each other?**

Under this Section, hospitals contact their designated procurement organization (defined in subsection (k)(A)) to permit it time to assess a patient's suitability to be an organ donor. Then under subsection (c) if the procurement organization concludes the patient would not be suitable for the making of an anatomical gift, it has no further responsibilities under the **act**. The section is phrased that way to take into account that the procurement organization may have responsibilities under other law or organizational rules.

Note that the assessment of suitability in (b) is limited to transplantation or therapy. This is reflected by the bracketed phrase. The assumption is that the designated procurement organization is not assessing to determine if the patient would be suitable for an anatomical gift for research purposes. **Do you agree the language does that?; Do you agree that such a limitation should apply? This concern runs throughout this section.**

If the designated procurement organization concludes the patient would be suitable and a gift of all of the patient's parts was made under Section 3, then it has no further responsibilities under Section 9. This section is worded in this way so that in this case the remainder of the section would not apply but other sections of the act (such as section 10 would). (Note the contrast here with the preceding paragraph where, for the unsuitable donor, the procurement organization has no further responsibilities under the Act).

If the designated procurement organization concludes the patient would be a suitable organ donor but no gift of all of the patient's parts was made, amended or revoked, nor precluded by Section 5, then the designated procurement organizations or the designated requestor goes into the request mode as set forth in subsection (e). I have included in subsection (e) those minimum items of information I've assumed would always be transmitted. I've also avoided the phrase "informed consent" believing it inappropriate in the context of organ and body donation.

The remainder of the section pretty much tracks the current version.

I have deleted old (2) is unnecessary. Am I right?

Section 10. Persons Who May Become Donees

SCOPE: This section provides who may be a donee of an anatomical gift. While conceptually it could be the individual into whom an organ might be transplanted (the “recipient”), more likely it will be one or more procurement organizations. Hospitals and surgeons are excluded as donees. The section then sets forth default donees in the event that the donor either fails to expressly name a donee while evidencing an intent to be a donor of his/her entire body and/or part or executes a document reflecting only a general intent to want to make an anatomical gift. There are no corresponding sections in the current act. The section empowers procurement organizations to select research facilities to receive bodies or parts, a matter on which the committee has had no discussion.

Most of this section reflects the reporter’s first stab as the commissioners have yet to discuss this material in any detail.

Subsection (a) allows a person designated by a donor (under section 3 or 7) to be donees. Typically, in a section 7 donation, a procurement organization will be specifically designated in the consent form. As written the named donee can be the individual receiving the organ, a procurement organization or a medical school, etc.

In most cases it would be anticipated that a Section 3 donation would be made either of the entire body or one or more parts without specifying a particular donee. Thus, the following sections.

Subsection (b) provides that if there is a gift of the entire body and no donee is designated, the parts go to the appropriate procurement organization, the rest of the body to the medical school, etc. selected by the appropriate procurement organization and custody of the rest under subsection (f) goes to the person under obligation to dispose of the body. This clause is likely triggered by a document gift that says almost nothing more than the organ owner wants to donate his entire body.

Subsection (c) applies where there is a gift of one or more parts. In this case the donee is the appropriate organ procurement organization.

Subsection (d) applies to what the reporter thinks is a common situation, the donor who says almost nothing more than he/she want to be an organ donor. For example, suppose the organ owner has checked his/her license to indicate nothing more than an intent to be an organ donor. Here there are two alternatives. Alternative 1 assumes that the indication of a general intent to be an organ donor is the equivalent of a gift of the entire body with the appropriate procurement organization, medical school it selects, and custodian for burial being the ultimate donees. Alternative 2 (which my research assistants strongly believe is the only correct policy result--I promised to tell you this) is to limit the gift just to medically suitable parts.

Does subsection (d)'s introductory phrase make sense? I am trying to reach the case where, as in some states, the document of gift merely states that the donor wants to be an organ donor but does not specify anything else.

Subsection e is for the gift of a part or body for other than transplantation or therapy purposes.

In multiple sections a medical school, etc. is designated the donee. The section allows the procurement organization for the geographical area in which the decedent died to select which particular medical school etc. is the donee if the donor did not. This is much like giving them a "special power of appointment" if I may be permitted to use the phrase. I am not sure whether the language adequately deals with which of the organizations' selections control if there is a dispute among them; furthermore, I'm not sure the research community will like the selection method but someone has to do it when the donor didn't. Also, by using the procurement organization for the geographical area in which the decedent died, have I created possible conflict should the decedent die in one area with his/her body taken by an ambulance to a hospital in another area? Is there some better way to select the research facility? These are matters the committee has not discussed.

The impact of subsection (e) is to force donees to check the donor registry to determine whether a gift, revocation or refusal has been made with respect to a decedent. Donees are bound by the registry but otherwise must have actual knowledge of a refusal or revocation to bar them from accepting an anatomical gift.

Should subsection (g) remain?

Subsection (i) is designed to reflect the concerns for HHS. It is intended to assure that this act has nothing to say about the distribution of parts by a donee. As you know, UNOS policies now control how donated organs are allocated. Subsection (i) assures nothing in the act would change that. The introductory "except" clause is designed to assure that there is no trumping of the "custody" clause in subsection (f).

Section 11 Delivery of Document of Gift

SCOPE: The section provides that delivery of a document of gift is not required to effectuate an anatomical gift. However, it can be delivered to a hospital, procurement organization or a donor registry. (Under Section 4, delivery of the document to a donee or a registry can affect whether the gift has later been amended or revoked. See Section 4(d). The section is essentially a re-wording of the current Act.

Section 12. Rights and Duties at Death

This section is hardly revised from the current act although the first sentence of subsection (b) is removed as unnecessary. **Should this subsection be deleted entirely?**

Section 9 Coordination of Procurement and Use

Section 10. Sale or Purchase of Parts Prohibited

SCOPE. These sections are unmodified with the exception for the added phrase in Section 10(a).

Section 15 Examination, Autopsy and Liability

SCOPE. This section is essentially the same as under prior law. In subsection (c) immunity from discipline for unprofessional conduct has been added. There has been a slight rewording, hopefully for clarity only.

Section 16 Choice of Law

SCOPE. This section is new and incorporates the choice of law principle that a document of gift is valid if executed in accordance with the act or in accordance with the law of the place of execution or the donor's domicile. This is essentially the wills standard. Subsection (b) provides that a person may assume a document of gift is valid absent actual knowledge that the document was not validly executed or had been revoked.

I look forward to a spirited discussion of this draft.