REVISED UNIFORM ANATOMICAL GIFT ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Revised Uniform Anatomical Gift Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Adult" means an individual who is at least [18] years of age.

(2) "Agent" means an individual:

(A) authorized to make health-care decisions on the principal's behalf by a power of attorney for health care; or

(B) expressly authorized to make an anatomical gift on the principal's behalf by any other record signed by the principal.

(3) "Anatomical gift" means a donation of all or part of a human body to take effect after the donor's death for the purpose of transplantation, therapy, research, or education.

(4) "Decedent" means a deceased individual whose body or part is or may be the source of an anatomical gift. The term includes a stillborn infant and, subject to restrictions imposed by law other than this [act], a fetus.

(5) "Disinterested witness" means a witness other than the spouse, child, parent, sibling, grandchild, grandparent, or guardian of the individual who makes, amends, revokes, or refuses to make an anatomical gift, or another adult who exhibited special care and concern for the individual. The term does not include a person to which an anatomical gift could pass under Section 11.

(6) "Document of gift" means a donor card or other record used to make an anatomical gift. The term includes a statement or symbol on a driver's license, identification card, or donor registry.

(7) "Donor" means an individual whose body or part is the subject of an anatomical gift.

(8) "Donor registry" means a database that contains records of anatomical gifts and amendments to or revocations of anatomical gifts.

(9) "Driver's license" means a license or permit issued by the [state department of motor vehicles] to operate a vehicle, whether or not conditions are attached to the license or permit.

(10) "Eye bank" means a person that is licensed, accredited, or regulated under federal or state law to engage in the recovery, screening, testing, processing, storage, or distribution of human eyes or portions of human eyes.

(11) "Guardian" means a person appointed by a court to make decisions regarding the support, care, education, health, or welfare of an individual. The term does not include a guardian ad litem.

(12) "Hospital" means a facility licensed as a hospital under the law of any state or a facility operated as a hospital by the United States, a state, or a subdivision of a state.

(13) "Identification card" means an identification card issued by the [state department of motor vehicles].

(14) "Know" means to have actual knowledge.

(15) "Minor" means an individual who is under [18] years of age.

(16) "Organ procurement organization" means a person designated by the Secretary of the United States Department of Health and Human Services as an organ procurement organization.

(17) "Parent" means a parent whose parental rights have not been terminated.

(18) "Part" means an organ, an eye, or tissue of a human being. The term does not include the whole body.

(19) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(20) "Physician" means an individual authorized to practice medicine or osteopathy under the law of any state.

(21) "Procurement organization" means an eye bank, organ procurement organization, or tissue bank.

(22) "Prospective donor" means an individual who is dead or near death and has been determined by a procurement organization to have a part that could be medically suitable for transplantation, therapy, research, or education. The term does not include an individual who has made a refusal.

(23) "Reasonably available" means able to be contacted by a procurement organization without undue effort and willing and able to act in a timely manner consistent with existing medical criteria necessary for the making of an anatomical gift.

(24) "Recipient" means an individual into whose body a decedent's part has been or is intended to be transplanted.

(25) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(26) "Refusal" means a record created under Section 7 that expressly states an intent to bar other persons from making an anatomical gift of an individual's body or part.

(27) "Sign" means, with the present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound,

or process.

(28) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(29) "Technician" means an individual determined to be qualified to remove or process parts by an appropriate organization that is licensed, accredited, or regulated under federal or state law. The term includes an enucleator.

(30) "Tissue" means a portion of the human body other than an organ or an eye. The term does not include blood unless the blood is donated for the purpose of research or education.

(31) "Tissue bank" means a person that is licensed, accredited, or regulated under federal or state law to engage in the recovery, screening, testing, processing, storage, or distribution of tissue.

(32) "Transplant hospital" means a hospital that furnishes organ transplants and other medical and surgical specialty services required for the care of transplant patients.

Legislative note: *If this state does not license "hospitals", the definition of "hospital" should include a reference to the facility or facilities with equivalent functions by an additional sentence such as the following: "The term includes an acute care facility."*

Comment

"Agent" (paragraph (2)) is an individual who, under certain circumstances, can make an anatomical gift on the principal's behalf. An agent is empowered to make a gift if the agent is authorized by a power of attorney for health care to make health-care decisions on the principal's behalf. Thus, this [act], independent of any other law, empowers an agent acting under a power of attorney for health care to make an anatomical gift on the principal's behalf. It is unnecessary that states adopting this [act] amend their power of attorney for health care statutes to specifically empower agents to make anatomical gifts on behalf of principals. On the other hand, a state may choose to amend its health-care power of attorney statute in order that all of the agent's powers, including the power to make an anatomical gift, are located and visible in one place setting forth the powers of a health-care agent. Even though this [act] enables an agent acting under a power of attorney for health care to make an anatomical gift, if the principal prohibits the agent from making an anatomical gift of the principal's parts, the agent would have

no authority to do so. See Section 4(2).

An agent also may be designated by a record, other than a power of attorney for health care, which authorizes the agent to make an anatomical gift. This would permit a principal to empower one individual to make health-care decisions and another individual to make anatomical gift decisions. In light of the definition of record, this authority could be expressed in a financial power of attorney.

"Anatomical gift" (paragraph (3)) means a gift that takes effect after the donor's death. Thus, an "anatomical gift" does not include a gift of an organ from a living donor to a living recipient.

"Decedent" (paragraph (4)) is defined as it was under prior versions of this [act] to include both stillborns and fetuses. A fetus, by definition, is not an embryo and nothing in this [act] allows for an anatomical gift of an embryo. Under other law fetuses can be used for research. *See*, 42 U.S. C. § 289g-1 & 289g-2; 42 CFR § 46.201.

By including stillborns and fetuses in the definition of "decedent," this [act] assures that stillborns and fetuses continue to receive the statutory protections conferred by this [act]; namely that their bodies or parts cannot be used for transplantation, therapy, research, or education without the same appropriate consents afforded other prospective donors. The definition of decedent does not broaden the scope of available transplant or research subjects or techniques. Although the needs of research and transplantation may have changed and expanded since the original 1968 Act was drafted, the scope of this [act] with regard to the definition of those who may be a source of an anatomical gift has neither changed nor expanded. By its terms, this [act] is silent on the issue of the use or donation of blastocytes and embryos, neither authorizing nor prohibiting their donation or use. Similarly, this [act] is silent on the nature of the research to be performed and provides no authorization or prohibition for somatic cell nuclear transfer or other specific research techniques. The complicated legal, scientific, moral, and ethical issues which may arise in the consideration of such research is, or should be, dealt with in separate statutes and policies. Thus, nothing in this [act] affects embryonic stem cell research. However, for jurisdictions that might prefer a more restrictive definition in the second sentence of the definition of "decedent," the following language is suggested: "The term does not include a blastocyst, embryo, or fetus that is the subject of an induced abortion."

"Disinterested witness" (paragraph (5)) means a witness other than those listed in the paragraph. Under Sections 5 and 6 anatomical gifts may be made or revoked. Under Section 7 a person may also make or revoke a refusal. In most circumstances these acts must be evidenced by a record. However, in limited circumstances they can be evidenced by oral statements to at least two adult witnesses. In those circumstances at least one of the witnesses must be a disinterested witness.

"Document of gift" (paragraph (6)) includes a donor card or any other record. It also includes a donor registry (paragraph (8)), a driver's license (paragraph (9)), and an identification card (paragraph (13)). While a donor card is a record, the reference to donor cards had been specifically retained because of the wide acceptance of that concept in our culture. Prior

versions of this [act] also expressly referred to a will in the definition of a document of gift. The omission in this [act] of a will in the definition of a document of gift does not mean a will is not a document of gift. Rather, the "will" is subsumed in the word "record." Where there is a need in this [act] to specially treat wills as documents of gift, the will is singled out from other documents of gift.

A statement or symbol on a driver's license or donor registry is a document of gift; it is not merely an expression of intent to make a gift. Therefore, where there is such a statement or symbol, no other document of gift is necessary to evidence the making of an anatomical gift. Potential donors utilizing records other than a driver's license or a donor registry to make an anatomical gift should be strongly encouraged to make their gifts on a driver's license or donor registry, as gifts on a license or registry are more likely to be discovered when the donor is dead or near death.

Under Section 5(b) a donor can make an anatomical gift by authorizing the persons who maintains a donor registry to include on the registry a statement or symbol that the donor has made an anatomical gift. By adding a "donor registry" as a device for making an anatomical gift, this [act] recognizes the increasing use of donor registries to make anatomical gifts. The use of donor registries was not contemplated when the previous versions of this act were adopted. Today, however, they have assumed increased importance and in time may come to dominate how anatomical gifts are made. While the format of donor registries differ, generally they allow for the making of an anatomical gift of one or more parts and permit that gift to be made over the internet. No known donor registry provides for a refusal to make an anatomical gift, and this [act] does not require that they do so. The person who maintains a donor registry may, if it chooses, follow up an electronic registration by sending the donor a card to sign. However, that is not legally required by this [act] to make an effective anatomical gift.

"Donor" (paragraph (7)) means the individual whose body or part is the subject of an anatomical gift. Thus, an individual who signs a donor card or authorizes a symbol to be placed on a driver's license or donor registry evidencing an anatomical gift is a donor even though the part donated will not be removed from the donor until the donor dies. Likewise, if the family of a decedent who did not make an anatomical gift during life donates a part of the decedent, that decedent is a donor. Thus, "donor" refers to a living individual who made an anatomical gift or on whose behalf an anatomical gift was made to take effect in the future. The term also includes a decedent whose body or part is the subject of an anatomical gift. Anatomical gifts by a donor, as well as amendments, revocations, and refusals, may preclude the ability of others to make or revoke anatomical gifts on behalf of the donor. *See* Sections 7 and 8.

"Donor registry" (paragraph (8)) means a database containing records of anatomical gifts. The concept of the registry is new to this version of the anatomical gift act. Many states now have donor registries. Most of them are operated by private organizations, such as a procurement organization (paragraph (21)) while some are operated by the state. Section 20 of this [act] authorizes states to either establish or contract for the establishment of a donor registry. Donor registries, like driver's licenses, are very effective devices to record the making of an anatomical gift. The making of an anatomical gift by these devices assures that the evidence of a gift is always available, unlike the traditional donor card which can often be lost. Furthermore,

they are easily accessible by procurement organizations.

"Driver's license" (paragraph (9)) includes both driver's licenses for which adults qualify, as well as licenses or permits issued to minors whether denoted "temporary permit," "permit," or "learner's permit," or something else. State laws vary widely on how young an individual under the age of 18 can be to obtain a driver's license. For example, it is not uncommon for a learner's permit to be issued to a 16-year-old individual. And, in some states licenses or permits can be issued to 14-year-olds for the purpose of driving only certain types of motorized vehicles, such as farm equipment. The definition of "driver's license" is broad enough to include all of these. Furthermore, under the definition, a condition, such as that the holder must be accompanied by an adult or the holder can drive only certain types of vehicles, does not prevent the license or permit from being considered a "driver's license" under this [act].

Under Section 4 if a minor is of an age that the minor would be entitled to obtain a driver's license, the minor can make an anatomical gift even though the minor does not actually apply for a license. Thus, a minor who could apply for a permit could make an anatomical gift by another means, such as a donor card or donor registry. Furthermore, if a minor acquires a license on which the minor has made an anatomical gift, the minor would not have to re-apply for a driver's license when attaining age 18 for the gift to be effective.

This [act], however, does not require that licenses provide space for a notation that the holder is a donor. That mandate, if it exists, is left to other law.

"Guardian" (paragraph (11)) means any person judicially appointed to make decisions for the support, care, education, health, or welfare of the ward. The intent is to exclude guardians ad litem or temporary guardians who would not have an expected long-term relationship to the ward.

"Identification card" (paragraph (13)) means an identification card issued by the [state department of motor vehicles]. Some individuals desire an identification card rather than a driver's license. These individuals could make an anatomical gift by authorizing a statement or symbol to be put on the card. While this [act] does not require that space be provided on the card for that purpose, it is anticipated that states will design these cards in ways to permit the making of an anatomical gift.

"Know" (paragraph (14)) means actual knowledge. Thus, it does not mean imputed knowledge. When imputed knowledge is relevant under any section of this [act], the section expressly so provides. *See, e.g.,* section 11(j).

"Parent" (paragraph (17)) means a parent whose parental rights have not been terminated. An adopting parent is a parent. On the other hand, a stepparent or judicially appointed guardian not otherwise by law designated as the child's parent is not a parent.

"Part" (paragraph (18)) means organ, eye, or tissue. While this definition is shorter than the definition in the 1987 Act, it is functionally the same because all parts of the human body, including bones and fluids, are encompassed within the definition. The definition excludes the

whole body.

"Prospective donor" (paragraph (22)) means an individual who is dead or near death and has been determined to have one or more parts that could be medically suitable for transplantation, therapy, research, or education. The term includes an individual who made an anatomical gift during life and, therefore, is a donor. The term also includes a non-donor individual at or near the time of death with parts that are medically suitable for donation who could become a donor if the individual's family made an anatomical gift under Section 9. The term does not include an individual who made a refusal as the refusal bars other persons from making an anatomical gift on that individual's behalf.

"Reasonably available" (paragraph (23)) is defined in a manner similar to that in the Uniform Health-Care Decisions Act. A decision to make an anatomical gift, particularly of an organ, is extremely time sensitive. Life-saving organs may be forfeited if persons with a priority to make an anatomical gift under Section 9 cannot be located. Physical presence, however, is not required to be "reasonably available." An individual is "reasonably available" if the individual can be contacted without undue effort. Also, the concept assumes that an individual is willing to act in a timely manner to permit the successful recovery of organs. An individual who is unwilling to make a decision to either donate or refuse to donate in a timely manner is not considered to be "reasonably available."

"Tissue" (paragraph (30)), as defined in this act, includes bone. The definition excludes blood unless donated for research or education. Blood is not obtained from deceased persons for purposes of transplantation or therapy. Furthermore, blood banks are not treated as tissue banks under other law. Accordingly, it is appropriate to exclude blood from the operation of this [act] except when donated for purposes of research or education.

SECTION 3. APPLICABILITY. This [act] applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift, whenever made.

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 an adult or if the donor is a minor and is:

(A) emancipated; 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 an individual may apply for any type of driver's license] 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 an unemancipated minor; or

(4) the donor's guardian.

Comment

Structurally, this [act] includes within Sections 4 through 8 provisions that were included in Section 2 of the 1987 Act. Section 4 relates to who may make an anatomical gift before a donor dies, Section 5 to the manner in which an anatomical gift may be made, Section 6 to the amending and revoking of an anatomical gift, Section 7 to the refusal to make an anatomical gift, and Section 8 to the effect of gifts, amendments, and revocations on the ability of others to make an anatomical gift.

Like the predecessor acts, this [act] provides that an individual may make an anatomical gift of the individual's body or part if the individual is an adult. This [act], however, expands prior law in a number of ways.

In most states a minor, under limited circumstances, can apply for a driver's license. The minor might wish to be a donor. As a policy matter, if the minor is old enough to drive a vehicle the minor should be old enough to make an anatomical gift. Thus, this [act] provides that a minor who could obtain a driver's license is empowered to make an anatomical gift whether on a driver's license or other document of gift. On the other hand, if the minor donor dies under the age of 18, it seems appropriate that the minor's parents should be able to revoke the gift. *See* Section 8(g). Because the minor's parents cannot revoke the anatomical gift if the minor donor later dies over the age of 18, there is no necessity under this [act] for the minor donor to confirm that anatomical gift after reaching 18. Thus, in a state that provides that a license issued to a minor is good for five years and the minor applies for the license at age 17, the minor can make an anatomical gift on the driver's license and need not reaffirm the gift for another five years. Furthermore, once the minor reaches age 18, the minor's parents cannot revoke the gift.

Section 4 expands prior law in other important respects. It permits anatomical gifts by an emancipated minor. The act does not define "emancipated minor," although a common example would be a married minor. State laws vary regarding the definition of an emancipated minor. By not defining the phrase in this [act], the phrase is effectively defined by other law of the state.

Section 4 expressly empowers an anatomical gift to be made on behalf of an individual by that individual's agent or a parent, if that individual is an unemancipated minor, or by a guardian.

An anatomical gift by an agent, parent, or guardian remains in effect until such time as amended or revoked by an agent, parent, or guardian, or by the donor on whose behalf the gift was made. For example, if a parent makes an anatomical gift for a minor and the parent does not revoke that gift before the minor reaches age 18 or becomes emancipated, the anatomical gift remains in effect until such time as it is altered by the donor or by the donor's agent or guardian. While agents, parents, and guardians can make an anatomical gift, they can not sign a refusal under Section 7 on their principal's or ward's behalf. A refusal can only be made by that individual whose part or body might otherwise have been the subject of an anatomical gift.

As noted in the comments to the definitions, an agent acting under a power of attorney for health care is authorized merely by that designation to make an anatomical gift on the principal's behalf. If the principal does not wish to authorize the agent acting under a power of attorney for health care to make that decision, the power must include language to expressly negate that authority. *See* Section 4(2). Conversely, if the agent is acting under another record, such as a financial power of attorney, the agent would be empowered to make an anatomical gift only if that authority was expressly conferred in the record. *See* Section 2(2)(B).

Section 4 specifically delineates the four purposes for which an anatomical gift may be made, namely, transplantation, therapy, research or education. The terms "transplantation", "therapy", "research" and "education" are not defined in this [act]. Rather, they are defined by their common usage in the communities to which they apply. In general terms, transplantation refers to the removal and grafting of one individual's body part into the body of another individual. Research is a process of testing and observing, the goal of which is to obtain generalizable knowledge, while therapy involves the processing and use of a donated part to develop and provide amelioration or treatment for a disease or condition. Education posits the use of the whole body or parts to teach medical professionals and others about human anatomy and its characteristics.

SECTION 5. MANNER OF MAKING ANATOMICAL GIFT BEFORE DONOR'S DEATH.

(a) A donor may make an anatomical gift:

(1) by authorizing a statement or symbol indicating that the donor has made an anatomical gift to be imprinted on the donor's driver's license or identification card;

(2) in a will;

(3) during a terminal illness or injury of the donor, by any form of communication addressed to at least two adults, at least one of whom is a disinterested witness; or

(4) as provided in subsection (b).

(b) A donor or other person authorized to make an anatomical gift under Section 4 may make a gift by a donor card or other record signed by the donor or other person making the gift or by authorizing that a statement or symbol indicating that the donor has made an anatomical gift be included on a donor registry. If the donor or other person is physically unable to sign a record, the record may be signed by another individual at the direction of the donor or other person and must:

(1) be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the donor or the other person; and

(2) state that it has been signed and witnessed as provided in paragraph (1).

(c) Revocation, suspension, expiration, or cancellation of a driver's license or identification card upon which an anatomical gift is indicated does not invalidate the gift.

(d) An anatomical gift made by will takes effect upon the donor's death whether or not the will is probated. Invalidation of the will after the donor's death does not invalidate the gift.

Comment

The execution formalities associated with the making of an anatomical gift generally remain the same as under the 1987 Act. However, in addition to the making of an anatomical gift by a donor card, will, or state-issued driver's license, an anatomical gift can also be made on a state-issued identification card or a donor registry.

Section 5(a) provides that a donor can make an anatomical gift by authorizing a statement or symbol to be imprinted on the donor's driver's license, in the donor's will, or during a terminal illness or injury, orally to at least two adult witnesses, at least one of whom is disinterested. Only a donor can make a gift under Section 5(a). A Section 5(a) gift cannot be made by an agent, parent, or guardian.

Under Section 5(a)(2) an anatomical gift can be made in a donor's will. The section is silent regarding who must sign the will. Statutes of Wills generally require wills to be signed by the testator, and under certain circumstances, permit wills to be signed by another individual acting on behalf of the testator at the testator's request and often in the testator's presence. *See* Uniform Probate Code § 2-502. Thus, an anatomical gift can be made by the will of a donor

whether the will is signed by a donor or a third party acting at the donor's request.

Typically an anatomical gift of a part for transplantation or therapy is not made by a will. In fact, donors are ill-advised to make an anatomical gift by will as the terms of the will may not be known in sufficient time to allow for successful recovery of the gifted parts. Individuals who make an anatomical gift of their parts in a will for transplantation or therapy should make their wishes known by other means as well. On the other hand, some individuals donate their bodies to medical science for research or education, and they may do so by a will. Subsection (d) provides that, if an anatomical gift is made by will, it takes effect at the donor's death. The gift is valid even though the will is not probated or is declared invalid. *See* Section 5(d).

Subsection (a)(3) permits an oral gift by a terminally ill or injured donor if the donor's communication is addressed to at least two adult witness, at least one of whom is a disinterested witness. This subsection is new to anatomical gift acts. The ability to make an oral gift parallels the ability to make oral revocations and refusals.

Section 5(b) permits an anatomical gift by a signed donor card or other record. The card or record can be signed by any person (donor, agent, parent, or guardian) authorized to make an anatomical gift under Section 4. If the person making the gift is physically unable to sign the card or record, the record can be signed by another individual acting at the direction of the donor or other person making the gift. In this case, the record must be witnessed by at least two adult witnesses, at least one of whom is a disinterested witness. Furthermore, the record must state that it was signed and witnessed at the request of the donor or other person.

A disinterested witness is a witness other than the spouse, child, parent, sibling, grandchild, grandparent, or guardian, of the individual who makes, amends, revokes, or refuses to make an anatomical gift, or another adult who exhibited special care and concern for that individual. A disinterested witness also does not include any person to whom an anatomical gift could pass under Section 11. *See* Section 2(5). For example, a terminally ill individual could make an anatomical gift by an oral communication to two unrelated neighbors or to one unrelated neighbor and one of the individual's adult children, but not to the individual's two adult children.

Section 5(b) also permits any person (donor, agent, parent, or guardian) authorized to make an anatomical gift under Section 4 to make that gift by authorizing that a statement or symbol indicating that the donor has made a gift be included on a donor registry. Donor registries were not contemplated by the prior versions of this [act]. Since the promulgation of those versions, numerous donor registries have been created under the auspices of states or private organizations. Over time donor registries may become the primary device by which anatomical gifts are made by donors. *See* Section 20 (creation of donor registry).

A decision was made in drafting this [act] not to include a specific form in the statute for the making of an anatomical gift. Rather, the drafting committee concluded that suggested forms consistent with this [act] be included in these comments. Three such forms follow:

DONOR CARD

I wish to donate my organs, eyes, and tissue. I give:

☐ Any needed organs, eyes, and tissue ☐ ONLY the following organs, eyes, and tissue:

_____

Date: _____ Donor's Signature _____

DONOR CARD

I wish to donate my organs, eyes, and tissue. I wish to give (complete either Section A, B, or C):

Subject of Gift:			Purpose of Gift:		
			Transplantation or therapy	Research or Education	Both
	Yes	No			
Section A ALL of my organs, eyes, and tissue	☐	☐	☐	☐	☐
Section B					
My Organs	☐	☐	☐	☐	☐
My Eyes	☐	☐	☐	☐	☐
My Tissue	☐	☐	☐	☐	☐

Section C
Special Instructions (If none of the above apply), I wish to give ONLY:

_____

Date: _____ Donor's Signature: _____

DONOR CARD

I give, upon my death, the following gifts for the purpose of (*choose whichever applies*): [ ] only transplantation and therapy, [ ] only research and education, [ ] transplantation, therapy, research, or education

For the purposes specified above, I give:

[ ] ALL needed organs, tissues, and eyes; or

(If you checked the box immediately above, you should not check specific boxes below).

[ ] Organs [ ] Tissues [ ] Eyes

If none of the above applies, I wish to give ONLY:

The following organs and tissues:_____

Date: _____ Donor's Signature: _____

SECTION 6. AMENDING OR REVOKING ANATOMICAL GIFT BEFORE DONOR'S DEATH.

(a) Subject to Section 8, a donor or other person authorized to make an anatomical gift under Section 4 may amend or revoke an anatomical gift by:

(1) a record signed by:

(A) the donor;

(B) the other person; or

(C) subject to subsection (b), another individual acting at the direction of the donor or the other person if the donor or other person is physically unable to sign; or

(2) a later-executed document of gift that amends or revokes a previous anatomical gift or portion of an anatomical gift, either expressly or by inconsistency.

(b) A record signed pursuant to subsection (a)(1)(C) must:

(1) be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the donor or the other person; and

(2) state that it has been signed and witnessed as provided in paragraph (1).

(c) Subject to Section 8, a donor or other person authorized to make an anatomical gift under Section 4 may revoke an anatomical gift by the destruction or cancellation of the document of gift, or the portion of the document of gift used to make the gift, with the intent to revoke the gift.

(d) A donor may amend or revoke an anatomical gift that was not made in a will by any form of communication during a terminal illness or injury addressed to at least two adults, at least one of whom is a disinterested witness.

(e) A donor who makes an anatomical gift in a will may amend or revoke the gift in the manner provided for amendment or revocation of wills or as provided in subsection (a).

Comment

Section 6 largely mirrors the provisions in the prior acts. It applies to the amendment or revocation of an anatomical gift whether made by a donor or by another person acting on behalf of the donor.

Under Section 6(a)(1), an anatomical gift can be revoked or amended by a record signed by the donor or the other person authorized to make an anatomical gift under Section 4. If the donor or other person is physically unable to sign a record amending or revoking an anatomical gift, the record may be signed by another individual acting at the direction of the donor or other person so long as the record is witnessed by at least two adult witness, at least one of whom is a disinterested witness. In this case, the record must state that it was signed and witnessed at the request of the donor or other person.

Subsection (a)(2), borrowing from statutes dealing with the revocation of wills, contemplates revocations or amendments made by a later-executed document of gift either

expressly or by inconsistency. For example, suppose a donor executes a will bequeathing her entire body to Medical School A for research or education. Later, the donor signs a document of gift donating a kidney for transplantation. Since the later-executed document of gift is only inconsistent with the prior document of gift to the extent of the donated kidney, the donor's kidney would, if medically suitable, pass to the appropriate procurement organization, and the donor's body without the kidney would pass to Medical School A. *See* Section 11.

A driver's license that makes no provision for the making of an anatomical gift is not a document of gift because a document of gift is defined to be a donor card or other record "used to make an anatomical gift." *See* Section 2(6). Therefore, a later-issued driver's license that is silent regarding the licensee's intent to make an anatomical gift would not be inconsistent with a prior driver's license on which the donor had made an anatomical gift. Thus, the gift on the prior license would still be effective. For donors using a driver's license to make an anatomical gift, however, it is wise to always make the gift on the most current license as motor vehicle departments may have expunged information on a previously issued license from their electronic databases.

There is no requirement under this [act] that documents of gift be dated. A "dating requirement" was purposely omitted to avoid invalidating documents of gift written without the advice of counsel that may not have included a date. That purposeful omission could result in some proof issues if a question arises whether one document of gift revokes another by inconsistency. There is little evidence to suggest that this would be a problem, but should it arise, the matter would have to be resolved by resort to any competent evidence. If the evidence is not available, a presumption should arise that the document of gift with the most comprehensive gift controls given the policy of this [act] to favor the making of anatomical gifts.

Under Section 6(c) an anatomical gift made by a document of gift also can be revoked by destruction of the document of gift if the destruction is done with the intent to revoke that gift. As a practical matter revocation by destruction is not possible for anatomical gifts made on a donor registry. A donor wishing to revoke anatomical gifts made on a donor registry should revise the registry. If an anatomical gift was evidenced by a written document that was destroyed inadvertently and cannot be found, there may be no effective Section 4 anatomical gift because no one may know of the anatomical gift. Inadvertent destruction of donor cards is common. A card may be lost when the donor decides to clean out a wallet or purse. Thus, donors are well advised to make their wishes known on documents of gift with greater permanency, such as a driver's license or a donor registry, in order to reduce the risk of inadvertent destruction.

The ability to revoke an anatomical gift is subject to the limitations in Section 8. For example, if a donor makes an anatomical gift of a kidney, all other persons are precluded from revoking that gift. Therefore, the donor's later-appointed guardian would not be empowered to revoke that anatomical gift under Section 6.

Under Section 6(d) an anatomical gift may also be amended or revoked by a donor with a terminal illness or injury by any form of communication that is addressed to at least two adult witnesses, at least one of whom must be a disinterested witness. If the donor cannot communicate orally, acceptable forms of communication, in addition to a record, could include a

movement of the head or eye in response to specific questions.

SECTION 7. REFUSAL TO MAKE ANATOMICAL GIFT; EFFECT OF REFUSAL.

(a) An individual may refuse to make an anatomical gift of the individual's body or part by:

(1) a record signed by:

(A) the individual; or

(B) subject to subsection (b), another individual acting at the direction of the individual if the individual is physically unable to sign;

(2) the individual's will, whether or not the will is admitted to probate or invalidated after the individual's death; or

(3) any form of communication made by the individual during the individual's terminal illness or injury addressed to at least two adults, at least one of whom is a disinterested witness.

(b) A record signed pursuant to subsection (a)(1)(B) must:

(1) be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the individual; and

(2) state that it has been signed and witnessed as provided in paragraph (1).

(c) An individual who has made a refusal may amend or revoke the refusal:

(1) in the manner provided in subsection (a) for making a refusal;

(2) by subsequently making an anatomical gift pursuant to Section 5 that is inconsistent with the refusal; or

(3) by destroying or canceling the record evidencing the refusal, or the portion of

the record used to make the refusal, with the intent to revoke the refusal.

(d) Except as otherwise provided in Section 8(h), 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 part bars all other persons from making an anatomical gift of the individual's body or part.

Comment

Section 7 honors the autonomy of an individual whose body or part might otherwise be the subject of an anatomical gift by empowering the individual to make a refusal. There is no age limitation for an individual to sign a refusal. An individual of any age can do so. (However, if a minor has made a refusal and dies under the age of 18, the refusal can be revoked by the minor's parents. *See* Section 8(h)).

A refusal can only be made by the individual whose parts are the subject of the refusal. Thus, an individual's agent, parent, or guardian cannot make a refusal for the individual under Section 7 even though the agent, parent, or guardian could have made a gift for the individual under Section 4.

Refusals typically are made by a signed record. If the individual who wants to sign a refusal cannot physically do so, the refusal can be signed by another individual acting at the request of the individual. If the refusal is signed by another individual acting at the request of the individual making the refusal, the refusal must be witnessed by at least two adults, at least one of whom is a disinterested witness. Furthermore, the record must state that it was signed and witnessed at the request of the individual. *See* Section 7(a)(1) and (b).

A refusal can also be made by the individual's will whether or not the will is admitted to probate or is later invalidated. Additionally, a refusal can be made by any form of communication by a terminally ill or injured individual addressed to at least two adults, at least one of whom is a disinterested witness. *See* Section 7(a)(3).

Subsection (c) provides for the amendment or revocation of a refusal. A refusal may be revoked by a signed record. It can also be revoked by a later-made anatomical gift that is inconsistent with the refusal. For example, suppose an individual signs a refusal to be an organ donor under Section 7. Later that individual signs a record stating only "I revoke the refusal." At this point that individual is neither a donor nor a refuser and upon the individual's death, an anatomical gift could be made by the person or persons listed in Section 9. On the other hand, suppose the individual who had signed a refusal later executed a document of gift donating "my eyes." Here there is an anatomical gift of the eyes and a refusal to be a donor of any other part. This would bar any person from revoking the anatomical gift of the eyes or making an anatomical gift of any other part. Similarly, suppose the individual had signed a refusal and later obtained a driver's license stating that the individual wanted to be an "organ donor." The driver's

license would revoke the refusal to the extent inconsistent with the refusal, and there would be an anatomical gift of the donor's organs, eyes, and tissue. *See* Section 11(f). Lastly, under limited circumstances, a refusal can be revoked orally. *See* Section 7(c)(1).

Subsection (d) provides that an individual's unrevoked refusal to make an anatomical gift of the individual's body or part bars all others from later making an anatomical gift of the body or part. Thus, suppose an individual signs an unrevoked Section 7 refusal. No other person before or after that individual's death could make an anatomical gift for that individual. This section honors the autonomy of the individual to refuse to have his body or parts become the subject of an anatomical gift. It prevents families from making donations on behalf of decedents who, while living, had signed a refusal to make an anatomical gift unless there is evidence that the individual signing the refusal did not intend to have that refusal bind others after death.

An individual might sign a Section 7 refusal that expressly provides that it is not intended to affect the ability of others to make an anatomical gift following the individual's death. If that intent is expressly indicated in the refusal, or if the refusal were later revoked, then other persons listed in Section 9 can make an anatomical gift. For example, suppose an individual signs a Section 7 refusal barring the making of an anatomical gift of the individual's body and parts. If that person does not revoke the refusal, then neither that individual's agent nor guardian nor any person listed in Section 9 can make an anatomical gift of the individual's body or parts. However, it is possible that an individual might wish to bar the individual's guardian from making an anatomical gift under Section 5 but not the individual's family from making a gift under Section 10. If that intent is expressed in the refusal, it will be honored. The intent to make only a limited refusal must be set forth expressly in the Section 7 refusal. Extrinsic evidence would not be admissible to establish intent to limit the refusal as subsection (d) provides that a contrary indication be expressly set forth in the refusal.

An individual's refusal could be limited to a part. For example, an individual might sign a refusal to donate the individual's eyes. In the absence of an express, contrary indication, the refusal would not apply to the individual's other parts. Thus, following the individual's death, the persons listed in Section 9 could make an anatomical gift of the individual's other parts.

A simple form of refusal under this [act] could provide:

I, _____, refuse to make any anatomical gift of my body or any part.

_____ _____

Date Signed Signature of Declarant

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

(a) Except as otherwise provided in subsection (g) and subject to subsection (f), 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 part if the donor made an anatomical gift of the donor's body or part under Section 5 or an amendment to an anatomical gift of the donor's body or part under Section 6.

(b) A donor's revocation of an anatomical gift of the donor's body or 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 part under Section 5 or 10.

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

(d) A revocation of an anatomical gift of a donor's body or 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 part under Section 5 or 10.

(e) 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.

(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 for one or more of the purposes set forth in Section 4 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 under Section 5 or 10.

(g) If a donor who is an unemancipated minor dies, a parent of the donor who is

reasonably available may revoke or amend an anatomical gift of the donor's body or part.

(h) If an unemancipated minor who signed a refusal dies, a parent of the minor who is reasonably available may revoke the minor's refusal.

Comment

Section 2(h) of the 1987 Act provided that "an anatomical gift 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." The intent of that section was to assure donation finality for anatomical gifts made by donors prior to death. For many years, however, it was the practice, albeit now changing, for procurement organizations to seek permission from donor families before parts could be recovered from deceased donors. This practice, however, is inconsistent both with the 1987 Act and, more importantly, the respect due to donors who have made anatomical gifts during their lives. Furthermore, that practice could result in unnecessary delays in the recovery of organs.

Section 8 is designed to state firmly the rule that a donor's autonomous decision regarding the making of an anatomical gift is to be honored and implemented and is not subject to change by others. Section 8 not only continues the policy of making lifetime donations irrevocable but also is restated to take away from families the power, right, or authority to consent to, amend, or revoke donations made by donors during their lifetimes.

Section 8 addresses the possible tension between a donor's autonomous decision to be a donor with the interest of surviving family members to make that decision. It addresses this tension by favoring the decision of the donor over the desires of the family. Section 8(a) strips surviving family members of at least one stick in a bundle of property rights they might otherwise have under state law—the right to make, amend, or revoke an anatomical gift of a body or part if the donor made an anatomical gift or an amendment of the gift of the body or part. This section does not affect property rights families might otherwise have in a decedent's body under other law, such as the right to dispose of a decedent's body after the part that was the subject of the anatomical gift has been recovered. In fact, language in Section 11(h) confirms the family's right to dispose of the donor's body after the donor's parts have been recovered for transplantation, therapy, research, or education.

Section 8(a) provides that, if a donor has made an anatomical gift or has amended an anatomical gift, no other person can make, amend, or revoke that gift. For example, suppose a donor gifts the donor's organs for transplantation. By virtue of Section 8(a), no other person can amend or revoke that gift. In fact, because all other persons are barred from doing so, they have no legal authority or right to amend or revoke the anatomical gift. This section does not apply to bar the parents of an unemancipated minor donor who dies under the age of 18 from revoking the minor donor's gift. *See* Section 8(g).

Section 8(a) is subject to the provisions of subsection (f). Under subsection (f) the donor's gift of a part for one purpose does not preclude another person from expanding the gift

to include another purpose under either Section 5 or 10. For example, suppose the donor signs a document of gift stating: "I give my kidney for transplantation." Following the donor's death, an individual listed in Section 9 could expand that gift to include research in the event the kidney was not medically suitable for transplantation. The right to expand the purposes of the gift can be restricted by the donor.

Section 8(b) provides that the donor's revocation of an anatomical gift (as distinguished from a refusal) bars no one from making an anatomical gift of the donor's body or parts. The difference between Section 8(a) and Section 8(b) is that a revocation is an ambiguous act respecting the donor's intention to bind others. A donor might want to bind others, but it is just as likely that a donor was ambivalent and was more than willing to leave the decision to donate to others. For example, suppose an individual who had donated a kidney by a donor card later destroys that card with the intent to revoke the anatomical gift. This revocation will not prevent another person acting under either Section 5 or 10 from making an anatomical gift. A donor who wishes both to revoke and bind others not to make a gift must sign a refusal.

Section 8(c) provides that a gift or an amendment of a gift by a person other than the donor under Section 5 or 6 bars other persons from making, amending, or revoking that gift under Section 10 only. For example, suppose the guardian of an adult makes a gift on the adult's behalf. At the adult's later death, the adult's surviving child could not amend or revoke that gift. On the other hand, suppose a donor's agent makes a gift during the donor's lifetime and later a guardian is appointed for the donor. The guardian would not be barred from amending that gift or revoking it. The difference is that the persons named in Section 4 are viewed as the donor's alter egos with power to control the donation decision up until the time of the donor's death. Of course, the donor could also amend or revoke the agent's gift.

Under Section 8(d) if a person other than the donor revokes an anatomical gift under Section 6, the revocation does not bar another person from making a gift under either Section 5 or Section 10. For example, suppose the donor's parent makes an anatomical gift. Twelve years later the donor's agent revokes that gift under Section 6. (Section 8(c) does not bar the agent from revoking the gift). Then, five years later a guardian is appointed for the principal. The guardian could make an anatomical gift for the principal under Section 5 because Section 8(d) does not bar the guardian from making the gift. Likewise, the revocation of an anatomical gift by an agent, parent, or guardian would not prevent the making of an anatomical gift under Section 10. For example, suppose an agent makes an anatomical gift for a donor which the agent revokes prior to the principal's death. The principal takes no further action to effectuate the anatomical gift and dies survived by a spouse and predeceased by the agent. The spouse could make an anatomical gift under Section 10 because the agent's revocation of the anatomical gift does not prevent the spouse from making the anatomical gift.

Section 8(e), consistent with prior law, provides that, absent express, contrary indications by the person making an anatomical gift, the gift of a part is neither a refusal to give other parts nor a limitation on the making of gifts of other parts. Thus, if a donor makes an anatomical gift of the donor's kidney, this gift does not bar the donor's family after the donor's death from making a gift of the donor's heart.

Anatomical gifts can only be made for four purposes—transplantation, therapy, research or education. *See* Sections 4 and 9. Section 8(f) provides that an anatomical gift of a part for one or more of the purposes of transplantation, therapy, research or education does not limit the ability to make a later gift of the part for other purposes by the donor or any other person under Section 5 or Section 10. For example, suppose a donor donates "all organs, eyes, and tissue for transplantation or therapy." That gift would not bar a gift under Section 10 of the organs, eyes, or tissue for research. The donor can bar an expansion of the gift's purposes by an express contrary direction. For example a donor's gift of "organs, eyes, and tissue only for transplantation" would bar others from expanding the purpose of the gift to include research.

Section 8(g) permits either parent of an unemancipated minor donor who dies under the age of 18 to revoke that gift. This subsection applies only if the child dies under the age of 18. It does not empower the parent of a living minor to revoke that minor's anatomical gift while the minor is living. In fact, Section 8(a) would preclude the parent from revoking the minor child's anatomical gift. A parent who does not wish the parent's minor child to make an anatomical gift should communicate the parent's desires to that child. Once the minor donor becomes an adult, neither parent has the right to revoke the gift.

Under Section 8(h) an unemancipated minor's refusal can also be revoked by the minor's parent if the minor dies under the age of 18. Like Section 8(g), a minor's refusal cannot be revoked by the minor's parent while the minor is alive.

Both Section 8(g) and 8(h) require the parent to be reasonably available to either revoke a gift or a refusal. If both parents are reasonably available, either one can revoke the gift or the refusal.

SECTION 9. WHO MAY MAKE ANATOMICAL GIFT OF DECEDENT'S BODY OR PART.

(a) Subject to subsections (b) and (c) and unless barred by Section 7 or 8, an anatomical gift of a decedent's body or part for purpose of transplantation, therapy, research, or education may be made by any member of the following classes of persons who is reasonably available, in the order of priority listed:

(1) an agent of the decedent at the time of death who could have made an anatomical gift under Section 4(2) immediately before the decedent's death;

(2) the spouse of the decedent;

(3) adult children of the decedent;

(4) parents of the decedent;

(5) adult siblings of the decedent;

(6) adult grandchildren of the decedent;

(7) grandparents of the decedent;

(8) an adult who exhibited special care and concern for the decedent;

(9) the persons who were acting as the [guardians] of the person of the decedent at the time of death; and

(10) any other person having the authority to dispose of the decedent's body.

(b) If there is more than one member of a class listed in subsection (a)(1), (3), (4), (5), (6), (7), or (9) entitled to make an anatomical gift, an anatomical gift may be made by a member of the class unless that member or a person to which the gift may pass under Section 11 knows of an objection by another member of the class. If an objection is known, the gift may be made only by a majority of the members of the class who are reasonably available.

(c) A person may not make an anatomical gift if, at the time of the decedent's death, a person in a prior class under subsection (a) is reasonably available to make or to object to the making of an anatomical gift.

Comment

Section 9(a) empowers the persons listed in the section to make an anatomical gift of a decedent's body or parts unless they are otherwise barred from doing so under Section 7 or Section 8. Persons who can make an anatomical gift under Section 9 often will be consulted whether they would be willing to make a gift when the prospective donor is near death. *See also* Section 10, comment (last paragraph).

The list of persons who can make an anatomical gift on behalf of a decedent is slightly expanded from prior law. This list now includes that individual who at the time of the decedent's death was acting as an agent of the decedent, adult grandchildren of the decedent, and a close friend of the decedent.

This [act] does not extend the agency relationship beyond a principal's death. Under

other law, an agent's power under a power of attorney for health care or any other power terminates when the principal dies. But, under this [act] and assuming that the agent was neither barred under Section 8 nor prohibited in the power of attorney for health care from making anatomical gifts, the person who had been acting as an agent at the time of the principal's death (even though death terminated the agency relationship) has the first priority to make an anatomical gift on behalf of the deceased principal.

Absent a donation by the decedent or the decedent's former agent, other persons or classes of person are empowered to make an anatomical gift in the following order: spouse of the decedent; adult children of the decedent; parents of the decedent; adult siblings of the decedent; adult grandchildren of the decedent; grandparents of the decedent; an adult who exhibited "special care and concern for the decedent;" and the person who was acting as guardian of the decedent at the time of the decedent's death. Lastly, "any other person having the authority to dispose of the decedent's body" can make the decision if no other persons are reasonably available. In those states that recognize domestic partners, the addition of the domestic partner to Section 9(a)(2) would be warranted. In states that do not recognize domestic partners, individuals with domestic partners who wish to be donors should make an anatomical gift before death or designate their domestic partners as agents to give them the first priority under this section.

To the extent that an individual is concerned that the person named in Section 9 may not take adequate account of the individual's personal preferences regarding anatomical gifts, the onus is on the individual to either make or bar the making of an anatomical gift.

In the absence of any person listed in paragraphs (1) through (9) to make an anatomical gift, the gift can be made by "any other person having the authority to dispose of the decedent's body." This [act], like its predecessors, does not specify what person has the authority to dispose of a decedent's body. Who that person is must be determined by law other than this [act]. One such person might be a coroner or medical examiner in possession of an unclaimed body who under law other than this [act] is authorized to dispose of the body after a certain period of time. Of course, in that case it is most unlikely that the decedent's organs could be donated as they are not likely to be medically suitable for transplantation or therapy given the amount of time that likely will pass before it can be determined that no one else will claim the body. But, the decedent's eyes or tissue might be medically suitable for donation. And, of course, the whole body could be the subject of an anatomical gift.

Subsection (a) permits any member of a class to make an anatomical gift. Under subsection (b), however, a class member cannot make an anatomical gift if the class member, or the person to which the gift could pass under Section 11, knows of any objection to the making of the gift by another member of the class. If an objection is known, the gift can only be made by a majority of the members of the same class who are reasonably available. If the class member wishing to make the gift is the only reasonably available member of the class, that class member alone can make the gift even though the class member knows of an objection by another class member who is not reasonably available. If more than one member of the class is reasonably available, the gift can be made only if a majority of them agree. To illustrate, suppose the decedent is survived by three children. The eldest, who is unaware of any objection by the other two, can make an anatomical gift. If, however, the eldest knows that one of the other siblings

objects and that sibling is reasonably available, both must agree to make the gift if the third sibling is not reasonably available. If all three siblings are reasonably available, at least two would have to agree to make the gift.

This section departs from both the 1968 Act which required children to act by a majority and the 1987 Act which barred a class member from making a gift (and the donee from accepting the gift) if there was a known objection by another member of the class.

The rule of subsection (b) does not apply to adults who exhibited special care and concern for the decedent. If there is more than one such person, any one of them can make an anatomical gift.

A person cannot make an anatomical gift if, at the time of the decedent's death, a person in a prior class is reasonably available to either make or object to the making of an anatomical gift. *See* Section 9(c). The assumption here is that a person in a prior class is reasonably available but has not yet been contacted by a procurement organization. For example, suppose only the decedent's grandchildren are physically present at the hospital when the decedent dies, but the decedent's children are able to be contacted. For purposes of this [act], the children are reasonably available and, therefore, the grandchildren who are at the hospital cannot make an anatomical gift.

As highlighted above, known objections by persons not reasonably available do not bar persons who are reasonably available from making an anatomical gift whether the objections are held by a person in a prior class or the same class. This is purposeful. The policy choice here is essentially that only persons who are reasonably available can make or object to the making of an anatomical gift. That is because the known objection of 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 the person been reasonably available to discuss the matter with a procurement organization or others.

The concept and definition of "reasonably available" is drawn from lessons learned in the drafting of the Uniform Health-Care Decisions Act and borrows from the language in Section 1(14) of that act. The making of an anatomical gift following a decedent's death is extremely time sensitive, and a decision to donate must be made within a relatively short period of time following death if the organs are to remain viable and human lives are to be saved. Reasonably available is not synonymous with physically present. The phrase (defined in Section 2 (23)) means able to be contacted without "undue effort and willing and able to act in a timely manner consistent with existing medical criteria necessary for the making of an anatomical gift." Thus, a sibling who can be easily contacted by telephone is reasonably available. Section 14(g) imposes on procurement organizations an obligation to make a reasonable search for persons with a priority to make an anatomical gift.

An individual with a higher priority to make an anatomical gift may be unwilling to make a decision, preferring it be made by others. For example, a decedent's spouse may be unwilling to make a decision to donate the decedent's organs, preferring that any decision be made by the decedent's children. Under this [act] the spouse, being unwilling to make a decision, is not

reasonably available. There is some concern that an unwillingness to make a decision is equivalent to an objection and should have been treated as such under this [act]. But, this [act] reflects a judgment that the potential savings in human life justifies the position that the inability to express a decision is tantamount to not being available to make a decision. This policy choice was supported by the fact that procurement organizations are well-trained to work with family members when seeking an anatomical gift to distinguish between an objection and a true unwillingness to make a decision.

SECTION 10. MANNER OF MAKING, AMENDING, OR REVOKING ANATOMICAL GIFT OF DECEDENT'S BODY OR PART.

(a) A person authorized to make an anatomical gift under Section 9 may make an anatomical gift by a document of gift signed by the person making the gift or by that person's oral communication that is electronically recorded or is contemporaneously reduced to a record and signed by the individual receiving the oral communication.

(b) Subject to subsection (c), an anatomical gift by a person authorized under Section 9 may be amended or revoked orally or in a record by any member of a prior class who is reasonably available. If more than one member of the prior class is reasonably available, the gift made by a person authorized under Section 9 may be:

(1) amended only if a majority of the reasonably available members agree to the amending of the gift; or

(2) revoked only if a majority of the reasonably available members agree to the revoking of the gift or if they are equally divided as to whether to revoke the gift.

(c) A revocation under subsection (b) is effective only if, before an incision has been made to remove a part from the donor's body or before invasive procedures have begun to prepare the recipient, the procurement organization, transplant hospital, or physician or technician knows of the revocation.

Comment

Section 10(a) provides that an anatomical gift by a person authorized to make the gift under Section 9 can be made by a document of gift that is signed by the person making the gift. The document of gift could be an e-mail. This might be a common form of a document of gift where the gift is made by a person named in Section 9 who is reasonably available but not physically present at the hospital where the donor died to deal in person with the procurement organization.

The person also may make the gift orally. An oral gift must be recorded or reduced to a record that is signed by the individual receiving the oral communication. For example, the decedent's spouse might consent to a gift over the telephone at the request of a procurement organization. The individual to whom the gift was communicated should then note that gift in a signed record.

In common with prior law, if a person makes an anatomical gift but there is a member of a prior class who becomes reasonably available, that member may revoke the gift. *See* Section 10(b)(2). If more than one member of the prior class becomes reasonably available, then the gift can be revoked only if the majority of the members of the prior class agree to revoke the gift or if they are equally divided. *See* Section 10(b)(2). For example, suppose an anatomical gift of a kidney is made by a parent of the decedent because none of the decedent's children are reasonably available to make the gift. However, before an incision is made to remove the kidney from the donor's body or invasive procedures have begun to prepare the recipient, a child of the decedent becomes reasonably available and purports to revoke the gift. If this child is the decedent's only reasonably available child, the gift is revoked. If, on the other hand, two children become reasonably available, the gift is revoked only if they agree to revoke or they are equally divided whether to revoke. And, if three children become reasonably available, the gift is revoked if at least two of the three agree to revoke the gift.

If a gift is made by a member of a more remote class, the gift can be amended by the members of the prior class who become reasonably available. *See* Section 10(b)(1). If more than one member becomes reasonably available, the gift can be amended only if a majority of them agree. *See* Section 10(b)(1). For example, a grandchild of the decedent makes an anatomical gift of the decedent's kidneys for transplant. Any reasonably available child or, if more than one, a majority of them can amend the gift to provide that if the kidney is not medically suitable for transplant, it can be used for research. Amendments are not subject to subsection (c) (requiring revocations to be made before the incision is made to remove a part from the body or before invasive procedures have begun to prepare the recipient) as amendments typically would involve extending the purpose of the gift rather than preventing the gift from being made at all.

This [act] is silent regarding whether a Section 10 gift can be made while a donor or prospective donor is near death or whether the gift can only be made after the donor or prospective donor has died. This is purposeful in order to allow procurement organizations and the person having the priority to make an anatomical gift under Section 9 some latitude as to when to sign a document of gift. Of course, no gift is effective unless the donor or prospective donor dies and at the time of death the person making the anatomical gift then had the priority to make the gift.

SECTION 11. PERSONS THAT MAY RECEIVE ANATOMICAL GIFT; PURPOSE OF ANATOMICAL GIFT.

(a) An anatomical gift may be made to the following persons named in the document of gift:

(1) a hospital; accredited medical school, dental school, college, or university; organ procurement organization; or other appropriate person, for research or education;

(2) subject to subsection (b), an individual designated by the person making the anatomical gift if the individual is the recipient of the part;

(3) an eye bank or tissue bank.

(b) If an anatomical gift to an individual under subsection (a)(2) cannot be transplanted into the individual, the part passes in accordance with subsection (g) in the absence of an express, contrary indication by the person making the anatomical gift.

(c) 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.

(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.

(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.

(d) For the purpose of subsection (c), 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 be used for transplantation or therapy, if suitable. If the gift cannot be used for transplantation or therapy, the gift may be used for research or education.

(e) 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 gift may be used only for transplantation or therapy, and the gift passes in accordance with subsection (g).

(f) 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 gift may be used only for transplantation or therapy, and the gift passes in accordance with subsection (g).

(g) For purposes of subsections (b), (e), and (f) 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.

(h) 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 as custodian of the organ.

(i) If an anatomical gift does not pass pursuant to subsections (a) through (h) 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.

(j) 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 the 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.

(k) Except as otherwise provided in subsection (a)(2), nothing in this [act] affects the allocation of organs for transplantation or therapy.

Comment

Section 11 sets forth various rules to identify the person to which a part or body passes as the result of an anatomical gift.

Under Section 11(a)(1), an anatomical gift of a body for research or education can be made to a named organization. These gifts typically occur as the result of a whole body donation to a particular institution in the donor's will or as the result of a prior arrangement between a donor and a particular research or educational institution.

While Section 11(a)(2) permits a donation of a part to a named individual if the part is to be transplanted into that individual, such donations are exceedingly rare for at least two reasons. Only in rare circumstances would a donor, during the donor's life, know of an individual who would need an organ, eye, or tissue that would be the subject of an anatomical gift and, similarly, decedent's families are generally not likely to know the identity of such individuals. Furthermore, gifts to a named individual may not be medically suitable as the donor and recipient may have different blood types or other characteristics that make them incompatible.

If a gift of a part is made to a named individual and it is later determined that the part cannot be transplanted into that individual, the part passes to the organ procurement organization as custodian under subsection (g) to allocate the organ in accordance with applicable organ allocation policies unless the person making the gift expressly provides to the contrary. *See* Section 11(b).

Gifts by donors before death and gifts by others after a donor's death could specify both the parts that are the subject of the anatomical gift and the purposes of the gift. For example, a donor might make a gift of a kidney for transplantation or therapy. If a gift is made of one or more specific parts and specifies the purposes of the gift but does not name a person to whom the

gift passes, then the gift passes to the appropriate eye bank if the gift is an eye and for the purpose of transplantation or therapy. *See* Section 11(c)(1). If the gift is of tissue for the purpose of transplantation or therapy, it passes to the appropriate tissue bank, Section 11(c)(2), and if the gift is an organ for the purpose of transplantation or therapy it passes to the appropriate organ procurement organization as custodian of the organ, Section 11(c)(3). A gift of a specific part for purposes of research or education passes to the appropriate eye bank, tissue bank, or organ procurement organization. *See* Section 11(c)(4). *See also* Section 5 comments, for examples of forms.

In some cases the person making the anatomical gift specifies that the gift can be used for transplantation, therapy, research, or education but these purposes are not set forth in the document of gift in any priority. For example, a donor might donate "my kidney for purposes of transplantation, therapy, research, or education." Under Section 11(d), the gift must first be used for transplantation or therapy if suitable for either of those purposes. If not suitable, the gift may be used for research or education.

Most gifts made by donors before death are made by a driver's license or entry on a donor registry. If a donor's gift does not specify the purpose of the gift, as would occur if the driver's license indicated only that the donor was an "organ donor," the gift is only of the donor's parts (not the whole body), and the parts may be used only for transplantation or therapy. *See* Section 11(f). Likewise, if a gift of a part is made but the document of gift fails to specify the purpose of the gift or name a person to receive the gift, the part may be used only for transplantation or therapy. *See* Section 11(e). In either case, if the part is an eye, it passes to the appropriate eye bank, if tissue, it passes to the appropriate tissue bank, and if an organ, it passes to the appropriate organ procurement organization as custodian of the organ. *See* Section 11 (e), (f) and (g).

If a gift made under Section 4 is limited to transplantation or therapy by Section 11(e) or (f), procurement organizations could approach persons with a priority to make gifts under Section 9 to expand the purpose of the gift to include research or education and obtain their consent to use the gift for those purposes in the event the gift is unsuitable for transplantation or therapy. *See* Section 8(f).

A statement on a document of gift that the donor is an "organ donor" is an anatomical gift and not merely evidence of intention to be a donor. *See* Section 11(f). Thus, parts can be recovered from the donor without the need of a Section 10 gift. Additionally, as an anatomical gift by the donor, surviving family members would be barred from revoking the gift. *See* Section 8.

Under this [act], when an organ passes to an organ procurement organization for purposes of transplantation or therapy, it passes to the organ procurement organization as a "custodian." *See* Section 11(h). Under Section 274 of the National Organ Transplant Act in 1984, Congress created the Organ Procurement Transplantation Network (OPTN). *See*, 42 CFR §§ 121 et seq. Among other things, the OPTN oversees the nationwide allocation of organs for transplantation. Currently, the OPTN contracts with the United Network Organ Sharing ("UNOS"), a non-profit corporation, to administer the nationwide allocation of organs for transplantation. UNOS, in turn,

has agreements with numerous organ procurement organizations that have specific designated service areas. The organ procurement organizations have primary responsibility to evaluate the medical suitability of organs for transplantation, seek anatomical gifts under Section 10 when the decedent was not a donor at or near death, arrange for the procurement of organs from donors, and cause organs to be allocated and transferred to recipients in accordance with their contractual obligations with the OPTN. Thus, organs passing to organ procurement organizations under this [act] for the purpose of transplantation or therapy pass to them in a custodial capacity. There is no expectation that the organ procurement organization will retain the organ. Eyes and tissue pass to the appropriate eye or tissue bank under no similar restrictions; therefore, eye and tissue banks do not properly take as a custodian.

To assist in the evaluation of potential donors, federal law also requires hospitals receiving Medicare and Medicaid funding to refer all deaths or near deaths to organ procurement organizations or a third party designated by the organ procurement organization for possible organ, eye, and tissue donation. *See* 42 CFR § 482.45 (Medicare and Medicaid Programs: Conditions of Participation: Identification of Potential Organ, Tissue, and Eye Donors and Transplant Hospitals' Provision of Transplant-Related Data). These referral requirements have made the provisions of Section 5 of the 1987 Act obsolete, and, accordingly, those provisions have been deleted from this [act].

Section 11(i) provides that, if parts do not pass under the preceding provisions of the [act] or are not used for transplantation, therapy, research, or education, custody of the decedent's body or parts vests in the person under obligation to dispose of them. The person having custody to dispose of the decedent's body is determined by law other than this [act].

This [act] does not define the appropriate eye or tissue bank or organ procurement organization. Which of the many eye banks, tissue banks, or organ procurement organizations is the appropriate one is determined by factors outside the scope of this [act]. For example, hospitals, coroners or medical examiners likely will have cooperative agreements with particular eye and tissue banks that coordinate eye and tissue donations. As for the appropriate organ procurement organizations, that is determined by the policies of the OPTN.

Under the common law, a gift is effectuated by intent, delivery, and acceptance. (*But see* Section 13(a) regarding delivery). In common with general principles of gift law, an express acceptance of an anatomical gift is not required. However, Section 11(j) provides certain bars on the acceptance of an anatomical gift by a person that would trump the "acceptance presumption." A person may not accept an anatomical gift if the person knows of a Section 7 refusal. A person may not accept an anatomical gift if the person knows that a gift once made had been revoked or that a gift under Section 5 or 10 was not properly made. For example, suppose the decedent's children wish to donate organs that under Section 11 would pass to an organ procurement organization but that organization knows that the decedent's spouse is reasonably available to make or refuse to make a gift. The organ procurement organization may not accept the purported gift from the children. Suppose an organ procurement organization knows an anatomical gift was made on a document of gift. Because of the imputed knowledge requirement in the last sentence of Section 11(j), the organization may not accept that gift if on the same document of gift there is evidence that the gift was revoked.

Lastly, nothing in this [act] affects the allocation of organs for transplantation or therapy except in the case of a gift to a named individual under Section 11(a)(2). *See* Section 11(k). As noted above, the allocation of organs is controlled by the policies of the OPTN.

SECTION 12. SEARCH AND NOTIFICATION.

(a) The following persons shall make a reasonable search of an individual who the person reasonably believes is dead or near death for a document of gift or other information identifying the individual as a donor or as an individual who made a refusal:

(1) a law enforcement officer, firefighter, paramedic, or other emergency rescuer finding the individual; and

(2) if no other source of the information is immediately available, a hospital, as soon as practical after the individual's arrival at the hospital.

(b) If a document of gift or a refusal to make an anatomical gift is located by the search required by subsection (a)(1) and the individual or deceased individual to whom it relates is taken to a hospital, the person responsible for conducting the search shall send the document of gift or refusal to the hospital.

(c) A person is not subject to criminal or civil liability for failing to discharge the duties imposed by this section but may be subject to administrative sanctions.

Comment

This section remains in substance the same as the prior 1968 and 1987 Acts. The constitutional standards of "reasonable search" under state and federal laws apply. In ordinary circumstances, reasonable search would only be of the person or in the immediate vicinity of the person. No courts have applied or extended this provision to allow a random and extensive search of premises. Because most likely an anatomical gift would have been made on a driver's license or donor registry and any donation on them is readily accessed by a procurement organization, there is no significant need to extend this section to allow searches of the premises.

SECTION 13. DELIVERY OF DOCUMENT OF GIFT NOT REQUIRED; RIGHT TO EXAMINE.

(a) A document of gift need not be delivered during the donor's lifetime to be effective.

(b) Upon or after an individual's death, a person in possession of a document of gift or a refusal to make an anatomical gift with respect to the individual shall allow examination and copying of the document of gift or refusal by a person authorized to make or object to the making of an anatomical gift with respect to the individual or by a person to which the gift could pass under Section 11.

Comment

Section 13(a), in common with prior versions of this [act], rejects the common-law principle that a gift requires delivery to be effective. With the exception of gifts of whole bodies in deeded body programs, most anatomical gifts made by a donor during the donor's life are made without any communication between the person making the gift and the person to which the gift passes under Section 11 and for obvious reasons—the person is likely unknown.

This section does not affirmatively require any person in possession of a document of gift or a refusal to come forward at a decedent's death with that information. *But see* Section 12(b) (obligation of certain individuals to deliver a document of gift or refusal following a search). On the other hand, if a document of gift or a refusal is in the possession of someone other than the donor, that person shall allow other persons who can make or object to the making of an anatomical gift to review and copy such records. They shall also allow the person to which a gift could pass under Section 11 to examine and copy such documents. *See* Section 13(b). *See* also Section 20(c)(2).

SECTION 14. RIGHTS AND DUTIES OF PROCUREMENT ORGANIZATION AND OTHERS.

(a) When a hospital refers an individual at or near death to a procurement organization, the organization shall make a reasonable search of the records of the [state department of motor vehicles] and any donor registry that it knows exists for the geographical area in which the individual resides to ascertain whether the individual has made an anatomical gift.

(b) A procurement organization must be allowed reasonable access to information in the records of the [state department of motor vehicles] to ascertain whether an individual at or near death is a donor.

(c) When a hospital refers an individual at or near death to a procurement organization, the organization may conduct any reasonable examination necessary to ensure the medical suitability of a part that is or could be the subject of an anatomical gift for transplantation, therapy, research, or education from a donor or a prospective donor. During the examination period, measures necessary to ensure the medical suitability of the part may not be withdrawn unless the hospital or procurement organization knows that the individual expressed a contrary intent.

(d) Unless prohibited by law other than this [act], at any time after a donor's death, the person to which a part passes under Section 11 may conduct any reasonable examination necessary to ensure the medical suitability of the body or part for its intended purpose.

(e) Unless prohibited by law other than this [act], an examination under subsection (c) or (d) may include an examination of all medical and dental records of the donor or prospective donor.

(f) Upon the death of a minor who was a donor or had signed a refusal, unless a procurement organization knows the minor is emancipated, the procurement organization shall conduct a reasonable search for the parents of the minor and provide the parents with an opportunity to revoke or amend the anatomical gift or revoke the refusal.

(g) Upon referral by a hospital under subsection (a), a procurement organization shall make a reasonable search for any person listed in Section 9 having priority to make an anatomical gift on behalf of a prospective donor. If a procurement organization receives

information that an anatomical gift to any other person was made, amended, or revoked, it shall promptly advise the other person of all relevant information.

(h) Subject to Sections 11(i) and 23, the rights of the person to which a part passes under Section 11 are superior to the rights of all others with respect to the part. The person may accept or reject an anatomical gift in whole or in part. Subject to the terms of the document of gift and this [act], a person that accepts an anatomical gift of an entire body may allow embalming, burial or cremation, and use of remains in a funeral service. If the gift is of a part, the person to which the part passes under Section 11, upon the death of the donor and before embalming, burial, or cremation, shall cause the part to be removed without unnecessary mutilation.

(i) Neither the physician who attends the decedent at death nor the physician who determines the time of the decedent's death may participate in the procedures for removing or transplanting a part from the decedent.

(j) A physician or technician may remove a donated part from the body of a donor that the physician or technician is qualified to remove.

Comment

When a hospital refers an individual at or near death to a procurement organization, Section 14(a) requires the procurement organization to conduct a reasonable search of the motor vehicle records or of any donor registry it knows to exist for the geographical area in which that individual resides to determine if that individual is a donor. This [act] does not require a hospital to make a referral to a procurement organization. However, a referral may be required by contract or by law other than this [act]. *See, e.g.,* Section 42 CFR § 482.45.

Section 14(b) requires a state department of motor vehicles to allow all procurement organizations reasonable access to information in the department's records.

Procurement organizations may conduct a reasonable examination to determine the medical suitability of a part that is or could be the subject of an anatomical gift. This examination typically is made in a relatively short period of time. During the examination period, measures necessary to ensure the medical suitability of a part cannot be withdrawn from the individual who was referred to the procurement organization unless the procurement organization or hospital knows that individual expressly provided to the contrary. *See* Section 14(c). A general

direction in a power of attorney for health care or advance health-care directive that the patient does not wish to have life prolonged by the administration of life support systems should not be construed as an expression of a contrary intent. *See* Section 14(c). *See also*, Section 21.

Persons to whom the part passes after the donor's death also may conduct a reasonable examination to ensure the medical suitability of the part. An examination includes an examination of the relevant medical records. *See* Section 14(e). Section 14(e) is not inconsistent with Section 164.512(h) of the HIPAA regulations permitting the disclosure without consent of protected health information "to organ procurement organizations or other entities engaged in the procurement, banking, or transplantation of cadaveric organs, eyes, or tissue for the purpose of facilitating organ, eye, or tissue donation and transplantation."

If a minor donor dies, the minor's parents are entitled to revoke the minor's anatomical gift or refusal, if any. Section 14(f) requires a procurement organization to make a reasonable search for the minor's parents to provide them with an opportunity to do so.

Under Section 14(g), a procurement organization also is required to make a reasonable search for any person empowered to make a gift under Section 9. If the donor made an anatomical gift of all parts for transplantation, therapy, research, or education or of the donor's whole body, there would be no one under Section 9 with a priority to make a gift because the persons listed in Section 9 would be barred by Section 8 from making or revoking the gift. Thus, if a donor made such a gift, there is no reason for procurement organizations to search for any of the persons named in Section 9.

Section 14(g) also requires a procurement organization that acquires knowledge that an anatomical gift has been made to another person to advise that person of the gift. For example, suppose an organ procurement organization discovers, while searching a donor registry, that an anatomical gift was made of the eyes. The organ procurement organization is required to notify the appropriate eye bank of that gift.

Under Section 14(j) neither the physician who attends the decedent at death nor the physician who determines the time of death may participate in the procedures for removing or transplanting a part. The concept of "attends" is well known in the medical profession and contemplates the attending physician who cared for the donor during the donor's life. This section is similar to provisions in prior law and is intended to bar what might otherwise be perceived as a conflict of interest should a physician attend both the donor and the recipient. Some surveys have suggested that a small segment of the population believes that a patient who might die without proper medical attention may not be treated in order that the patient's organs can be used for another. While there is absolutely no evidence that this has ever occurred, this section is included in this [act] to address any public misperceptions by making clear that it should not be able to happen legally.

SECTION 15. COORDINATION OF PROCUREMENT AND USE. Each hospital in this state shall enter into agreements or affiliations with procurement organizations for

coordination of procurement and use of anatomical gifts.

Comment

42 CFR § 482.45 (Medicare and Medicaid Programs: Conditions of Participation: Identification of Potential Organ, Tissue, and Eye Donors and Transplant Hospitals' Provision of Transplant-Related Data) sets forth criteria requiring hospitals and organ procurement organizations to have cooperative agreements to permit organ procurement organizations to determine the suitability of organs for transplant. Furthermore in the absence of alternative arrangements by a hospital, organ procurement organizations have the responsibility to determine the suitability of tissues and eyes using the definition of potential tissue and eye donors and the notification protocol developed in consultation with the tissue and eye banks identified by the hospital for this purpose. Hospitals are also required to (1) have an agreement with at least one tissue bank and one eye bank to cooperate in the retrieval, processing, preservation, storage, and distribution of tissue and eyes and (2) ensure, working with organ procurement organizations, that families of potential donors are informed of the option of donating eyes, tissue, and organs.

SECTION 16. SALE OR PURCHASE OF PARTS PROHIBITED.

(a) Except as otherwise provided in subsection (b), a person that for valuable consideration, knowingly purchases or sells a part for transplantation or therapy if removal of a part from an individual is intended to occur after the individual's death commits a [[felony] and upon conviction is subject to a fine not exceeding [$50,000] or imprisonment not exceeding [five] years, or both][class[ ] felony].

(b) A person may charge a reasonable amount for the removal, processing, preservation, quality control, storage, transportation, implantation, or disposal of a part.

Comment

This section applies only to anatomical gifts and is substantially the same as the provisions in the 1968 and 1987 Acts. It only applies to sales of parts intended to be recovered from a decedent after death for transplantation or therapy. It remains essentially unchanged from prior law. This section is consistent and in accord with the National Organ Transplant Act, 42 U.S. C. § 274(e).

SECTION 17. OTHER PROHIBITED ACTS. A person that, in order to obtain a

financial gain, intentionally falsifies, forges, conceals, defaces, or obliterates a document of gift, an amendment or revocation of a document of gift, or a refusal commits a [[felony] and upon conviction is subject to a fine not exceeding [$50,000] or imprisonment not exceeding [five] years, or both] [class[ ] felony].

Comment

This section is new and addresses abuses that have been widely reported. It criminalizes the intentional falsification of a document of gift or refusal when done to obtain a financial gain. For example, suppose a person falsifies a document of gift in order to sell a decedent's part to a research institution. The person who falsified the document of gift would be guilty of a felony.

The only express liability sections in this [act] are in Section 16 relating to sales and Section 17 relating to falsified documents. Occasional news stories have surfaced about alleged other improprieties in the procurement and allocation of organs and some have argued that this [act] should address them. However, those other improprieties are addressed by law other than this [act] or administratively, including regulatory rules, licensing requirements, Unfair and Deceptive Practices Acts, and the common law.

SECTION 18. IMMUNITY.

(a) A person that acts in accordance with this [act] or with the applicable anatomical gift law of another state, or attempts in good faith to do so, is not liable for the act in a civil action, criminal prosecution, or administrative proceeding.

(b) Neither the person making an anatomical gift nor the donor's estate is liable for any injury or damage that results from the making or use of the gift.

(c) In determining whether an anatomical gift has been made, amended, or revoked under this [act], a person may rely upon representations of an individual listed in Section 9(a)(2), (3), (4), (5), (6), (7), or (8) relating to the individual's relationship to the donor or prospective donor unless the person knows that the representation is untrue.

Comment

A version of subsection (a) has been in the two prior anatomical gift acts. *See* Subsection

7(c) of the 1968 Act and Section 11(c) of the 1987 Act. In the 1968 Act, "good faith" had the common-law meaning of honesty-in-fact. In short, it was meant to be a subjective standard involving determination of the intent or state of mind of the person concerned, namely the honesty of intent. As the official comment for Section 7 of the 1968 Act states: "The entire section 7 merits genuinely liberal interpretation to effectuate the purpose and intent of the Uniform Act, that is, to encourage and facilitate the important and ever increasing need for human tissue and organs for medical research, education and therapy, including transplantation." Thus, immunity was intended to be extended to persons which generally and substantively act in accordance with the 1968 Act, with honesty of intent.

If parties were held to an overly strict adherence to this [act] when transplants must be made shortly after the decedent's death, it might well have a chilling effect on the making of anatomical gifts for the purpose of transplantation or therapy. This [act] retains the meaning of the term of "good faith" in the 1968 Act in order to encourage and facilitate transplantation. On the other hand, if a person acts in subjective "bad faith," the common law provides remedies.

In order to encourage donations, Section 18(b) immunizes the person making an anatomical gift and the donor's estate from any liability for damages resulting from the making or using of an anatomical gift. Persons who make anatomical gifts and donors have little or no ability to determine the medical suitability or risks associated with transplantation or therapy of donated parts. Risk assessment is appropriately left to the medical community, broadly conceived.

When an individual at or near death who is not a donor has been referred to a procurement organization, the organization will seek out persons to discuss the possibility of making an anatomical gift if the individual had not made a refusal. Because the gift can only be made by the persons listed in Section 9 with the appropriate priority, Section 18(c) provides that procurement organizations can rely on the representations of the individuals listed in Section 9(a)(2) through (8) as to their relationship to the donor or prospective donor. This immunity does not apply if the individual who documents a gift knows the representation is false.

The purpose of subsection (c) is to relieve procurement organizations of the burden of ascertaining the truthfulness of relationship claims because proof may be impracticable or time consuming in light of the need to act expeditiously to effectuate an anatomical gift. For example, if an individual claims to be the decedent's spouse or child, the procurement organization can rely on that representation. This immunity does not run to persons claiming to be agents or guardians or persons who have authority to dispose of a decedent's body. Agents or guardians should have documentation of their relationship readily available or their relationship to the donor or prospective donor will likely be reflected in the available medical records.

SECTION 19. LAW GOVERNING VALIDITY; CHOICE OF LAW AS TO EXECUTION OF DOCUMENT OF GIFT; PRESUMPTION OF VALIDITY.

(a) A document of gift is valid if executed in accordance with:

(1) this [act];

(2) the laws of the state or country where it was executed; or

(3) the laws of the state or country where the person making the anatomical gift was domiciled, has a place of residence, or was a national at the time the document of gift was executed.

(b) If a document of gift is valid under this section, the law of this state governs the interpretation of the document of gift.

(c) A person may presume that a document of gift or amendment of an anatomical gift is valid unless that person knows that it was not validly executed or was revoked.

Comment

Section 19 is new to the anatomical gift act and accomplishes two things. First, it assures that a document of gift is valid if it was valid either in the place where executed or in the place where the person making the gift was domiciled, had a residence, or was a national. This section tracks like provisions for wills, such as Section 2-506 of the Uniform Probate Code.

More importantly, Section 19(c) provides that a person can presume a document of gift to be valid unless the person has actual knowledge that it was not validly executed or was revoked. For example, if the person knows that the donor had signed a Section 7 refusal but the document of gift was signed by the decedent's spouse following the decedent's death, the person knows that the document of gift was not validly executed.

SECTION 20. DONOR REGISTRY.

(a) The [insert name of appropriate state agency] may establish or contract for the establishment of a donor registry.

(b) The [state department of motor vehicles] shall cooperate with a person that administers any donor registry that this state establishes, contracts for, or recognizes for the purpose of transferring to the donor registry all relevant information regarding a donor's making, amendment to, or revocation of an anatomical gift.

(c) A donor registry must:

(1) allow a donor or other person authorized under Section 4 to include on the donor registry a statement or symbol that the donor has made, amended, or revoked an anatomical gift;

(2) be accessible to a procurement organization to allow it to obtain relevant information on the donor registry to determine, at or near death of the donor or a prospective donor, whether the donor or prospective donor has made, amended, or revoked an anatomical gift; and

(3) be accessible for purposes of paragraphs (1) and (2) seven days a week on a 24-hour basis.

(d) Personally identifiable information on a donor registry about a donor or prospective donor may not be used or disclosed without the express consent of the donor, prospective donor, or person that made the anatomical gift for any purpose other than to determine, at or near death of the donor or prospective donor, whether the donor or prospective donor has made, amended, or revoked an anatomical gift.

(e) This section does not prohibit any person from creating or maintaining a donor registry that is not established by or under contract with the state. Any such registry must comply with subsections (c) and (d).

Legislative Note: *If the state has an existing donor registry statute, it should consider whether this section is necessary. It should also consider whether subsections (c) and (d), and Section 14(g)(last sentence), should be incorporated into its existing statute. Subsection (b) may be deleted if the state department of motor vehicles is the agency specified in subsection (a).*

Comment

A donor registry is one of many devises to facilitate the making of anatomical gifts. In time, it may prove to be the most effective way of making anatomical gifts, particularly when the records of the state department of motor vehicles and the donor registry can be coordinated to

assure a unitary source of donor information. This section is intended primarily to encourage states to facilitate the creation of donor registries operated by the state or by another. This section should not be construed to prohibit otherwise valid anatomical gifts as provided for in Section 5.

The section sets forth minimum requirements for a donor registry whether created by the state or not. These requirements are that the registry: (1) provide an electronic database that allows persons to make an anatomical gift by use of a statement or symbol; (2) be accessible to all procurement organizations at or near the time of death of a donor or prospective donor to determine whether the donor or prospective donor made, amended, or revoked an anatomical gift; and (3) be operational on a seven day a week, twenty-four hour basis.

Under subsection (d), a donor's personally identifiable information on a donor registry may not be used or disclosed without appropriate consent except to determine whether the donor or prospective donor has made, amended, or revoked an anatomical gift.

This section does not require states to create or contract for the creation of a donor registry. It merely gives them discretion to do so. Also, this section does not bar the creation of a private donor registry although it does require private registries to meet the requirements in subsection (c) and (d).

Although every donor registry meeting the requirements of Section 20 would also meet the Section 2(8) definition of a donor registry, the definition of a donor registry in Section 2(8) is not tied to meeting the Section 20 requirements. This was purposeful. A donor registry as a place to make an anatomical gift should be broadly defined to respect the wishes of donors who make an anatomical gift on a registry that should, but failed to, comply with this section.

SECTION 21. EFFECT OF ANATOMICAL GIFT ON ADVANCE HEALTH-CARE DIRECTIVE.

(a) In this section:

(1) "Advance health-care directive" means a power of attorney for health care or a record signed by a prospective donor containing the prospective donor's direction concerning a health-care decision for the prospective donor.

(2) "Declaration" means a record signed by a prospective donor specifying the circumstances under which a life support system may be withheld or withdrawn from the prospective donor.

(3) "Health-care decision" means any decision made regarding the health care of

the prospective donor.

(b) If a prospective donor has a declaration or advance health-care directive, measures necessary to ensure the medical suitability of an organ for transplantation or therapy may not be withheld or withdrawn from the prospective donor, unless the declaration expressly provides to the contrary.

Comment

This section differs from Section 14(c). That section provides that measures necessary to ensure the medical suitability of a part not be withdrawn while an examination is being made to determine whether an individual who has been referred to a procurement organization has a part that could be the subject of an anatomical gift. If, following such an examination, it is determined by the procurement organization that the individual has a part that could be the subject of an anatomical gift, the individual is a prospective donor under this [act] unless the individual had signed a refusal. In light of the definition of a prospective donor, this section would also apply to a donor near death who has medically suitable organs for transplantation as determined by the organ procurement organization. *See* Section 2(22).

Measures necessary to insure the medical suitability of an organ for transplantation or therapy may not be withheld or withdrawn from a prospective donor who has an advance health-care directive or declaration unless the directive or declaration expressly provides to the contrary. The purpose of this section is to recognize a potential tension between the intent to make an anatomical gift and the intent to not have life support systems administered merely to prolong a life. The section presumes that for prospective donors the desire to save lives by making an anatomical gift trumps the desire to have life support systems withheld or withdrawn. Such measures are necessary for only a brief period of time. Individuals who desire to overcome this presumption can do so by express language in their advance health-care directive or declaration.

SECTION 22. COOPERATION BETWEEN [CORONER] [MEDICAL EXAMINER] AND PROCUREMENT ORGANIZATION.

(a) A [coroner] [medical examiner] shall cooperate with procurement organizations to maximize the opportunity to recover anatomical gifts for the purpose of transplantation, therapy, research, or education.

(b) If a [coroner] [medical examiner] receives notice from a procurement organization that an anatomical gift might be available or was made with respect to a decedent whose body is

under the jurisdiction of the [coroner] [medical examiner] and a post-mortem examination is going to be performed, unless the [coroner] [medical examiner] denies recovery in accordance with Section 23, the [coroner] [medical examiner] or designee shall conduct a post-mortem examination of the body or the part in a manner and within a period compatible with its preservation for the purposes of the gift.

(c) A part may not be removed from the body of a decedent under the jurisdiction of a [coroner] [medical examiner] for transplantation, therapy, research, or education unless the part is the subject of an anatomical gift. The body of a decedent under the jurisdiction of the [coroner] [medical examiner] may not be delivered to a person for research or education unless the body is the subject of an anatomical gift. This subsection does not preclude a [coroner] [medical examiner] from performing the medicolegal investigation upon the body or parts of a decedent under the jurisdiction of the [coroner] [medical examiner].

Comment

This section includes a number of provisions designed to allow for the cooperation of procurement organizations and [coroners] [medical examiners] in obtaining bodies and parts that otherwise are the subject of an anatomical gift. Unlike prior law, this section does not empower [coroners] [medical examiners] to make an anatomical gift of the body or parts of a decedent. However, and although quite rare, if the [coroner] [medical examiner] is the person with authority to dispose of the decedent's body and has the priority to make a gift under Section 9, the [coroner] [medical examiner] could make an anatomical gift under Section 10.

SECTION 23. FACILITATION OF ANATOMICAL GIFT FROM DECEDENT WHOSE BODY IS UNDER JURISDICTION OF [CORONER] [MEDICAL EXAMINER].

(a) Upon request of a procurement organization, a [coroner] [medical examiner] shall release to the procurement organization the name, contact information, and available medical and social history of a decedent whose body is under the jurisdiction of the [coroner] [medical examiner]. If the decedent's body or part is medically suitable for transplantation, therapy,

research, or education, the [coroner] [medical examiner] shall release post-mortem examination results to the procurement organization. The procurement organization may make a subsequent disclosure of the post-mortem examination results or other information received from the [coroner] [medical examiner] only if relevant to transplantation or therapy.

(b) The [coroner] [medical examiner] may conduct a medicolegal examination by reviewing all medical records, laboratory test results, x-rays, other diagnostic results, and other information that any person possesses about a donor or prospective donor whose body is under the jurisdiction of the [coroner] [medical examiner] which the [coroner] [medical examiner] determines may be relevant to the investigation.

(c) A person that has any information requested by a [coroner] [medical examiner] pursuant to subsection (b) shall provide that information as expeditiously as possible to allow the [coroner] [medical examiner] to conduct the medicolegal investigation within a period compatible with the preservation of parts for the purpose of transplantation, therapy, research, or education.

(d) If an anatomical gift has been or might be made of a part of a decedent whose body is under the jurisdiction of the [coroner] [medical examiner] and a post-mortem examination is not required, or the [coroner] [medical examiner] determines that a post-mortem examination is required but that the recovery of the part that is the subject of an anatomical gift will not interfere with the examination, the [coroner] [medical examiner] and procurement organization shall cooperate in the timely removal of the part from the decedent for the purpose of transplantation, therapy, research, or education.

(e) If an anatomical gift of a part from the decedent under the jurisdiction of the [coroner] [medical examiner] has been or might be made, but the [coroner] [medical examiner] initially

believes that the recovery of the part could interfere with the post-mortem investigation into the decedent's cause or manner of death, the [coroner] [medical examiner] shall consult with the procurement organization or physician or technician designated by the procurement organization about the proposed recovery. After consultation, the [coroner] [medical examiner] may allow the recovery.

(f) Following the consultation under subsection (e), in the absence of mutually agreed-upon protocols to resolve conflict between the [coroner] [medical examiner] and the procurement organization, if the [coroner] [medical examiner] intends to deny recovery, the [coroner] [medical examiner] or designee, at the request of the procurement organization, shall attend the removal procedure for the part before making a final determination not to allow the procurement organization to recover the part. During the removal procedure, the [coroner] [medical examiner] or designee may allow recovery by the procurement organization to proceed, or, if the [coroner] [medical examiner] or designee reasonably believes that the part may be involved in determining the decedent's cause or manner of death, deny recovery by the procurement organization.

(g) If the [coroner] [medical examiner] or designee denies recovery under subsection (f), the [coroner] [medical examiner] or designee shall:

(1) explain in a record the specific reasons for not allowing recovery of the part;

(2) include the specific reasons in the records of the [coroner] [medical examiner]; and

(3) provide a record with the specific reasons to the procurement organization.

(h) If the [coroner] [medical examiner] or designee allows recovery of a part under subsection (d), (e), or (f), the procurement organization, upon request, shall cause the physician or technician who removes the part to provide the [coroner] [medical examiner] with a record

describing the condition of the part, a biopsy, a photograph, and any other information and observations that would assist in the post-mortem examination.

(i) If a [coroner] [medical examiner] or designee is required to be present at a removal procedure under subsection (f), upon request the procurement organization requesting the recovery of the part shall reimburse the [coroner] [medical examiner] or designee for the additional costs incurred in complying with subsection (f).

Legislative Note: *Section 23 could be incorporated into the provisions of the state's code where the provisions relating to a coroner or medical examiner are codified rather than included in this act. If codified in that manner, the definitions in Section 2 of "anatomical gift", "donor", "eye bank", "organ procurement organization", "part", "procurement organization", "prospective donor" (first sentence only), "tissue", and "tissue bank" also should be included.*

Comment

This section is new. It was developed in extensive discussions among the drafting committee, the procurement organizations, medical professionals, and the trade group for the medical examiners. It is in accord with the policy guidance articulated by the National Association of Medical Examiners. Copies of its policies can be obtained by writing to the National Association of Medical Examiners, 430 Pryor Street W. Stoebuck & D. Whitman, The Law of Property, 3rd. ed., Atlanta, GA 30312.

SECTION 24. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 25. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This act modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit or supersede Section 101(a) of that act, 15 U.S.C. Section 7001, or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 26. REPEALS. The following acts and parts of acts are repealed:

(1) [Uniform Anatomical Gift Act];

(2)

(3)

Comment

Many states have related laws that should not be repealed but should remain in effect, such as: donor registry provisions; donor awareness programs; Transplant Councils; and licensing provisions for procurement organizations and health care providers. The state may also have regulatory and other law that applies to the subject matter of this [act] that should remain in place. However, it is highly desirable that the core provisions of the [act] be uniform among states as there is very little time available to timely prepare, possibly transport across state lines, and transplant life-saving organs, let alone assess and comply with significant variations of state law.

SECTION 27. EFFECTIVE DATE. This [act] takes effect ____.