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Legislative Update on the State Adoption of the 1987 Revision to the Uniform Anatomical Gift Act of 1968

*Daphne D. Sipes**

I. INTRODUCTION

The National Conference of Commissioners on Uniform State Laws (NCCUSL)¹ first proposed the Uniform Anatomical Gift Act (UAGA) in 1968.² The UAGA, with an organized approach to organ donation procedures, was considered a success, in that forty-one states passed it within an eighteen-month period.³ The remaining jurisdictions soon followed, and all fifty states, plus the District of Columbia, adopted a substantially similar version of the UAGA.⁴

However, several factors have eroded the original objectives of the 1968 Uniform Act.⁵ For example, the states have changed procedures

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1. Seven states organized the Conference of State Boards of Commissioners on Promoting Uniformity of Law in the United States in 1892. In 1915, the Conference was reorganized into the National Conference of Commissioners on Uniform State Laws [hereinafter NCCUSL], which is composed of representatives from each state and from the District of Columbia and Puerto Rico. M. ROSZKOWSKI, *BUSINESS LAW* 14 (2d ed. 1989). The commissioners are appointed by the governors of their jurisdictions. After a proposed act is approved by the NCCUSL, it is then forwarded to each legislature for consideration. Coordination with the legislature may or may not be through a particular commissioner. See also R. HOEBER, J. REITZEL, D. LYDEN, N. ROBERTS & G. SEVERANCE, *CONTEMPORARY BUSINESS LAW* 27 (2d ed. 1982).

2. Uniform Anatomical Gift Act, 8A U.L.A. (1968) [hereinafter 1968 UAGA]. For treatment on the adoption of the UAGA, see Dukeminier, *Supplying Organs for Transplantation*, 68 MICH. L. REV. 811 (1970); Louisell, *The Procurement of Organs for Transplantation*, 64 NW. L. REV. 607 (1970); Petty & Heck, *Life After Death—The Ultimate Goal for Transplantation*, 27 N.Y.L. SCH. L. REV. 1207 (1982); Richards, *Medical-Legal Problems of Organ Transplantation*, 21 HASTINGS L.J. 77 (1969); Sanbar, *Medicolegal Aspects of Human Organ Transplantation*, 12 LEGAL ASPECTS OF MED. PRACT. 1 (Apr. 1984); Note, *Heart Transplants: Legal Obstacles To Donation*, 45 CHI.-[]KENT L. REV. 78 (1968); Note, *Retailing Human Organs Under The Uniform Commercial Code*, 16 JOHN MARSHALL L. REV. 393 (1983); Note, *The Sale of Human Parts*, 72 MICH. L. REV. 1182 (1972); Note, *Human Organ Transplantation—The Medical Miracle and the Legal Maze*, 20 S.C.L. REV. 419 (1968); Note, *Legal Aspects of Tissue Donation from Cadavers*, 21 SYRACUSE L. REV. 825 (1970); Note, *Legal Problems in Donations of Human Tissues to Medical Science*, 21 VAND. L. REV. 352 (1968).

3. Dukeminier, *supra* note 2, at 817 (1970). The first 24 states adopted the Act within a 14-month period. Note, *The Sale of Human Parts*, *supra* note 2, at 1184.

4. 1968 UAGA, *supra* note 2, Prefatory Note 15-18.

5. In presenting the 1968 UAGA, the commissioners represented that "[i]t will provide a

relating to the execution of donor cards. Many states have amended their Uniform Gift Act by deleting the requirement of two witnesses on a donor card when a donor personally signs.⁶ The use of drivers' licenses as donor cards opting for donation has become more prevalent.⁷ However, a survey revealed that only seventeen percent of potential donors had actually executed a donor card.⁸ Even when donor cards have been executed, only a small percentage are personally carried and are often not timely discovered.⁹ It has also been recognized that while the

useful and uniform legal environment throughout the country for this new frontier of modern medicine." 1968 UAGA, *supra* note 2, at 18.

The laws now on the statute books do not, in general, deal with these legal questions in a complete or adequate manner. The laws are a confusing mixture of old common law dating back to the seventeenth century and state statutes that have been enacted from time to time In short, both the common law and the present statutory picture is one of confusion, diversity and inadequacy. This tends to discourage anatomical gifts and to create difficulties for physicians, especially for transplant surgeons.

Id. at 17. See also 1987 UAGA, *infra* note 6, at 3.

6. Uniform Anatomical Gift Act, 8A U.L.A. (1987) [hereinafter 1987 UAGA]. "In 1980, the NCCUSL voted to make optional the language that previously required the donor card to be signed 'in the presence of two witnesses who must sign the document in his presence.'" *Id.*

7. At the time of the proposal of the 1968 UAGA, the commissioners recommended that the use of drivers' licenses for indicating organ donors be actively encouraged. 1968 UAGA, *supra* note 2, at § 4. That option has been incorporated into the 1987 UAGA, *supra* note 6, at § 2(c).

Not all state driver license provisions for donation are sufficient for the purpose intended. Iowa has specifically declared that a driver's license, although indicating that the driver is a donor, is insufficient without the additional UAGA donor card. IOWA CODE ANN. § 321.189(1) (West 1985). See Overcast, Evans, & Bowen, *Problems in the Identification of Potential Organ Donors*, 251 J.A.M.A. 1559-62 (1984) [hereinafter Overcast].

In the days prior to the acceptance of the 1968 UAGA, some commentators stated "there is something macabre, even repulsive, about a society where people walk around with little cards saying they have donated their organs on death to so-and-so." Sanders & Dukeminier, *Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation*, 15 UCLA L. REV. 357, 364 (1968). Paradoxically, this view was espoused by two who are recognized for publicizing a movement towards accepting presumed consent in the harvesting of cadavers' parts. Dukeminier, *supra* note 2, at 837-38 n.98.

8. 1987 UAGA, *supra* note 6, *Prefatory Note*. Recent surveys indicate that 70% to 75% of the American people are in favor of organ donations. Action 7-8 (May-June 1985) (newsletter published by the American Council on Transplantation [ACT]), listing results of a 1985 Gallup Poll conducted on behalf of ACT). Sixty-two percent would not mind if their organs were donated even if they had not previously given permission. Sipes, *State, Federal Statutes Guide Organ Donation Procedures*, 68 HEALTH PROGRESS 46, 49 (1987) (citing 1985 Gallup poll).

The American public's view toward organ giving has been consistent. A Gallup poll conducted in 1968 indicated that 70% were willing to donate their bodies. Note, *The Sale of Human Parts*, *supra* note 2, at 1185 n.23.

9. Task Force on Organ Transplantation, Office of Organ Transplantation, U.S. Dept. of Health and Human Services, *Organ Transplantation: Issues and Recommendations* (final report), at 29 (Apr. 1986) [hereinafter Task Force Report]. See also Note, *Human Organ Transplantation—The Medical Miracle*, *supra* note 2, at n.56 and accompanying text (discussing the problems with mistaken identification); Overcast, *supra* note 7.

In 1984, Congress enacted the National Organ Transplant Act, which established the Task Force on Organ Transplantation. 42 U.S.C. § 273 (Supp. 1985). The Task Force's final report

1968 Uniform Act was established to provide a uniform means for donating organs, it does not actively encourage donation.¹⁰

One effort to encourage and increase donation was introduced between 1985 and 1987, when most states adopted "routine inquiry/required request" laws.¹¹ Generally, "routine inquiry/required request" laws encourage donation by requiring a hospital protocol that timely requests the next of kin to consider consenting to an anatomical donation. In some states, the laws were amendments to the state UAGA; in other states, the laws were enacted in addition to the UAGA. A potential conflict resulted in those states that adopted a routine inquiry act without considering the effect on their existing Uniform Gift Act.¹² For example, although the 1968 UAGA grants both civil and criminal immunity to any person who acts in good faith, the Texas "routine inquiry" act incorporated a separate immunity clause which relieves any person who acts in good faith, except in the case of the "person's own negligence."¹³ Thus, the Texas "routine inquiry" law may conflict with the Texas UAGA and perhaps expose organ procurement personnel to legal liability.

Another development occurred in 1986 with the promulgation by Congress of Hospital Protocols for Organ Procurement and Standards

was filed in May 1986 and reported on the legal, medical, ethical, economic, and social barriers to organ donation. See generally Sipes, *supra* note 8, at 46-48; Sipes, *Requesting Organ Donations: A New State Approach to Organ Transplants*, 8 HEALTH LAW IN CANADA 39, 51 (1987).

10. Caplan & Bayer, *Preface to Ethical, Legal and Policy Issues Pertaining to Solid Organ Procurement*, HASTINGS CENTER REP., at i (Oct. 1985) (Report of the Project on Organ Transplantation).

11. D. Sipes, *supra* note 9, 8 HEALTH LAW IN CANADA at 51. The terms "required request/routine inquiry" are used interchangeably and are basically similar. A "required request" means requiring a hospital to request the family to consent to a donation. A "routine inquiry" means to routinely ask the family about the extent of their organ donation information. Typically, state and/or federal law requires the routine inquiry, so that the end result is very similar.

By the end of 1988, 43 states had adopted a version of "required request/routine inquiry" legislation. *Required Request Laws*, STATE HEALTH NOTES 1 (June 1988) (a publication of the Intergovernmental Health Policy Project, George Washington University) and *Organ Transplantation*, OVERVIEW OF 1988 LAWS 1 (unpublished document of the Intergovernmental Health Policy Project, George Washington University). South Dakota and Vermont have passed resolutions pertaining to required request, but Idaho, Iowa, South Carolina, Utah, and Wyoming have not enacted required request laws as of the end of 1988. *Organ Transplantation*, *supra*, at 2.

12. Sipes & McGaw, *An Update on Organ Donation Legislation*, 8 NATCO 21-22 (Feb. 1988) (publication newsletter of North Atlantic Transplant Coordinators Organization).

The primary area of conflict was the ability of the ranking family members to veto either each other or the decedent's previously executed anatomical gift. *Id.* at 22 (citing California, Minnesota, and Ohio). Another example of a conflict between the state UAGA and the routine inquiry act occurred in Georgia. Georgia's order of next of kin differ in each statute. See Sipes, *supra* note 9, at 44. See also *id.* at nn.57, 65, 73-74 and accompanying text (citing other examples of conflicts between state routine inquiry laws and the UAGA).

13. TEX. REV. CIV. STAT. ANN. art. 4590-2, § (8a) (Vernon Supp. 1989) (effective Apr. 22, 1987).

for Organ Procurement Agencies.¹⁴ The federal law pressured the states into once again accepting legislation that encouraged organ donation by requiring all participating Medicaid/Medicare hospitals to establish a protocol to make families aware of their option to consent to donate or to decline to donate.¹⁵

In 1984, the executive committee of the NCCUSL approved a committee to study the anatomical gift legislation and, subsequently, a drafting committee began work in 1985 to propose amendments to the 1968 UAGA. A committee draft for discussion purposes only was circulated in 1986.¹⁶ In the summer of 1987, a final version of the revised Uniform Anatomical Gift Act (1987 UAGA)¹⁷ was approved by the NCCUSL at its annual conference. The American Bar Association then approved the Act at its annual meeting on February 9, 1988.¹⁸

In 1988, three states took the lead in enacting the 1987 UAGA: California,¹⁹ Connecticut,²⁰ and Hawaii.²¹ By the fall of 1989, another five states enacted versions of the 1987 UAGA: Arkansas,²² Idaho,²³ Montana,²⁴ Nevada,²⁵ and North Dakota.²⁶ Eight other states have considered bills proposing adoption of the 1987 UAGA.²⁷

14. Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9318, 100 Stat. 1875, 2009 (amending Title XI of the Social Security Act at § 1138) (effective Oct. 1, 1987). This legislation provides, in pertinent part, that to be eligible for Medicaid/Medicare the hospitals must have written protocols that identify potential donors and "(i) assure that families of potential organ donors are made aware of the option of organ or tissue donation and their option to decline, and (ii) encourage discretion and sensitivity with respect to the circumstances, views, and beliefs of such families" *Id.* at § 1138(a)(1) (codified at 42 U.S.C. § 1320(a)(1)(A)(i) - (ii) (Supp. II 1984)).

15. *Id.*

16. The draft is dated Nov. 1, 1986. Draft for Discussion Only, *Amendments to Uniform Anatomical Gift Act*, NCCUSL (Nov. 1, 1986).

17. 1987 UAGA, *supra* note 6, at 2-3.

18. Sipes & McGaw, *UNOS & Uniform Anatomical Gift Act Revisions*, 3 *NEPHROLOGY NEWS & ISSUES* 21 (June 1989).

19. *CAL. HEALTH & SAFETY CODE* §§ 7150-7156.5 (Deering Supp. 1989) (effective Jan. 1, 1989).

20. *CONN. GEN. STAT.* §§ 19a-279a to -280a (Supp. 1989) (effective July 1, 1989).

21. *HAW. REV. STAT.* § 327-1 (Supp. 1988) (effective June 13, 1988).

22. *ARK. STAT. ANN.* §§ 20-17-601 to -613 (Supp. 1989).

23. *IDAHO CODE* §§ 39-3401 to -3417 (Supp. 1989) (signed 3/29/89).

24. 1989 *Mont. Laws* 540 (signed 4/14/89).

25. 1989 *Nev. Stat.* 200 (passed 5/26/89).

26. *N.D. CENT. CODE* §§ 23-06.02-01 to .02-12 (1989) (signed Apr. 11, 1989) (effective July 12, 1989).

27. Jurisdiction where bills were filed: Georgia (adopted several amendments in 1988, apparently from the 1987 UAGA); Illinois (SB 546) (filed 4/5/89) (failed, lost in committee); Iowa (HB 257) (failed); Minnesota (SF 1222 & HF 1101) (pending), Oklahoma (SB 410) (pending), Ohio (HB 21) (pending), Virginia (H 1569) (tabled), Wisconsin (AB 550) (pending), Wyoming (SB 120) (failed).

Interested jurisdictions where no bills were filed: Maine, Michigan, Nebraska, Rhode Island,

The purpose of this article is to review the new provisions of the 1987 UAGA and to compare them with the versions that have been enacted in the eight states and to identify the reasons why the 1987 Act will not be enacted as progressively as its 1968 predecessor.

II. THE 1987 UAGA

A. *Comparison with the 1968 UAGA*

The 1968 UAGA contains eleven sections:

(1) Definitions, (2) Persons Who May Execute an Anatomical Gift, (3) Persons Who May Become Donees; Purposes for Which Anatomical Gifts May be Made, (4) Manner of Executing Anatomical Gifts (5) Delivery of Document of Gift, (6) Amendment or Revocation of the Gift, (7) Rights and Duties at Death, (8) Uniformity of Interpretation, (9) Short Title, (10) Repeal, (11) Time of Taking Effect.²⁸

In comparison, the 1987 UAGA contains seventeen sections:

(1) Definitions, (2) Making, Amending, Revoking, and Refusing to Make Anatomical Gifts by Individual, (3) Making, Revoking, Objecting to Anatomical Gifts, by Others, (4) Authorization by [Coroner][Medical Examiner] or [Local Public Health Official] (5) Routine Inquiry and Required Request; Search and Notification, (6) Persons Who May Become Donees; Purposes for Which Anatomical Gifts may be Made, (7) Delivery of Document of Gift, (8) Rights and Duties at Death, (9) Coordination of Procurement and Use, (10) Sale or Purchase of Parts Prohibited, (11) Examination, Autopsy, Liability, (12) Transitional Provisions, (13) Uniformity of Application and Construction, (14) Severability, (15) Short Title, (16) Repeals, (17) Effective Date.²⁹

In general, the 1987 Act serves four primary functions. First, it further simplifies the manner of making an anatomical gift (Sections 2-3 & 6-8). Next, it clarifies the three potential donor groups in order of hierarchy: an individual of his/her own body organs and/or tissues (Section 2); the next of kin (Section 3); and a public health official (Section 4). Then the Act incorporates a uniform "routine inquiry" standard (Sections 5 & 9). Finally, it makes the sale and/or purchase of certain organs and tissues illegal (Section 10).

Tennessee, U.S. Virgin Islands.

28. 1968 UAGA, *supra* note 2.

29. 1987 UAGA, *supra* note 6.

B. Section by Section Comparison of the 1987 UAGA to the 1968 UAGA with State Adoption Analysis

1. Section One of the 1987 UAGA

a. Definitions:

As used in this [Act]:

- (1) "Anatomical gift" means a donation of all or part of a human body to take effect upon or after death.
- (2) "Decedent" means a deceased individual and includes a still-born infant or fetus.
- (3) "Document of gift" means a card, a statement attached to or imprinted on a motor vehicle operator's or chauffeur's license, a will or other writing used to make an anatomical gift.
- (4) "Donor" means an individual who makes an anatomical gift of all or part of the individual's body.
- (5) "Enucleator" means an individual who is [licensed][certified] by the [State Board of Medical Examiners] to remove or process eyes or parts of eyes.
- (6) "Hospital" means a facility licensed, accredited, or approved as a hospital under the law of any state or a facility operated as a hospital by the United States government, a state, or a subdivision of a state.
- (7) "Part" means an organ, tissue, eye, bone, artery, blood, fluid, or other portion of a human body.
- (8) "Person" means an individual, corporation, business trust, estate, trust, partnership, joint venture, association, government, governmental subdivision or agency, or any other legal or commercial entity.
- (9) "Physician" or "surgeon" means an individual licensed or otherwise authorized to practice medicine and surgery or osteopathy and surgery under the laws of any state.
- (10) "Procurement organization" means a person licensed, accredited, or approved under the laws of any state for procurement, distribution, or storage of human bodies or parts.
- (11) "State" means a state, territory, or possession of the United States, the District of Columbia, or Commonwealth of Puerto Rico.
- (12) "Technician" means an individual who is [licensed] [certified] by the [State Board of Medical Examiners] to remove or process a part.

The 1987 UAGA definitions are not a significant departure from the 1968 Act.³⁰ The definitions section of the 1987 Act adds five terms.³¹ Two of the terms, (5) "Enucleator" and (12) "Technician," have been modified in the states adopting the 1987 Act because of the varying methods or official organizations by which the non-physician specialists are certified.

b. State adoptions of Section One:

Arkansas: Arkansas has adopted all of the definitions, but a "technician" is required to be under the direction or supervision of a surgeon or hospital.³² This differs from the proposed 1987 UAGA by requiring the technician to be supervised, instead of independent.

California: California has substantially adopted all of the definitions, and adds that a pacemaker device is also defined to be an anatomical part which can be donated.³³

Connecticut: Connecticut has adopted all but one of the terms; it excludes "enucleator," which is not significant since the term "technician" incorporates anyone trained by the American Association of Tissue Banks or the Eyebank Association of America.³⁴

Hawaii: Hawaii is similar to Arkansas in that all of the definitions have been adopted and a "technician" is required to be under the supervision of a licensed physician.³⁵

Idaho: Idaho adopted all of the terms and added "enucleation."³⁶

Montana: Montana adopted all of the terms and added "department" and "ophthalmologist."³⁷

Nevada: The Nevada terms are substantially similar, but Nevada

30. The NCCUSL has again deferred the issue of including a definition of death since most states have a definition of death similar to the Uniform Determination of Death Act. 1987 UAGA, *supra* note 6, § 1 comment.

31. The terms are: (1) "Anatomical gift" and (3) "Document of gift," which were originally in Sections 4 & 5 of the 1968 UAGA. Also added are (5) "Enucleator," (10) "Procurement organization" (which was originally included as a "Bank or storage facility" in Section 1(a) of the 1968 Act), and (12) "Technician."

32. ARK. STAT. ANN. § 20-17-601 (Supp. 1989).

33. CAL. HEALTH & SAFETY CODE § 7150.1(a), (g) (Deering Supp. 1989). Georgia also includes a heart pacemaker as a "part" in its Anatomical Gift Act. GA. CODE ANN. § 44-5-142(5) (Supp. 1988).

34. CONN. GEN. STAT. § 19a-279a.(11) (Supp. 1989).

35. HAW. REV. STAT. § 327-1(12) (Supp. 1989).

36. IDAHO CODE § 39-3401(5) (Supp. 1989). Idaho also adds a section that requires its state health department to maintain a registry of storage facilities that certify that quality assurance tests are conducted for AIDS. *Id.* at § 39-3402. *See infra* note 151.

37. MONT. CODE ANN. § 72-17-102(3), (8) (1989). Montana does not adopt the sections in the same order as the 1987 Act.

elected not to amend the term "person" to include the usual inclusive laundry list of potential members.³⁸

North Dakota: North Dakota has included all of the terms except "person."³⁹

2. Section Two of the 1987 UAGA

a. Making, Amending, Revoking, and Refusing to Make Anatomical Gifts by Individual:

- (a) An individual who is at least [18] years of age may (i) make an anatomical gift for any of the purposes stated in Section 6(a), (ii) limit an anatomical gift to one or more of those purposes, or (iii) refuse to make an anatomical gift.
- (b) An anatomical gift may be made only by a document of gift signed by the donor. If the donor cannot sign, the document of gift must be signed by another individual and by two witnesses, all of whom have signed at the direction and in the presence of the donor and of each other, and state that it has been so signed.
- (c) If a document of gift is attached to or imprinted on a donor's motor vehicle operator's or chauffeur's license, the document of gift must comply with subsection (b). Revocation, suspension, expiration, or cancellation of the license does not invalidate the anatomical gift.
- (d) A document of gift may designate a particular physician or surgeon to carry out the appropriate procedures. In the absence of a designation or if the designee is not available, the donee or other person authorized to accept the anatomical gift may employ or authorize any physician, surgeon, technician, or enucleator to carry out the appropriate procedures.
- (e) An anatomical gift by will takes effect upon the death of the testator, whether or not the will is probated. If, after death, the will is declared invalid for testamentary purposes, the validity of the anatomical gift is unaffected.
- (f) A donor may amend or revoke anatomical gift, not made by will, only by:
 - (1) a signed statement;
 - (2) an oral statement made in the presence of two individuals;
 - (3) any form of communication during a terminal illness or injury addressed to a physician or surgeon; or
 - (4) the delivery of a signed statement to a specified donee to whom a document of gift had been delivered.

38. 1989 Nev. Stat. 200, §§ 1 to 5.5. & NEV. REV. STAT. §§ 451.520, .525, .530, .535, .545, & .550, as amended by 1989 Nev. Stat. 200, §§ 16-21. "Person" is already defined at NEV. REV. STAT. § 451.540.

39. N.D. CENT. CODE § 23-06.2-01 (Supp. 1989).

- (g) The donor of an anatomical gift made by will may amend or revoke the gift in the manner provided for amendment or revocation of wills, or as provided in subsection (f).
- (h) An anatomical gift that is not revoked by the donor before his death is irrevocable and does not require the consent or concurrence of any person after the donor's death.
- (i) An individual may refuse to make an anatomical gift of the individual's body or part by (i) a writing signed in the same manner as a document of gift, (ii) a statement attached to or imprinted on a donor's motor vehicle operator's or chauffeur's license, or (iii) any other writing used to identify the individual as refusing to make an anatomical gift. During a terminal illness or injury, the refusal may be an oral statement or other form of communication.
- (j) In the absence of contrary indications by the donor, an anatomical gift of a part is neither a refusal to give other parts nor a limitation on an anatomical gift under Section 3 or on a removal or release of other parts under Section 4.
- (k) In the absence of contrary indications by the donor, a revocation or amendment of an anatomical gift is not a refusal to make another anatomical gift. If the donor intends a revocation to be a refusal to make an anatomical gift, the donor shall make the refusal pursuant to subsection (i).

The changes in Section 2 of the 1987 Act do not represent a significant departure from the 1968 Act;⁴⁰ instead, the mechanisms for expressing one's desire to make or not to make an anatomical gift are clarified. Section 2 of the 1987 Act emphasizes the presumption to make a gift. Unless an individual has clearly refused to make a donation, there is no presumption that silence automatically implies refusal to donate.

Originally, the 1968 Act required two witnesses when a person executed his/her own donor card.⁴¹ But now, the 1987 Act does not require any witnesses, unless the donor is not able to sign personally.⁴² Like the 1968 UAGA,⁴³ a gift may also be made orally if the donor is not able to sign, provided the document is signed and witnessed by two other people.⁴⁴

40. Section 2 of the 1987 Act is the equivalent of former Sections 4 and 6 of the 1968 Act. Specifically, Section 2(a) is former Section 2(a). Section 2(b) is former Section 4(b). Section 2(c) incorporates the typical driver's license laws. *See supra* note 7. Sections 2(d), (e), (f) and (g) are former Sections 4(d), 4(a), 6(a)-(b), and 6(a) of the 1968 Act, respectively.

41. *See supra* note 6.

42. 1987 UAGA, *supra* note 6, at § 2(b).

43. 1968 UAGA, *supra* note 2, at § 4(b).

44. 1987 UAGA, *supra* note 6, at § 2(b).

One significant clarification is found in Section 2(h), which unequivocally states that an individual's consent to the donation of his/her organs/tissues cannot be overridden. The import of this section is underscored in the Report of the Task Force on Organ Transplantation,⁴⁵ which found that health care professionals were routinely and unnecessarily confirming with a donor's next of kin the donor's intention to donate.⁴⁶ In fact, if a family member objected, then the donation was probably not accepted.⁴⁷ This routine practice violated the 1968 Act and may have resulted in a reduction in the number of organs available for transplantation.⁴⁸

Sections (i), (j), and (k) clarify the concepts of amendment, revocation, and refusal. If, for example, a person had executed a donor card indicating his desire to donate his heart and kidneys, but later revoked the card, the presumption is only that the person "has neither made nor refused to make an anatomical gift."⁴⁹ A person who has consented to give his/her kidneys has not eliminated the possibility of donating additional organs or tissues. Only a refusal places a person in the category of being an unavailable donor.

However, Section 2 alone will not increase organ donations. It operates in connection with the subsequent Sections 3 and 4, which first permit the family to consider making a donation, and if there is no available family, then a proper official may make a donation. Thus, a potential donor, who has neither made nor refused to make a gift, may become a donor if his next of kin consents or if a proper official consents, under certain conditions.

The 1987 Act also unofficially offers forms to indicate consent or refusal to make a gift.

45. See *supra* note 9.

46. "[P]hysicians are reluctant to retrieve organs on the basis of these cards alone, and almost always require the consent of the next of kin." Task Force Report, *supra* note 9, at 29. The Task Force criticized the medical profession on several counts. "Physicians and nurses are in a position to facilitate organ donation but too frequently do not The failure of many health professionals to participate in the organ donation process will remain a major barrier to organ donation unless measures are taken to overcome the underlying causes." *Id.* at 43. "[P]hysicians should not avoid participating in organ procurement out of fear of legal liability" since the occurrence of law suits is "extremely rare." *Id.* at 30.

47. Caplan, *Organ Procurement: It's Not In The Cards*, 14 HASTINGS CENTER REP. 9, 11 (Oct. 1984). In comparing France with America, Caplan notes that even in France, which has strong written presumed consent legislation, there is an unwillingness on the part of the French physicians to procure organs without the permission of the next of kin. *Id.*

48. 1987 UAGA, *supra* note 6, at § 2(h) comment.

49. *Id.* at § 2(k) comment.

b. State adoptions of Section Two:

Arkansas: Arkansas has adopted the entire section and has added two additional sections. Section (l) mandates that the highway department issue licenses with the gift option.⁵⁰ Section (m) officially incorporates the forms suggested by the 1987 Act.⁵¹

California: There are no deviations from the 1987 version in the California section.⁵²

Connecticut: Connecticut has adopted the entire section with one change in subsection (b), where the word "only" is deleted.⁵³ This change is an improvement to the 1987 UAGA. By using the word "only," the 1987 UAGA apparently limits the manner of making a gift to a written document. In fact, the 1987 UAGA permits a written gift to be amended orally, and thus, an additional gift could be made by an oral amendment without the necessity of executing another written document of gift.⁵⁴ Thus, the Connecticut modification is not significant and remains consistent with the intention of the 1987 UAGA.

Hawaii: Hawaii's section is verbatim.⁵⁵

Idaho: Idaho's section is verbatim.⁵⁶

Montana: The Montana section is substantially similar.⁵⁷

Nevada: Nevada's comparable section is substantially similar to Section 2 of the 1987 Act.⁵⁸

North Dakota: The North Dakota section is substantially similar.⁵⁹

3. Section 3 of the 1987 UAGA

a. Making, Revoking, and Objecting to Anatomical Gifts, by Others:

- (a) Any member of the following classes of persons, in order of priority listed, may make an anatomical gift of all or a part of the decedent's body for an authorized purpose, unless the decedent, at the time of death, has made an unrevoked refusal to make that anatomical gift:

50. ARK. STAT. ANN. § 20-17-602(1) (Supp. 1989).

51. *Id.* at § 602(m).

52. CAL. HEALTH & SAFETY CODE § 7150.5 (Deering Supp. 1989).

53. CONN. GEN. STAT. § 19-a-279b (Supp. 1989).

54. 1987 UAGA, *supra* note 6, at § 2(f)(2), (f)(3).

55. HAW. REV. STAT. § 327-2 (Supp. 1989).

56. IDAHO CODE § 39-3403 (Supp. 1989).

57. MONT. CODE ANN. § 72-17-201 (1989).

58. NEV. REV. STAT. § 451.555 (1987), *as amended by* NEV. REV. STAT. § 200.22 (1989).

59. N.D. CENT. CODE § 23-06.2-02 (Supp. 1989).

- (1) the spouse of the decedent;
 - (2) an adult son or daughter of the decedent;
 - (3) either parent of the decedent;
 - (4) an adult brother or sister of the decedent;
 - (5) a grandparent of the decedent; and
 - (6) a guardian of the person of the decedent at the time of death.
- (b) An anatomical gift may not be made by a person listed in subsection (a) if:
- (1) a person in a prior class is available at the time of death to make an anatomical gift;
 - (2) the person proposing to make an anatomical gift knows of a refusal or contrary indications by the decedent; or
 - (3) the person proposing to make an anatomical gift knows of an objection to making an anatomical gift by a member of the person's class or a prior class.
- (c) An anatomical gift by a person authorized under subsection (a) must be made by (i) a document of gift signed by the person or (ii) the person's telegraphic, recorded telephonic, or other recorded message, or other form of communication from the person that is contemporaneously reduced to writing and signed by the recipient.
- (d) An anatomical gift by a person authorized under subsection (a) may be revoked by any member of the same or prior class if, before procedures have begun for the removal of a part from the body of the decedent, the physician, surgeon, technician, or enucleator removing the part knows of the revocation.
- (e) A failure to make an anatomical gift under subsection (a) is not an objection to the making of an anatomical gift.

There are no significant changes from the 1968 Act.⁶⁰ Section 3 simply gives to the next of kin an opportunity to make a donation, provided there is not already a donor card, a refusal, or known contrary intent.⁶¹ If a decedent has merely failed to make a gift, his kin may do so, according to the ranking priority classes. Consistent with Section 2, a family member may also add to a decedent's gift by making additional organs available.

Another important clarification is the effect of an undecided family member. Under the former Act, if a higher priority member was

60. Section 3 of the 1987 UAGA, *supra* note 6, is the equivalent of Sections 2(b) and 4(c) of the 1968 UAGA.

61. If there is already a gift card in existence or a refusal to make a gift, then the priority class members cannot override that intention. 1987 UAGA, *supra* note 6, at § 2(h). *See also supra* note 46 and accompanying text (discussing physicians' reluctance to harvest without family consent, despite the presence of a donor card).

“available” but could not decide whether to make a gift, that would probably end any further inquiry. As a consequence, if a lower priority member desired to make a gift, but an available higher priority member was simply undecided, no gift would likely result. Now, however, if a higher class member is available but does not clearly object to authorizing an anatomical gift, then the ambivalence allows a lower priority member to act and to make a gift.⁶² However, no lower priority member can override a higher priority member who has objected to the making of a gift. In fact, if a ranking member becomes available and objects even after a lower ranking member has agreed to a gift, the donee may not accept the gift, if removal procedures have not yet begun.⁶³

A family member must be “available at the time of death” to be able to consent to a gift, but the term is not defined in either the 1987 or 1968 Act. The definition has been addressed by Illinois and California. With the adoption of the 1968 UAGA, California originally required a “diligent search” and a certification of the nonavailability of the kin.⁶⁴ Illinois modified its standard of “available” in 1986 by adopt-

62. 1987 UAGA, *supra* note 6, § 3(e) comment.

63. 1987 UAGA, *supra* note 6, at § 3(d). The hierarchy is preserved throughout the 1987 UAGA, since a priority member may revoke a gift made by a member of the same class or of a lower class. *Id.*

64. California added § 7151.6 at the time of the adoption of the 1968 Act (repealed by 1988 Cal. Stat. 1095, § 1). The act provided a detailed standard for determining “availability.” A “diligent search” was required by an accredited hospital, which had to certify that a check of missing persons and other records had been undertaken for 24 hours. *Id.* A 24-hour search could render many organs useless, although the search could be started in anticipation of death. *See also* CAL. HEALTH & SAFETY CODE § 7151.5 (Deering Supp. 1989) (in the new UAGA, which maintains the language of former § 7151.6).

California permitted the coroner in earlier days to make certain donations. *See* Quay, *Utilizing the Bodies of the Dead*, 28 ST. LOUIS U.L.J. 889, 924 n.121 (1984) and accompanying text; Sadler & Sadler, *Transplantation and the Law: The Need for Organized Sensitivity*, 57 GEO. L.J. 5, nn.68-69 & accompanying text (1968) (citing §§ 7113 to -15 of the CAL. HEALTH & SAFETY CODE that were the autopsy statutes that allowed the coroner to authorize tissue removal without family knowledge or consent if a search similar to that described in § 7151.5 (Deering Supp. 1989) was carried out).

Illinois amended its UAGA in 1988 to define a standard of when the family is considered to be “available.” ILL. ANN. STAT. ch. 110½, § 303(b)-(c) (Smith-Hurd Supp. 1989). The act requires a search of the decedent’s hospital records and telephone contact of any possible family members. The Illinois standard originated from the Illinois Organ Donation Request Act, effective January 1, 1987. *See id.* § 752(c).

Texas has also incorporated a type of a definition of “available” family members with the adoption of its routine inquiry law in 1987 but has not yet specifically amended its UAGA to incorporate a similar requirement. TEX. REV. CIV. STAT. ANN. art. 4590-2, § 8A(h) defines “available” through the “good faith” immunity clause, which requires “making reasonable efforts to locate and contact” the family. *Id.* *See infra* note 87.

Arizona spells out a standard for determining availability in its Corneal Removal Statute. ARIZ. REV. STAT. ANN. § 36-851 A(3)(c), C (Supp. 1989). *Cf.* ARIZ. REV. STAT. ANN. § 36-349

ing language from its "required request" act that specifies what is meant by searching for family members.⁶⁶

Another clarification is the substitution of "knowledge" for "notice."⁶⁶

The 1987 UAGA proposes a form for the next of kin to sign.

b. State adoptions of Section Three:

Arkansas: The Arkansas section is verbatim.⁶⁷

California: There are two limitations in the California version. Instead of the 1987 UAGA's list of ranking members, California's highest priority begins with anyone who has a "power of attorney that expressly authorizes" permission to make an anatomical gift.⁶⁸ The other limitation is contingent on another California act, which prohibits any one from making an anatomical gift for another person if that person had "known" (religious) beliefs that depends "solely upon prayer for . . . healing" or opposes the purposes of the 1987 UAGA.⁶⁹

Connecticut: The section is substantially similar in Connecticut.⁷⁰

Hawaii: Hawaii's section is verbatim.⁷¹

Idaho: Like California, Idaho substitutes as the first priority class the holder of a "power of attorney for health care."⁷² Otherwise, the remaining section is equivalent.⁷³

Montana: Montana's equivalent section is verbatim, although the

(Supp. 1989) (requiring an attempt be made to locate the family for the Arizona "routine inquiry" law). A "diligent effort" to contact the next of kin means telephoning the next of kin at 15 minute intervals, for a period of not less than 4 nor more than 5 hours following death, which must be documented in a log. *Id.*

65. ILLINOIS ORGAN DONATION REQUEST ACT, ILL. ANN. STAT. ch. 110½ § 752(c).

66. 1987 UAGA, *supra* note 6, at § 3 comment. The Comment explains that the standard of knowledge "is a more useful concept than actual notice." *Id.* The 1968 UAGA used the standard of "actual notice" throughout. *See* 1968 UAGA, *supra* note 2, § 2(b)-(c). *See also infra* text at note 88.

67. ARK. STAT. ANN. § 20-17-603 (Supp. 1989).

68. CAL. HEALTH & SAFETY CODE § 7151(a)(1) (Deering Supp. 1989).

69. *Id.* at § 7152.

Only an individual may make an anatomical gift of all or part of the individual's body or pacemaker, if it is made known that the individual at the time of death was a member of a religion, church, sect, or denomination which relies solely upon prayer for the healing of disease or which has religious tenets that would be violated by the disposition of the human body or parts thereof or a pacemaker for any of the purposes stated in subdivision (a) of Section 7153 [parallel to Section 6 of the 1987 UAGA].

Id. (formerly § 7151.7). California had added this section when the 1968 UAGA was adopted in 1970.

70. CONN. GEN. STAT. § 19a-279c (Supp. 1989).

71. HAW. REV. STAT. § 327-3 (Supp. 1989).

72. IDAHO CODE § 39-3404(1)(a) (Supp. 1989).

73. *Id.* at § 39-3404.

overall order of the subsections is varied from the 1987 Act.⁷⁴

Nevada: Nevada has added that “[t]he legal procedure for authorization must be defined and established by the committee on anatomical dissection by the University of Nevada System.”⁷⁵ The remainder of Section 3 is substantially adopted by Nevada.

North Dakota: The section is substantially similar to the 1987 Act.⁷⁶

4. Section Four of the 1987 UAGA

a. Authorization by [Coroner][Medical Examiner] OR [Local Public Health Official]:

- (a) The [coroner][medical examiner] may release and permit the removal of a part from a body within that official’s custody, for transplantation or therapy, if:
 - (1) the official has received a request for the part from a hospital, physician, surgeon, or procurement organization;
 - (2) the official has made a reasonable effort, taking into account the useful life of the part, to locate and examine the decedent’s medical records and inform persons listed in Section 3(a) of their option to make, or object to making, an anatomical gift;
 - (3) the official does not know of a refusal or contrary indication by the decedent or objection by a person having priority to act listed in Section 3(a);
 - (4) the removal will be by a physician, surgeon, technician; but in the case of eyes, by one of them or by an enucleator;
 - (5) the removal will not interfere with any autopsy or investigation;
 - (6) the removal will be in accordance with accepted medical standards; and
 - (7) cosmetic restoration will be done, if appropriate.
- (b) If the body is not within the custody of the [coroner][medical examiner], the [local public health officer] may release and permit the removal of any part from a body in the [local public health officer’s] custody for transplantation or therapy if the requirements of subsection (a) are met.
- (c) An official releasing and permitting the removal of a part shall

74. 1989 Mont. Laws 540, § 11.

75. 1989 Nev. Stat. 200, § 6(1) (formerly NEV. REV. STAT. § 451.555.2). This is not a change from the previous UAGA in Nevada, which had incorporated the requirement when the 1968 UAGA was adopted.

76. N.D. CENT. CODE § 23-06.2-03 (Supp. 1989).

maintain a permanent record of the name of the decedent, the person making the request, the date and purpose of the request, the part requested, and the person to whom it was released.

Section 4 of the 1987 UAGA could be considered to be a novel concept, but the provision is actually an extension of a principle found in both the 1968 Act and in many existing state "unclaimed body" statutes.⁷⁷

Section 4 is a derivative of the 1968 UAGA's lowest priority class authorized to make anatomical gifts of a decedent. In the 1968 Act, if all higher priority members were unavailable at the time of a potential donor's death, then "any other person authorized or under obligation to dispose of the body"⁷⁸ could execute an anatomical gift. This lowest ranking class would include any other statutory relative or, if none, the public official responsible as a matter of law for disposing of the remains.⁷⁹ The 1987 UAGA has expanded this lowest priority class into a separate, potential donor group.⁸⁰ Thus, the overall scheme of the

77. There are three basic types of laws governing dead bodies: autopsy statutes that permit the family to authorize an autopsy, unclaimed body statutes that allow delivery to schools for education and scientific purposes, and the coroner/medical examiner laws that allow complete post-mortem exams in criminal investigation without the family's consent. Sadler & Sadler, *supra* note 64, at 13-14.

78. 1968 UAGA, *supra* note 2, at § 2(b)(6). Thus, if the body is unclaimed, the duty falls upon a public official to bury or deliver the body to a medical school. The public is relieved of the expense usually if the medical school receives the body. Note, *The Law of Dead Bodies: Impeding Medical Progress*, 19 OHIO ST. L.J. 455, 458-59 (1958).

79. In the late eighteenth century, the medical need for cadavers exceeded the supply. Because of medical schools purchasing cadavers, "grave robbing" became a prevalent profession. Comment, *Property in Corpses*, 5 ST. LOUIS U.L.J. 280, 294 (1958). The English Anatomy Act of 1832 was enacted to allow schools to receive the bodies of paupers and the unclaimed. American anatomy acts followed soon thereafter. Dukeminier, *Supplying Organs for Transplantation*, *supra* note 2, at n.2; Note, *The Law of Dead Bodies: Impeding Medical Progress*, *supra* note 78, at 455. These "unclaimed body" statutes are also referred to as "anatomy" statutes, and vest authority in coroners to deliver unclaimed bodies to medical schools for research and dissection. See Sadler & Sadler, *supra* note 64, 13-15; Sanders & Dukeminier, *supra* note 7, at 395, 403 (1968); Comment, *supra* note 79, at 294-95; Note, *The Law of Dead Bodies: Impeding Medical Progress*, *supra* note 78, at 459 (1958); Note, *Legal Problems in Donation of Human Tissue to Medical Science*, *supra* note 2, at 354-56.

See, e.g., N.Y. PUB. HEALTH LAW § 4301, *as amended*, (McKinney Supp. 1989), which provides the same. Thus, the coroner may consent to corneal tissue and/or pituitary gland removal from a body in New York, if no kin are available at death. N.Y. PUB. HEALTH LAW § 4222 (McKinney Supp. 1989).

80. When the 1968 UAGA was originally proposed, the commissioners recognized cadavers as a potential source of organ and tissue donors. "[I]t may prove desirable in many if not most states to authorize and direct medical examiners to expedite their autopsy procedures." 1968 UAGA, *supra* note 2, at § 7(c) comment.

The Task Force recommended that states enact legislation requiring coroners and medical examiners to give permission for organ and tissue procurement when families have consented. The Task Force also recommended legislation requiring the coroners/medical examiners to evaluate all nonheart-beating cadavers for possible organ and tissue donation and to provide the next of kin

1987 Act allows for three possible donors: an individual of his/her own body parts, next of kin, or an authorized public official.⁸¹

However, there are prerequisites to an official making the anatomical gift:

(1) The body must be under the authority of the official. Thus, if there is not a reason for the official to have custody, then it would not be proper for a coroner to authorize removal.⁸²

(2) There must be a request to remove a body part by a hospital, physician, surgeon, or procurement organization for the purposes of transplantation or therapeutic purposes. Thus, the official should not initiate the removal. Therefore, Section 4 does not mandate the removal of organs, it only permits the public official to make a decision, and only in the event that there has first been a proper request.

(3) The official must make "a reasonable effort" to inform the kin of the option to donate or to object. If the next of kin are "available,"⁸³ Section 4 is nullified because the next of kin can exercise their right to consent or to object to an anatomical gift per Section 3.⁸⁴ The new Act limits the ability of a non-relative official to "give away" the organs of a deceased person to the situation when no ranking family are available and there have first been reasonable efforts to locate the family.⁸⁵ If, however, the kin are

with postmortem donation opportunities. Task Force Report, *supra* note 9, at 31.

81. The 1987 UAGA comment to Section 4 explains that "[i]f an anatomical gift is not made pursuant to Section 3, the provisions of Section 4 apply." 1987 UAGA, *supra* note 6, at § 4 comment.

The order of officials is also ranked; if the body is not under the coroner's jurisdiction, then the next official is the local health officer. *Id.* at § 4(b).

82. *State v. Powell*, 497 So. 2d 1188 (Fla.), *cert. denied*, 107 S. Ct. 2202 (1986) (holding that the state corneal tissue removal act is not unconstitutional because it gives the medical examiner the right to remove corneal tissue without the notice or consent of the next of kin; however, the statute is not activated unless the body is properly under the jurisdiction of the medical examiner and a request for the tissue has been made). Whether the deceased is under the jurisdiction of the coroner may be an issue, depending upon the wording of relevant statutes. The plaintiffs also alleged that the autopsies were unnecessary as the deaths were clearly accidental and not suspicious. *See also Georgia Lions Eye Bank v. Lavant*, 255 Ga. 60, 335 S.E.2d 127 (1985), *cert. denied*, 106 S. Ct. 1464 (1986) (sudden infant death syndrome gives coroner jurisdiction over the body). The autopsy statutes may grant broad autopsy authority. If there is a possible benefit to science, the coroner may automatically have the right to perform an autopsy and thus the possible right to consent to a tissue removal. *Cf. Hicks v. NLO, Inc.*, 631 F. Supp. 1207 (S.D. Ohio 1986) (widow alleged a conspiracy between physicians and the coroner to obtain jurisdiction fraudulently over her husband's body and to perform an unnecessary autopsy. The court denied the complaint without sufficient facts and noted that the autopsy act grants blanket jurisdiction to autopsy any unusual or violent death and to remove tissues necessary for testing).

83. *See supra* note 64 and accompanying text.

84. 1987 UAGA, *supra* note 6, at § 3(b)(1)-(3).

85. However, the search could be suspended if the useful life of the organ is in jeopardy.

not available and there is a request for a usable organ, then the removal may be authorized without the knowledge of the kin, only if a "reasonable effort" has been made to locate the family.⁸⁶ The term "reasonable effort" is not defined. Some groups may welcome the lack of specificity; others, however, may desire a more defined method for the "reasonable effort" required in the search for the relatives.⁸⁷

(4) The official must not "know" of any actual contraindication by either the decedent or the prioritized next of kin.⁸⁸ If the official has conducted the required "reasonable effort" to inform the kin, then this prerequisite would also take into account any information that has come to the official's attention about the family's desires or beliefs from non-family sources. If the official knows of a desire not to give, the gift cannot be made, even though the ranking family members are not "available" to consent or to object.

(5) The removal of the parts must be by a physician, surgeon, or technician.

(6) The removal must not interfere with any autopsy or investigation.

(7) The removal must be in accordance with "accepted medical standards."

(8) Cosmetic restoration must be made, if necessary.

1987 UAGA, *supra* note 6, at § 4.

The duty to search the medical record or to inform next of kin is limited to 'a reasonable effort taking into account the useful life of the part'. If removal must be immediate and there is no medical or other record and no person specified in Section 3(a) is present, the requirement of subsection (a)(2) is satisfied.

Id. at § 4 comment.

86. 1987 UAGA, *supra* note 6, at § 4(a)(2).

87. However, too much specificity could lead to a standard that appears fair, but is difficult to comply with in certain cases. *See, e.g.*, Arizona, *supra* note 64. The rarity of published cases resulting in liability also indicates that the approach used in the 1968 UAGA, *supra* note 2, has been appropriate and protective. *See supra* note 46 (Task Force Report noting legal cases "extremely rare").

88. *See supra* note 66. In *Nicolleta v. Rochester Eye & Human Parts Bank, Inc.*, 136 Misc.2d 1065, 519 N.Y.S.2d 928 (1987), the UAGA's immunity clause standard of "reasonable" and the "actual notice" was tested. In that case, the apparent common law wife of the deceased had consented to the donation of the deceased's eyes. The father of the deceased objected, upon learning of the removal, alleged that the hospital should have known that the donor was not a legally authorized donor. The court held in favor of the defendant and pointed out that a nurse had indeed questioned the woman when she had used a different last name than that of the deceased. However, the nurse had been given a plausible explanation, and the other people in the company of the "wife" had not contradicted the explanation. Thus, the court concluded that the inquiry was reasonable and that there was no evidence of "actual notice" to the defendant that the woman was not an authorized donor under the New York Anatomical Gift Act. *Id.* at 931.

Thus, the integrity of the ranking of family over the officials is still preserved in Section 4, since any "available" family must be consulted about the gift. And, even if the family is not "available," the official's power to make a gift is only activated upon certain conditions precedent, which include not only a request for a gift but also a "reasonable effort" to locate the family.

All but Connecticut and Nevada have retained Section 4(a).

b. State adoptions of Section Four:

Arkansas: Arkansas' equivalent to Section 4(a) of the 1987 Act combines the authority for either the coroner or a hospital administrator to permit removal, depending upon the respective official's custody of the body.⁸⁹ This version therefore eliminates the necessity of the companion section suggested in Section 4(b) of the 1987 Act. Section 4(c) of the 1987 Act is adopted.⁹⁰

California: In the California version, there are three possible groups of officials who may be authorized to release an anatomical gift, with each of the classes dependent upon who has custody of the body.⁹¹ California also includes a "religious beliefs" exception.⁹²

The chief modification in the California section is the retention from a former California law⁹³ that a search for the next of kin be conducted for twenty-four hours before a release of organs is to be allowed, except in the case of eyes, or unless loss of time would render the part unuseful.⁹⁴ Thus, the California standard of a prior twenty-four hour search is nullified if time is of the essence. The California version also allows removal for "reconditioning,"⁹⁵ in addition to "transplantation or therapy."⁹⁶

Before a hospital (as opposed to the medical examiner or other official) can grant removal, California specifies that the hospital make a "reasonable effort" to contact relatives, "determine[] and certif[y] that the persons are not available,"⁹⁷ check the missing persons' list, and

89. 1989 Ark. Acts 436, at § 4. The jurisdiction over the body depends upon the location of the body and the cause of death.

90. *Id.* at § 4(b).

91. CAL. HEALTH & SAFETY CODE § 7151.5(a)-(c) (Deering Supp. 1989). The three groups are the coroner/medical examiner, the hospital, and the local public health care official.

92. *Id.* at § 7152. See *supra* note 69.

93. See *supra* note 64 (repealed).

94. CAL. HEALTH & SAFETY CODE § 7151.5(a)-(c) (Deering Supp. 1989).

95. *Id.* at § 7151.5(a).

96. *Id.*

97. *Id.* at § 7151.5(b).

question anyone who has been present with the decedent.⁹⁸ The California standard still provides leeway in deciding whether the useful life of the part is in jeopardy such that a search for less than twenty-four hours may be reasonable.

Connecticut: Connecticut omits Section 4. Instead, Section 19a-279d states that “[t]he chief medical examiner shall serve as a facilitator for tissue harvesting and organ procurement within the constraints imposed by his official investigative responsibilities.”⁹⁹ This section does not specifically grant to the medical examiner any authority to allow a removal of organs or tissues if a request for transplantation is made. The Connecticut version may either signal that the broad authority granted by Section 4 in the 1987 Act is not to be given to non-relatives or that the public officials did not desire the additional authority to donate offered by Section 4(a).

Hawaii: In Hawaii’s equivalent to Section 4(a) of the 1987 Act, the “medical examiner, coroner, or coroner’s physician” may permit removal.¹⁰⁰ In the section comparable to Section 4(b), the “director of health” may permit removal if the body is not within the jurisdiction of the other listed officials.¹⁰¹

A significant departure from the 1987 Act is that the requesting person/entity must be the one that “certifies” that a “reasonable effort” to locate the decedent’s medical records and to inform the kin has been conducted.¹⁰² Therefore, Hawaii’s version shifts the responsibility of the certification, and probably the search, away from the coroner to the requesting entity/person. The Hawaii version is probably a favorable compromise in terms of allocating responsibility and the practical benefit that is derived by the requesting party.

Idaho: The section is verbatim in Idaho.¹⁰³

Montana: The Montana section is almost verbatim, but instead of requiring compliance with “accepted medical standards,” Montana’s compliance for removal of the part need only be “in accordance with accepted standards.”¹⁰⁴

Nevada: Like Connecticut, Nevada did not adopt Section 4 of the 1987 Act.¹⁰⁵

98. *Id.* Note that California imposes a seemingly higher standard on the hospital than on the coroner or medical examiner by requiring both certification and a defined search. *Id.*

99. CONN. GEN. STAT. § 19a-279d (Supp. 1989).

100. HAW. REV. STAT. § 327-4(a) (Supp. 1989).

101. *Id.* at § 327-4(b).

102. *Id.* at § 327-4(a)(1), (2), 4(b).

103. IDAHO CODE § 39-3405 (Supp. 1989).

104. 1989 Mont. Laws 540, § 12(1)(f).

105. In the original bill, A.B. 226, Section 7 did include the equivalent of Section 4; however,

North Dakota: The North Dakota section is substantially similar to the 1987 Act.¹⁰⁶

5. *Section Five of the 1987 UAGA*

a. *Routine Inquiry and Required Request; Search and Notification:*

- (a) On or before admission to a hospital, or as soon as possible thereafter, a person designated by the hospital shall ask each patient who is at least [18] years of age: "Are you an organ or tissue donor?" If the answer is affirmative, the person shall request a copy of the document of gift. If the answer is negative or there is no answer and the attending physician consents, the person designated shall discuss with the patient the option to make or refuse to make an anatomical gift. The answer to the question, an available copy of any document of gift or refusal to make an anatomical gift, and any other relevant information, must be placed in the patient's medical record.
- (b) If, at or near the time of death of a patient, there is no medical record that the patient has made or refused to make an anatomical gift, the hospital [administrator] or a representative designated by the [administrator] shall discuss the option to make or refuse to make an anatomical gift and request the making of an anatomical gift pursuant to Section 3(a). The request must be made with reasonable discretion and sensitivity to the circumstances of the family. A request is not required if the gift is not suitable, based upon acceptable medical standards, for a purpose specified in Section 6. An entry must be made in the medical record of the patient, stating the name and affiliation of the individual making the request, and of the name, response, and relationship to the patient of the person to whom the request was made. The [Commissioner of Health] shall [establish guidelines][adopt regulations] to implement this subsection.
- (c) The following persons shall make a reasonable search for a document of gift or other information identifying the bearer as a donor or as an individual who refused to make an anatomical gift:
 - (1) a law enforcement officer, fireman, paramedic, or other emergency rescuer finding an individual who the searcher believes is dead or near death; and
 - (2) a hospital, upon the admission of an individual at or near

the section was deleted by amendment prior to passage. *Compare* 1989 Nev. Stat. 226, § 7, p. 2 (filed Feb. 16, 1989), Nev. Leg. Serv. (4/15/89), with 1989 Nev. Stat. 200, § 7, p. 2, Nev. Leg. Serv. (A.B. 226, as enacted, states that § 7 was deleted by amendment).

106. N.D. CENT. CODE § 23-06.2-04 (Supp. 1989).

the time of death, if there is not immediately available any other source of that information.

- (d) If a document of gift or evidence of refusal to make an anatomical gift is located by the search required by subsection (c)(1), and the individual or body to whom it relates is taken to a hospital, the hospital must be notified of the contents and the document or other evidence must be sent to the hospital.
- (e) If, at or near the time of death of a patient, a hospital knows that an anatomical gift has been made pursuant to Section 3(a) or a release and removal of a part has been permitted pursuant to Section 4, or that a patient or an individual identified as in transit to the hospital is a donor, the hospital shall notify the donee if one is named and known to the hospital; if not, it shall notify an appropriate procurement organization. The hospital shall cooperate in the implementation of the anatomical gift or release and removal of a part.
- (f) A person who fails to discharge the duties imposed by this section is not subject to criminal or civil liability but is subject to appropriate administrative sanctions.

This section is an addition to the 1968 Act. Section 5 of the 1987 Act incorporates a two-step version of the "routine inquiry/required request" laws passed by almost all of the states, since 1985.¹⁰⁷ Section 5(a) asks an incoming patient whether he/she is already a donor. If the answer is affirmative, it negates the need for additional inquiry of the patient's family. However, if a person answers no, and only if the attending physician consents, can the matter be further discussed. Section 5(a) imposes a routine question to be asked of every patient upon admission. The Comment to Section 5 states that although it "is limited to the admission process of hospitals, doctors are encouraged to include a similar routine inquiry of patients in their office procedures and hospitals are encouraged to extend the routine inquiry to outpatient, emergency, minor surgery, and similar procedures that do not require admission to the hospital."¹⁰⁸

Section 5(b) is a uniform culmination of the already existing "required request" state laws, which direct inquiry to the family, if the decedent is not already a donor.¹⁰⁹

Section 5(c) imposes a duty upon rescue and emergency care personnel to be on the look out for potential donors and to locate any

107. There are 43 states that have such legislation, as well as the District of Columbia. See also *supra* notes 11 & 14 and accompanying text.

108. 1987 UAGA, *supra* note 6, at § 5 comment.

109. See *supra* note 107.

evidence that a person either is or is not a donor.¹¹⁰

As the Comment to Section 5(e) points out, there is a trend and a need to implement procedures for working with procurement agencies.¹¹¹

Section 5(f) eliminates any civil or criminal liability for the duties imposed by "routine inquiry," which is probably superfluous because of the broad immunity granted in Section 11(c) of the 1987 Act. Also, administrative sanctions may be imposed for the failure of rescue personnel to comply with Section 5, and these potential sanctions offer enforcement.

Of the eight states that have adopted the 1987 UAGA, only Connecticut retained Section 5(a), although Hawaii adopted a diluted version of the section. The remaining subsections in Section 5 have been generally enacted by the adopting states.

b. State adoptions of Section Five:

Arkansas: Arkansas omits the routine inquiry provision upon hospital admission in Section 5(a). Also, the last sentence in Section 5(b) that gives the health commissioner authority to implement the protocol is eliminated. The remainder of the section is adopted verbatim by Arkansas.¹¹²

California: California also omits Section 5(a).¹¹³ Instead of adopting the 1987 Act version of "routine inquiry" in Section 5(b), California simply refers to its present routine inquiry statute.¹¹⁴

Except for the equivalent Section 5(c)(1), where California has eliminated the additional references to the "fireman, paramedic, or other emergency rescuer," California has adopted the remainder of Section 5 of the 1987 Act.¹¹⁵

Connecticut: The only change in Connecticut's section is the omission of the last sentence in Section 5(b), which provides for the appropriate official to implement rules for the protocol; however, another sec-

110. Section 5(c) is based upon the Uniform Duties to Disabled Persons, which requires the communication of the existence of a condition requiring special treatment. 1987 UAGA, *supra* note 6, at § 5(c) comment.

111. 1987 UAGA, *supra* note 6, at § 5(e) comment. *See also infra*, 1987 UAGA, *supra* note 6, at § 9.

112. ARK. STAT. ANN. § 20-17-605 (Supp. 1989).

113. CAL. HEALTH & SAFETY CODE § 7152.5 (Deering Supp. 1989).

114. *Id.* at § 7184, *as amended*. The required request law was amended to attain compliance with the Federal law. *See supra* note 14 and accompanying text. California's act requires a protocol for identifying and requesting potential donors to consent to an anatomical gift as a condition precedent to participating in Medi-Cal. *Id.* at § 7184(b).

115. *Id.* at § 7152.5(b)-(e).

tion specifically grants such authority.¹¹⁶

Hawaii: Although Hawaii substantially adopts the highlights of Section 5, there are some changes. In its equivalent to Section 5(a), Hawaii adopts routine inquiry upon hospital admission, but stops short of specifying a follow up discussion procedure if the patient is not a donor. Thus, regardless of whether the patient is a donor, the hospital is only required to furnish "basic information regarding the option to make or refuse to make an anatomical gift."¹¹⁷

The equivalent to Section 5(c) directs emergency personnel to search for donor card information "if time and resources permit, and if doing so would be inoffensive to anyone in the vicinity of the body."¹¹⁸

Idaho: Idaho has adopted Sections 5(b)-(f) verbatim but has omitted the routine inquiry upon hospital admission of Section 5(a) of the 1987 Act.¹¹⁹

Montana: Although Section 5(a) was proposed in Montana's Senate Bill 204, the routine inquiry upon hospital admission section was not finally adopted.¹²⁰ The remainder of Sections 5(b)-(f) has been substantially adopted by Montana. Montana has also added one other exception to requiring a request to the family in its version of Section 5(b). "[I]f there are medical or emotional conditions under which the request would contribute to severe emotional distress,"¹²¹ then the request is exempted.

Nevada: Nevada has omitted the parallel of Section 5(a) of the 1987 Act. Nevada has not adopted the language of Section 5(b) of the 1987 Act, but Nevada's existing "routine inquiry" law is similar in result to Section 5(b).¹²² Nevada has substantially adopted Sections 5(c)-(f) of the 1987 Act.¹²³

North Dakota: North Dakota has omitted Section 5(a) of the 1987

116. CONN. GEN. STAT. § 19a-279e. (Supp. 1989). Section 19a-279l grants to the "commissioner of health services" the authority to adopt regulations. *Id.*

117. HAW. REV. STAT. § 327-5(a) (Supp. 1989).

118. *Id.* at § 327-5(c).

119. IDAHO CODE § 39-3406 (Supp. 1989).

120. Compare S. 204, 51st Leg., Reg. Sess., § 13 (originally including Section 5(a) of the 1987 UAGA), with 1989 Mont. Laws 540, § 13, (enacted without Section 5(a) of the 1987 UAGA).

121. 1989 Mont. Laws 540, § 13.

122. NEV. REV. STAT. § 451.577 (Supp. 1989). Nevada's existing protocol requires that a request to donate be made in order of the priority classes. Nevada's routine inquiry law also requires taking into account the person's "religious and cultural beliefs." *Id.* at § 451.577 1.(b)(1).

Part of the required protocol can also be interpreted to allow a hospital to make routine inquiries of patients at the time of admission to the hospital, thus being similar to Section 5(a) of the 1987 Act. "The policies and procedures must require the administrator of the hospital or his representative: (1.) To determine whether a person is a donor. . . ." *Id.* at § 451.577 1.(a).

123. *Id.* at § 451.577 2.-5.

Act. Although the North Dakota version of Section 5(b) is similar in result to the 1987 Act, North Dakota has essentially enacted an individual "routine inquiry" act.¹²⁴ North Dakota has adopted versions substantially similar to Sections 5(c)-(f) of the 1987 Act.¹²⁵

6. Section Six of the 1987 UAGA

a. Persons Who May Become Donees; Purposes for Which Anatomical Gifts may be Made:

- (a) The following persons may become donees of anatomical gifts for the purposes stated:
 - (1) a hospital, physician, surgeon, or procurement organization, for transplantation, therapy, medical or dental education, research, or advancement of medical or dental science;
 - (2) an accredited medical or dental school, college, or university for education, research, advancement of medical or dental science; or
 - (3) a designated individual for transplantation or therapy needed by that individual.
- (b) An anatomical gift may be made to a designated donee or without designating a donee. If a donee is not designated or if the donee is not available or rejects the anatomical gift, the anatomical gift may be accepted by any hospital.
- (c) If the donee knows of the decedent's refusal or contrary indications to make an anatomical gift or that an anatomical gift by a member of a class having priority to act is opposed by a member of the same class or a prior class under Section 3(a), the donee may not accept the anatomical gift.

Section 6 specifies a list of potential donees and purposes, emphasizing that the purpose of transplantation is primary.¹²⁶ The section is merely a rearrangement of various sections in the 1968 Act.¹²⁷

124. N.D. CENT. CODE § 23-06.2-05.1.-3 (Supp. 1989). North Dakota had adopted a routine inquiry law in 1987; the law specifies that the family in order of the priority list must be asked to donate according to the hospital protocol. The person who does the requesting must not be "connected with the determination of death." *Id.* at § 23-06.2-05.1. There are two specifically authorized exceptions to requiring a request to donate: nonsuitability based upon medical criteria and the "attending physician's special and peculiar knowledge of the decedent or the circumstances surrounding the death" allow the physician to dictate that a request will not be made. *Id.* at § 23-06.2-05.2. & 3.

125. *Id.* at § 23-06.2-05.4.-7.

126. 1987 UAGA, *supra* note 6, at § 6 comment. Naming one's donee is certainly a personal prerogative, but there is also a potential problem of discrimination when the donor has made such an indication.

127. Sections 3, 4(c), & 2(c) of the 1968 UAGA, *supra* note 2.

b. State adoptions of Section Six:

Arkansas: Arkansas has adopted the parallel of Section 6 of the 1987 Act.¹²⁸

California: The California equivalent section is identical to the 1987 Act, except that it adds as a potential donee (in the case of pace-makers) "a person who reconditions pacemakers."¹²⁹

Connecticut: The parallel section has been adopted in Connecticut.¹³⁰

Hawaii: The Hawaii counterpart is identical to Section 6 of the 1987 Act.¹³¹

Idaho: Idaho has adopted the equivalent of Section 6, but a pre-requisite is added. "[P]arts for transplantation shall not be transplanted or transfused under any conditions unless accompanied by a medical certificate which states that the part comes from a person who has been tested for HIV antibodies or antigens, and that the test is negative for the presence of HIV antibodies or antigens."¹³²

Montana: The Montana law is substantially similar.¹³³

Nevada: Nevada's act is substantially similar to the 1987 Act.¹³⁴

North Dakota: The law in North Dakota is substantially similar to the 1987 Act.¹³⁵

7. *Section Seven of the 1987 UAGA*

a. Delivery of Document of Gift:

- (a) Delivery of a document of gift during the donor's lifetime is not required for the validity of an anatomical gift.
- (b) If an anatomical gift is made to a designated donee, the document of gift, or a copy, may be delivered to the donee to expedite the appropriate procedures after death. The document of gift, or a copy, may be deposited in any hospital, procurement organization, or registry office that accepts it for safekeeping or for facilitation of procedures after death. On request of an interested person, upon or after the donor's death, the person in possession

128. ARK. STAT. ANN. § 20-17-606 (Supp. 1989).

129. CAL. HEALTH & SAFETY CODE § 7153(b)(4) (Deering Supp. 1989).

130. CONN. GEN. STAT. § 19a-279f. (Supp. 1989).

131. HAW. REV. STAT. § 327-6 (Supp. 1989).

132. IDAHO CODE § 39-3407(1) (Supp. 1989). *See supra* note 36 and *infra* note 151.

133. MONT. CODE ANN. § 72-17-202 (Supp. 1989).

134. NEV. REV. STAT. § 451.560 (Supp. 1989).

135. N.D. CENT. CODE § 23-06.2-06 (Supp. 1989). An educational institution may also be a donee for the added purpose of "therapy," which is not included in the 1987 Act. *Id.* at §§ 23-06.2 to -06.1.b.

shall allow the interested person to examine or copy the document of gift.

Section 7 does not substantially change the 1968 UAGA.¹³⁶ Section 7 specifies that delivery of the anatomical gift document is not necessary to make the gift effective and that the document may, but need not, be recorded.¹³⁷ An "interested person" must be given a copy of any recorded anatomical gift document, but neither the 1968 nor the 1987 Act defines who is an "interested person." In reality, since the document is much like a will, which can be read and/or copied by practically anyone, there should not and there has not been any published concern for this provision.

b. State adoptions of Section Seven:

Arkansas: The Arkansas counterparts are verbatim.¹³⁸

California: The California equivalent sections are parallel.¹³⁹

Connecticut: The Connecticut parallel sections are verbatim.¹⁴⁰

Hawaii: Hawaii's provisions are parallel.¹⁴¹

Idaho: The Idaho section is identical to Section 7 of the 1987 Act.¹⁴²

Montana: The Montana provision is substantially similar.¹⁴³

Nevada: Nevada has limited the access to the document of gift to the priority members, otherwise the remainder is unchanged by adoption of the section.¹⁴⁴

North Dakota: The North Dakota equivalent sections are substantially similar.¹⁴⁵

8. *Section Eight of the 1987 UAGA*

a. Rights and Duties at Death:

- (a) Rights of a donee created by an anatomical gift are superior to rights of others except with respect to autopsies under Section

136. Section 7 of the 1987 UAGA is a combination of Sections 4(b) and 5 of the 1968 Act.

137. A document of gift should *never* be required to be filed in order to be effective; the organ donation laws would be defeated by such a requirement.

138. ARK. STAT. ANN. § 20-17-607 (Supp. 1989).

139. CAL. HEALTH & SAFETY CODE § 7153.5 (Deering Supp. 1989).

140. CONN. GEN. STAT. § 19a-279g. (Supp. 1989).

141. HAW. REV. STAT. § 327-7 (Supp. 1989).

142. IDAHO CODE § 39-3408 (Supp. 1989).

143. MONT. CODE ANN. § 72-17-208 (Supp. 1989), *as amended by* 1989 Mont. Laws 540,

§ 7.

144. NEV. REV. STAT. § 451.570 (Supp. 1989).

145. N.D. CENT. CODE § 23-06.2-07 (Supp. 1989).

- 11(b). A donee may accept or reject an anatomical gift. If a donee accepts an anatomical gift of an entire body, the donee, subject to the terms of the gift, may allow embalming and use of the body in funeral services. If the gift is of a part of a body, the donee, upon the death of the donor and before embalming, shall cause the part to be removed without unnecessary mutilation. After removal of the part, the custody of the remainder of the body vests in the person under obligation to dispose of the body.
- (b) The time of death must be determined by a physician or surgeon who attends the donor at death or, if none, the physician or surgeon who certifies the death. Neither the physician or surgeon who attends the donor at death nor the physician or surgeon who determines the time of death may participate in the procedures for removing or transplanting a part unless the document of gift designates a particular physician or surgeon pursuant to Section 2(d).
- (c) If there has been an anatomical gift, a technician may remove any donated parts and an enucleator may remove any donated eyes or parts of eyes, after determination of death by a physician or surgeon.

Section 8 does not depart from the 1968 UAGA.¹⁴⁶ It sets out the rights of donees, who have priority to the body over everyone else, unless an autopsy is necessary. Like the 1968 Act, a specified donee is entitled to remove the anatomical gift, without unnecessary mutilation, and then deliver the body to the appropriate kin for burial. Also, the transplant physician and the attending physician must maintain their separate responsibilities to avoid the appearance of a conflict of interest.

b. State adoptions of Section Eight:

Arkansas: The Arkansas provision is substantially similar to the 1987 Act.¹⁴⁷

California: California adds references to a pacemaker; otherwise, the comparable section is identical to the 1987 Act.¹⁴⁸

Connecticut: Connecticut's version of Section 8(a) is identical to the 1987 Act. However, Connecticut modifies Section 8(b) and omits Section 8(c). In the equivalent to Section 8(b), Connecticut defines "death," then specifically requires death to be determined by two physicians.¹⁴⁹

146. The section is a combination of Sections 2(e) and 7(a) & (b) of the 1968 UAGA.

147. ARK. STAT. ANN. § 20-17-606 (Supp. 1989).

148. CAL. HEALTH & SAFETY CODE § 7154 (Deering Supp. 1989).

149. CONN. GEN. STAT. § 19a-279h.(b) (Supp. 1989).

Hawaii: Hawaii's parallel section is identical to Section 8 of the 1987 Act.¹⁵⁰

Idaho: The comparable section in Idaho is substantially similar to the 1987 Act, except that a donee may not accept a gift until it has first been tested and certified to be suitable.¹⁵¹

Montana: The parallel section is identical to the 1987 Act.¹⁵²

Nevada: The parallel section is identical to the 1987 Act.¹⁵³

North Dakota: The comparable section is substantially similar to the 1987 Act.¹⁵⁴

9. Section Nine of the 1987 UAGA

a. Coordination of Procurement and Use:

Each hospital in this State, after consultation with other hospitals and procurement organizations, shall establish agreements or affiliations for coordination of procurement and use of human bodies and parts.

Although this section is an addition to the 1968 Act, it is similar to the provisions found in many of the "required request/routine inquiry" laws.¹⁵⁵

b. State adoptions of Section Nine:

Arkansas: The comparable section in Arkansas is identical to the 1987 Act.¹⁵⁶

California: The comparable California section is identical to the 1987 Act.¹⁵⁷

Connecticut: The Connecticut version is identical.¹⁵⁸

Hawaii: The Hawaii version is identical.¹⁵⁹

Idaho: Idaho adopts the section in its entirety.¹⁶⁰

Montana: Montana's comparable version is identical to the 1987

150. HAW. REV. STAT. § 327-8 (Supp. 1989).

151. IDAHO CODE § 39-3409(1) (Supp. 1989) (citing § 39-2307); see *supra* notes 36 & 132.

152. MONT. CODE ANN. § 72-17-301 (Supp. 1989), as amended by 1989 Mont. Laws 540, § 8.

153. NEV. REV. STAT. § 451.580 (Supp. 1989), as amended by 1989 Nev. Stat. 200, § 26.

154. N.D. CENT. CODE § 23-06.2-08 (Supp. 1989).

155. See Sipes, *supra* note 9, nn.104-12 and accompanying text (citing examples of routine inquiry laws). See also 1987 UAGA, *supra* note 6, at § 9 comment.

156. ARK. STAT. ANN. § 20-17-609 (Supp. 1989).

157. CAL. HEALTH & SAFETY CODE § 7154.5 (Deering Supp. 1989).

158. CONN. GEN. STAT. § 19a-279i. (Supp. 1989).

159. HAW. REV. STAT. 327-9 (Supp. 1989).

160. IDAHO CODE § 39-3410 (Supp. 1989).

Act.¹⁶¹

Nevada: Nevada adopts the section in its entirety.¹⁶²

North Dakota: North Dakota is substantially similar.¹⁶³

10. Section Ten of the 1987 UAGA

a. Sale or Purchase of Parts Prohibited:

- (a) A person may not knowingly, for valuable consideration, purchase or sell a part for transplantation or therapy, if removal of the part is intended to occur after the death of the decedent.
- (b) Valuable consideration does not include reasonable payment for the removal, processing, disposal, preservation, quality control, storage, transportation, or implantation of a part.
- (c) A person who violates this section is guilty of a [felony] and upon conviction is subject to a fine not exceeding [\$50,000] or imprisonment not exceeding [five] years, or both.

Although this section is an altogether new addition to the 1987 Act, many states have a similar provision. The federal law enacted in 1984 makes selling and buying organs illegal.¹⁶⁴

b. State adoptions of Section Ten:

Arkansas: Arkansas' comparable provision is substantially similar.¹⁶⁵

California: The parallel section in California is very similar.¹⁶⁶

Connecticut: The section adopted by Connecticut differs from the 1987 Act, but the result is substantially similar.¹⁶⁷

161. 1989 Mont. Laws 540, § 14.

162. 1989 Nev. Stat. 200, § 8.

163. N.D. CENT. CODE § 23-06.2-09 (Supp. 1989).

164. National Transplant Act, 42 U.S.C. § 274e (Supp. 1989). The Act makes it unlawful to trade in human organs for "valuable consideration." *Id.* "Valuable consideration" does not include "reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses in travel, housing, and lost wages" for a donor. Sipes, *Health Progress*, *supra* note 8, at 47. The idea of a "black market" in organs has been considered to be repellent. *Id.* at 50; Quay, *supra* note 64, at 895 n.28.

Massachusetts had an early law that prohibited organ sales. Sadler & Sadler, *supra* note 64, at 391 n.110.

165. ARK. STAT. ANN. § 20-17-610 (Supp. 1989). The Arkansas provision makes it a Class C felony. *Id.* at § 610(c).

166. CAL. HEALTH & SAFETY CODE § 7155 (Deering Supp. 1989). The term of imprisonment is "three, five, or seven years." *Id.*

167. CONN. GEN. STAT. § 19a-280a (Supp. 1989). The definition for "valuable consideration" is broader and more liberal than the 1987 Act version.

"Valuable consideration" does not include (A) a fee paid to a physician or to other medical personnel for services rendered in the usual course of medical practice or a fee

Hawaii: Hawaii's comparable section is identical to Section 10 of the 1987 Act.¹⁶⁸

Idaho: The parallel section in Idaho is identical to Section 10 of the 1987 Act.¹⁶⁹

Montana: The Montana section is identical.¹⁷⁰

Nevada: The Nevada section is the same as Section 10 of the 1987 Act.¹⁷¹

North Dakota: North Dakota's comparable section is similar to Section 10 of the 1987 Act, but the offense is a misdemeanor.¹⁷²

11. Section Eleven of the 1987 UAGA

a. Examination, Autopsy, Liability:

- (a) An anatomical gift authorizes any reasonable examination necessary to assure medical acceptability of the gift for the purposes intended.
- (b) The provisions of this [Act] are subject to the laws of this State governing autopsies.
- (c) A hospital, physician, surgeon, [coroner], [medical examiner], [local public health officer], enucleator, technician, or other person, who acts in accordance with this [Act] or with the applicable anatomical gift law of another state [or foreign country] or attempts in good faith to do so is not liable for that act in a civil action or criminal proceeding.
- (d) An individual who makes an anatomical gift pursuant to Section 2 or 3 and the individual's estate are not liable for any injury or damage that may result from the making or the use of the anatomical gift.

Section 11 is almost identical to the 1968 Act.¹⁷³ The 1987 Act adds the phrase "attempts in good faith" which provides more protection from potential liability by allowing actions, as well as attempts, to

paid for hospital or other clinical services; (B) reimbursement of legal or medical expenses incurred for the benefit of the ultimate receiver of the organ; or (C) reimbursement of expenses of travel, housing and lost wages incurred by the donor of a human organ in connection with the donation of the organ.

Id. at § 19a-280a(a)(2). The Connecticut act is very similar to the National Transplant Act, *supra* note 164.

168. HAW. REV. STAT. § 327-10 (Supp. 1989).

169. IDAHO CODE § 39-3410 (Supp. 1989).

170. 1989 Mont. Laws 450, § 15.

171. 1989 Nev. Stat. 200, § 10.

172. N.D. CENT. CODE § 23-06.2-10 (Supp. 1989).

173. Sections 11(a)-(c) are derived from former sections of the original act; Section 11(a) is former Section 2(d), and Sections (b)-(c) are former Sections 7(d) and 7(c), respectively.

be covered.¹⁷⁴ Section (d) enlarges immunity protection by specifically protecting the donor's estate from liability.

b. State adoptions of Section Eleven:

Arkansas: The parallel provision in Arkansas is identical.¹⁷⁵

California: California has added a requirement that "[a]ll donors shall be screened for infectious diseases."¹⁷⁶

Connecticut: Connecticut's comparable version is substantially similar to the 1987 Act.¹⁷⁷

Hawaii: The parallel section in Hawaii is identical to Section 11 of the 1987 Act.¹⁷⁸

Idaho: The Idaho section is identical to the 1987 Act's version.¹⁷⁹

Montana: The section is substantially similar, and Montana specifically adds nurses to the list of personnel entitled to immunity.¹⁸⁰

Nevada: Nevada's version is similar to the 1987 Act, but immunity is only specifically granted to those who act in accordance with Nevada laws, instead of in accordance with any other state or foreign country.¹⁸¹ Nevada did not adopt Section 11(b); however, the operative language, subjecting the RUAGA to autopsy laws, is adopted in another section.¹⁸²

North Dakota: The section is substantially similar to the 1987 Act.¹⁸³

The remaining Sections 12-17 are procedural sections for incorporating a new statute.¹⁸⁴

III. OVERVIEW

A. *Acceptance of the 1987 UAGA*

There are four probable reasons for the lack of a positive attitude towards enacting the 1987 UAGA, when compared to the unanimous

174. 1987 UAGA, *supra* note 6, at § 11(c) comment.

175. ARK. STAT. ANN. § 20-17-611 (Supp. 1989).

176. CAL. HEALTH & SAFETY CODE § 7155.5(a) (Deering Supp. 1989).

177. CONN. GEN. STAT. § 19a-279j (Supp. 1989).

178. HAW. REV. STAT. § 327-11 (Supp. 1989).

179. IDAHO CODE § 39-3412 (Supp. 1989).

180. MONT. CODE ANN. § 72-17-207 (Supp. 1989).

181. 1989 Nev. Stat. 200, § 10.

182. *Id.* at § 27 (to be codified at NEV. REV. STAT. § 451.585).

183. N.D. CENT. CODE § 23-06.2-11 (Supp. 1989).

184. These sections relate to the transition of a subsequently executed anatomical gift (Section 12); uniformity in interpretation (Section 13); severability of the sections (Section 14); the title (Section 15); repeals (Section 16); and the effective date (Section 17). 1987 UAGA, *supra* note 6, §§ 12-17.

popularity of the 1968 UAGA. The first reason is that the 1987 UAGA is not needed as vitally as the 1968 UAGA was when it was proposed. Prior to 1968, the states had a variety of statutes that authorized donations in a confusing array.¹⁸⁵ The 1968 UAGA was a welcome solution to the donation problems, and it also offered a uniform immunity clause.¹⁸⁶

Another reason that the 1987 UAGA is not as necessary as a uniform law is that it is not significantly different from the 1968 UAGA, with the exception of Section 5(a). The majority of the 1987 UAGA only clarifies certain areas, but Sections 4 and 5(a) present concepts that do not represent uniform state interests.

Lack of acceptance of the 1987 UAGA may be attributed to the number of existing statutes that must be reviewed to avoid a conflict with the 1987 UAGA. As the states have been busy with donation legislation since early 1985, the legislatures may be understandably sluggish in analyzing the potential impact of the 1987 UAGA.

There has been general acceptance of the 1987 UAGA by the adopting states, except for Sections 4 and 5(a). Thus, analyzing the historical sources, as well as the effects, of Sections 4 and 5(a) may provide insight into the future acceptability of the 1987 UAGA.

1. Section Four

Section 4 specifies that coroners/medical examiners are the last of the three ranking groups able to make anatomical gifts. The first donor group is the individual himself; the second group is the family, according to a further ranking of members. Section 4 has been generally acceptable to the eight states that have enacted it, except to Connecticut and Nevada.

There are two possible areas for objections to Section 4. The first is an official's potential power to give parts without the family's knowledge. The second is the origin of that official's power.

The section does not, of course, permit the official to make a donation without compliance with the necessary prerequisites. Furthermore, the official's power is last in the hierarchy. Although Section 4 is not a pure "presumed consent" provision, it does, however, allow the official to make a gift without family knowledge or consent if there is no family

185. Sanders & Dukeminier, *supra* note 7, at 401-02; Dukeminier, *supra* note 2, at 817; Note, *The Sale of Human Body Parts*, *supra* note 2, at 1185; Note, *Legal Problems in Donation of Human Tissues to Medical Science*, *supra* note 2, at 356-57; Comment, *Property in Corpses*, *supra* note 79, at 280-93; Note, *The Law of Dead Bodies: Impeding Medical Progress*, *supra* note 78, at 456-59.

186. Note, *The Sale of Human Body Parts*, *supra* note 2, at 1186.

“available” and the required “reasonable search” has been unsuccessful.¹⁸⁷

The comment to Section 4 reveals a preference for “presumed consent” procedures, but only when the family is not “available.”¹⁸⁸ On the other hand, the Task Force specifically recommended that if an official, such as the coroner, is given the power to donate, that the power should be only with the consent of the family.¹⁸⁹ Section 4 does not follow the Task Force’s philosophy, since it does permit the official to donate, without family consent, after an unsuccessful search.

The origin of presumed consent statutes can probably be traced to the “unclaimed body statutes.” In the late eighteenth century, the medical need for cadavers exceeded the supply. Because of medical schools purchasing cadavers, “grave robbing” became a prevalent profession.¹⁹⁰ The English Anatomy Act of 1832 was enacted to allow schools to receive the bodies of paupers and the unclaimed.¹⁹¹ American anatomy acts followed soon thereafter. These “unclaimed body” statutes are also referred to as “anatomy” statutes and vest authority in coroners to deliver unclaimed bodies to medical schools for research and dissection.¹⁹²

a. Removal statutes. There are currently two types of presumed consent or removal statutes: quasi, which require a search, but no con-

187. There is an issue about the interpretation of “consent” or “absence of objection.” The problem is that a coroner may be able to authorize removal if there is no objection; this, however, does not require the coroner to search actively for the relatives first. It is obvious that if the coroner has no prior relationship, he will have no “knowledge” until he does perform a search or locates the next of kin.

In several states, there are statutes authorizing the medical examiner to remove eyes or corneal tissue under specified circumstances There is a variation among existing statutes in the requirement to inform or seek consent of next of kin before organs or tissues are removed. In several states, including Georgia and Florida, there is no requirement to inform or seek consent if the other conditions prescribed by statute are satisfied. In others, information and consent are required.

1987 UAGA, *supra* note 6, at § 4 comment.

188. However, the search may be ignored if the useful life of the organ is in jeopardy. Subsection (a)(2) seeks to balance societal and family interests, that is, to increase the size of the donor pool and to give the family the opportunity to make or refuse to make an anatomical gift. The balance . . . is on the side of increasing the size of the donor pool. The duty . . . to inform next of kin is limited to “a reasonable effort taking into account the useful life of the part”

Id.

189. Task Force Report, *supra* note 9, at 30-31.

190. Comment, *Property in Corpses*, *supra* note 79, at 294.

191. Dukeminier, *supra* note 2, at 811 n.2; Note, *The Law of Dead Bodies: Impeding Medical Progress*, *supra* note 78, at 455.

192. Sadler & Sadler, *supra* note 64, 13-15; Sanders & Dukeminier, *supra* note 7, at 395, 403; Comment, *Property in Corpses*, *supra* note 79, at 294-95; Note, *The Law of Dead Bodies: Impeding Medical Progress*, *supra* note 78, at 455, 459; Note, *Legal Problems in Donation of Human Tissue to Medical Science*, *supra* note 2, at 354-56.

sent, if the search is unsuccessful; and pure, which require no search and no consent of the family.¹⁹³ Although, the presumed consent statutes have generally been limited to harvesting corneas and pituitary glands, these "presumed consent" statutes have also been the subject of recent constitutional challenges.¹⁹⁴

The quasi type of removal statutes are similar to Section 4 of the 1987 UAGA because a search is first required. There are thirteen states with quasi statutes. There are seven that specifically refer to eye/corneal tissue removal and five statutes to pituitary gland removal.¹⁹⁵

193. There are several statutes that do require consent. They are probably superfluous because of the UAGA; however, the idea underlying the statutes is recognizable. The statutes promote coroners' involvement, a lack of which has been cited as a barrier to donations. *See supra* note 80; *see, e.g.*, CALIF. GOV'T CODE § 27491.44 (Deering Supp. 1989).

For eye enucleations, see COLO. REV. STAT. § 30-10-620 (Supp. 1986); IND. CODE ANN. § 29-2-16-4 (Burns 1972 & Supp. 1988); MINN. STAT. ANN. § 525.924 (West 1975).

For other statutes that require consent and allow for more than eye/corneal removal, see D.C. CODE ANN. § 11-2313 (Supp. 1989) (allowing tissue removal); NEB. REV. STAT. § 71-4813 (Supp. 1988) (allowing eye tissue and pituitary gland removal). At one time, the Nebraska statute was a pure presumed consent statute. *See Note, The Sale of Human Body Parts, supra* note 2, at 1212 & n.217; N.Y. PUB. HEALTH § 4222 (McKinney 1985 & Supp. 1989) (allowing removal of corneal tissue and pituitary gland); TEX. REV. CIV. STAT. ANN. art. 4590-6 (Vernon Supp. 1989) (allowing removal of visceral organs); VA. CODE ANN. § 32.1-287 (1985) (organs, eyes, tissues, and glands, other than the pituitary which may be removed without consent).

194. Apparently, the common practice of harvesting pituitary glands from dead bodies without the family's consent spawned a public outcry in the 1960s to enact legislation to prevent unauthorized recovery. Caplan & Bayer, *supra* note 10, at 10 (citing Sadler & Sadler, *A Community of Givers, Not Takers*, THE HASTINGS CENTER REPORT, 14, 5 pp. 6-9) (discussing reports from California and Minnesota when pituitary glands had been removed without family consent). *See also Note, The Law of Dead Bodies: Impeding Medical Progress, supra* note 78, at 465; Sadler & Sadler, *supra* note 64, at 14-15.

195. The seven eye/cornea/corneal tissue removal statutes are: ARIZ. REV. STAT. ANN. § 36.851 (Supp. 1988); ILL. ANN. STAT. ch. 110 ½, para. 351-354 (Smith-Hurd Supp. 1989) (under former law, permission was required; the Illinois Corneal Transplant Act was amended in 1985, effective 1987, to delete the requirement of permission and to add conditions of a "good faith effort" to locate the next of kin. 1985 Ill. Laws 85-192); LA. REV. STAT. ANN. § 2354.1 (West 1982) (At first glance, Louisiana's removal statutes may appear to be "pure" presumed consent; however, when § 2354.1 is read in conjunction with T. 33, § 1565 B.(3), they clearly require that the parish coroner first make a good faith effort to locate the kin. LA. CIV. CODE ANN. art. T. 33 § 1565 B.(3) (West 1982)); MASS. ANN. LAWS ch. 113 § 14 (Law. Co-op 1988); MISS. CODE ANN. § 41-61-71 (Supp. 1989). *Compare* TENN. CODE ANN. § 68-30-201 (1987) (which requires consent under certain circumstances) *with* § 68-30-204 (Supp. 1988) (which does not require family consent or search under certain circumstances); WASH. REV. CODE ANN. § 68.50.280 (Supp. 1989) (§ 68.50.290 provides an exceedingly protective immunity clause).

The five pituitary gland removal statutes are: ARK. STAT. ANN. § 12-12-30 (1987) (at first glance, the Arkansas statute would appear to be a pure presumed consent, however, § 20-17-702 requires that the person who has custody of the body must try to locate the next of kin. Thus, a medical examiner authorizing removal of the pituitary gland under § 12-12-30 would be subject to a required search. *Id.* § 20-17-702 (1987)); MISS. CODE ANN. § 41-61-71 (Supp. 1989); TENN. CODE ANN. § 68-30-301 (1987); VA. CODE §§ 32.1-283 & 32.1-287 (1985) (*See Note, The Sale of Human Body Parts, supra* note 2, at 1212-13 (discussing Virginia's earlier nonconsensual removal statute); *accord* Dukeminier, *supra* note 2, at 843; Sadler & Sadler, *supra* note 64, at

A representative quasi-type removal statute reads:

- (1) A medical examiner shall request the available next of kin of a decedent, as provided in applicable state law, for their permission to obtaining corneal tissue, pituitaries or other tissues from the decedent, when the tissues would be suitable for transplant utilization, as outlined by the Mississippi Eye and Human Tissue Bank.
- (2) A medical examiner or pathologist designated by the medical examiner may provide corneal tissue, pituitaries or other tissues from a decedent under the jurisdiction of the medical examiner or the designated pathologist, to the Mississippi Eye and Human Tissue Bank or other donee specified under the following conditions:
 - (a) (i) Consent from the next of kin is obtained; or
 - (ii) A reasonable attempt to determine the next of kin has failed; or
 - (iii) The medical examiner or designated pathologist believes that there are no next of kin to be contacted for consent; and
 - (b) The removal of the tissue for transplant or therapy will not interfere with any subsequent course of investigation or autopsy or alter the post-mortem facial appearance.
- (3) If the requirements of subsection (2)(a) of this section have been met, neither the medical examiner, the designated pathologist, nor the donee shall be liable in any civil action brought by the next of kin on the contention that authorization of the next of kin was required to remove the tissues.¹⁹⁶

The pure presumed consent group is found in eighteen jurisdictions.¹⁹⁷ These eighteen have nine pituitary gland removal statutes¹⁹⁸

15); WASH. REV. CODE ANN. § 68.50.106 (Supp. 1989).

There are other quasi statutes that allow the removal of more than corneas/eyes/corneal tissue/pituitary glands: CAL. GOV'T CODE § 27491.45 (Deering Supp. 1989) (body parts) (California has consistently maintained a presumed consent approach. See Sadler & Sadler, *supra* note 64, at 16 (discussing earlier California autopsy laws); Note, *Human Organ Transplantation—The Medical Miracle*, *supra* note 2, at n.218 and accompanying text); LA. REV. STAT. ANN. § 2354.3 (West Supp. 1989) (heart, lungs, liver, soft tissue, or bone) & § 2354.2 (West 1982) (kidneys); MD. EST. & TRUSTS CODE ANN. § 4-509 (Supp. 1989) (organs) (See Note, *Human Organ Transplantation—The Medical Miracle*, *supra* note 2, at 1212-13 (discussing Maryland's predecessor nonconsensual removal statute)); MISS. CODE ANN. § 41-61-71 (Supp. 1989) (other tissue); TEX. CIV. CODE ANN. art. 4590-6 (Vernon Supp. 1989) (non-visceral organs and other tissues); UTAH CODE ANN. § 26-4-23 (Supp. 1989) (organs and tissues).

196. MISS. CODE ANN. § 41-61-71 (Supp. 1989).

197. In 1988, Kansas repealed its pure presumed consent statute, which allowed for removal of the pituitary gland. 1988 Kan. Sess. Laws 103, § 3 (repealing KAN. STAT. ANN. § 22a-233 (Supp. 1988)).

198. CAL. GOV'T CODE § 27491.46 (Deering Supp. 1989); COLO. REV. STAT. § 30-10-621

and thirteen eye/corneal tissue removal types.¹⁹⁹ Generally, these statutes allow removal if there is no known objection, if there is a request for transplantation, and if the official consenting to the removal has proper custody over the body.

b. Removal cases. Unlike any of the pituitary gland removal statutes, the corneal statutes in the pure category have been the subject of constitutional challenges. The challenges have been futile, however, on the grounds that the next of kin have no property right in the body and that the overwhelming good of the public is at stake in allowing corneal removal and transplant.

In *Tillman v. Detroit Receiving Hospital*,²⁰⁰ a mother complained that her deceased daughter's eyes had been removed without her consent or knowledge. However, the appeals court ruled that the Michigan corneal removal statute gave to the medical examiner the right to authorize the removal in the absence of knowledge of any objection. There was no invasion of the mother's right of privacy because she had no right of privacy in her daughter's body.

The second action involved a constitutional attack on the Georgia corneal removal statute, which is similar to the Michigan statute. In *Georgia Lions Eye Bank, Inc. v. Lavant*,²⁰¹ the Georgia Supreme Court held that the statute was constitutional because the plaintiff had no property right in her deceased infant and, thus, could not complain. The court also pointed out that with the passage of the corneal removal statute, more than 1000 people had regained their eyesight.²⁰²

(Supp. 1986); CONN. GEN. STAT. ANN. § 19a-281 (West 1986) (formerly required permission, amended, 1982 Conn. Acts P.A. 82-260); MICH. STAT. ANN. § 333.2855 (Callaghan 1988) (*see also* § 52.205, which requires the medical examiner to make a diligent effort to locate the next of kin before performing an autopsy when there is a body found that apparently died a violent or suspicious death); MINN. STAT. ANN. § 390.36 (West Supp. 1989); MO. REV. STAT. § 58.770 (1989); OHIO REV. CODE ANN. § 2108.53 (Baldwin 1988); OKLA. STAT. ANN. tit. 63, § 944.1 (West Supp. 1988); VT. STAT. ANN. tit. 18, § 510 (Supp. 1989).

199. CAL. GOV'T CODE § 27491.47 (Deering Supp. 1989); CONN. GEN. STAT. ANN. § 19a-281 (West 1986) (*see supra* note 198); DEL. CODE ANN. tit. 29, § 4712 (Supp. 1988) (formerly good faith efforts to contact the next of kin were required, amended, 65 Del Laws 43 (1985); FLA. STAT. ANN. § 732.9185 (West 1983); GA. CODE ANN. § 31.23.6 (1985); KY. REV. STAT. ANN. § 311.187 (Supp. 1988); MD. EST. & TRUSTS CODE ANN. § 4-509.1 (Supp. 1989) (specifies the regional allocation of the corneal tissue); MICH. STAT. ANN. § 333.10202 (Callaghan 1988) (*see also* § 52.205, which requires the medical examiner to make a diligent effort to locate the next of kin before performing an autopsy when there is a body found that apparently died a violent or suspicious death); N.C. GEN. STAT. § 130A-391 (1984); OHIO REV. CODE ANN. § 2108.60 (Baldwin 1988); TENN. CODE ANN. § 68-30-204 (Supp. 1988); TEX. CIV. CODE ANN. art. 4590-4 (Vernon Supp. 1989); W. VA. CODE § 16-19-3a (1984).

200. 138 Mich. App. 683, 360 N.W.2d 275 (1984).

201. 255 Ga. 60, 335 S.E.2d 127 (1985), *cert. denied*, 106 S. Ct. 1464 (1986).

202. 335 S.E.2d at 128. The dissenting opinion maintained that the statute prevented the mother from using her right to object. *Id.* at 129 (dissenting opinion).

The latest reported constitutional attack on a pure presumed corneal removal statute was in Florida.²⁰³ The case involved two complaints; one in which a drowned victim's corneal tissue had been removed without his parents' consent or knowledge and the other, a single automobile accident in which the deceased's corneal tissue had been removed without his parents' knowledge or consent. The Florida court ruled, as had the previous state courts, that the parents had no property right and that the statute gave the medical examiner the right to remove the corneal tissue without first contacting the parents. However, the Florida dissent raises the other controversial issue in Section 4—the origin of the coroner's power to donate. That power originated with the "anatomy" statutes. The problem, as the Florida dissent points out, is that there is now a conflict with the original common law principle, since the enactment of the 1968 UAGA.

When the UAGA was promulgated, it altered the traditional common law theory of property rights in dead bodies. That traditional common law approach dictates that the next of kin have no property right in the remains of a dead body.²⁰⁴ In fact, no one according to the common law can own a body. The common law does grant to the next of kin the personal right of burial because the relative's right to possess the body for proper burial is a morally and legally recognized right.²⁰⁵ The relative's right has also been referred to as a "quasi-property" right, but the accepted view is that there is no property right in the body, rather only an obligation to dispose of the remains and thus, a coincidental personal right that the burial be handled properly.²⁰⁶

203. *State v. Powell*, 497 So. 2d 1188 (Fla.), *cert. denied*, 107 S. Ct. 2202 (1986). *Accord Kirker v. Orange County*, 519 So. 2d 682 (Fla. Dist. Ct. App. 1988) (The associate medical examiner could be liable, since he had caused removal of the eyes, even though the child's medical chart indicated the mother's refusal to make a donation.).

204. Note, *Heart Transplants: Legal Obstacles To Donation*, *supra* note 2, at 80; Note, *Human Organ Transplantation—The Medical Miracle*, *supra* note 2, at 422, 424.

Lord Coke has been accused of misreading the property law principle in *Haynes' Case* (12 Coke 113, 77 Eng. Rep. 1389) (c. 1612). Note, *Law and Life*, 20 S.C.L. REV. 765, at 781 (1968); Note, *Human Organ Transplantation—The Medical Miracle*, *supra* note 2, at n.18; Sanders & Dukeminier, *supra* note 7, at 397.

The jurisdiction over dead bodies and burials in early England was originally in ecclesiastical hands. Later, the ecclesiastical courts exercised control. *See* Note, *Human Organ Transplantation*, *supra* note 2, at 422; Sanders & Dukeminier, *supra*, note 7, at 397.

205. *State v. Powell*, 497 So. 2d 1188, 1192 (Fla. 1986) (quoting W. PROSSER, *THE LAW OF TORTS*, 43-44 (2d ed. 1955)). *Accord Kirker v. Orange County*, 519 So. 2d 682, 684 at n.2 (Fla. Dist. Ct. App. 1988).

206. *Georgia Lions Eye Bank*, 335 S.E.2d at 128; *Estate of Moyer*, 577 P.2d 108, 110 n.5 (Utah 1978); *Tillman*, 360 N.W.2d at 277. *Cf. Mexican v. Circle Bear*, 370 N.W.2d 737 (S.D. 1985) (discussing precedence of tribal custom allowing the widow custody of her deceased husband over his express burial wishes).

Through the years, the family has been given a remedy for injury if there is improper inter-

Prior to the UAGA, since no one had a property interest in the body, no one could legally dictate how his/her body would be disposed of at death.²⁰⁷ New York was apparently the first state to enact a statute that gave a right to dictate the disposition of one's own remains.²⁰⁸ Then, in 1968, the UAGA granted to individuals and their next of kin the uniform right to donate organs. However, if there is no family, then an official must take custody of the body for disposition. Thus, the legal right of an official to exercise control over an unclaimed body is both an extension of the 1968 Act and common law principles.

The dissenting opinion in the Florida case recognizes the conflict between the common law and the UAGA. The 1968 UAGA altered the traditional common law principle by specifically giving to the family the right not only to consent to a gift but also to object to a removal.²⁰⁹ Thus, the presumed consent statutes that allow removal without a search for the family appear to contradict the rights granted by the 1968 UAGA because the family's right to object has not been meaningfully exercised. However, the rights of coroners to remove tissue for testing and autopsy have also been recognized as supreme over the family's rights, and this too is included in the 1968 UAGA.²¹⁰

It is not easy to square the two apparently conflicting views, unless the issues of a required search and availability are separated. Although the 1987 UAGA recognizes the extension of the 1968 UAGA's approach to allowing a coroner supreme access to the body for the purposes of autopsy and investigation, neither statute presumes organ removal as an incident to an autopsy.²¹¹ Thus, the date of enactment of a removal statute, if prior to the 1968 UAGA, could be decisive of the priority of the coroner and the family over the body. However, such a point should not be the topic of endless judicial debate; rather, it is preferable that the 1987 UAGA's approach be used to resolve the issue.

ment. Note, *Law & Life: Organ Transplants*, *supra* note 204, at 781; Sanders & Dukeminier, *supra* note 7, at 398-99.

207. Sanders & Dukeminier, *supra* note 7, at 395.

208. Sanders & Dukeminier, *supra* note 7, at 399 n.141 (citing New York's 1881 donation law). Many states did pass donation enabling legislation, which was a primary reason for the 1968 UAGA. Note, *The Sale of Human Body Parts*, *supra* note 2, at 1185; Sanders & Dukeminier, *supra* note 7, at 401.

209. 1968 UAGA, §§ 2, 7; 1987 UAGA, §§ 2, 6.

210. 1968 UAGA, § 7(d). The rights granted to the next of kin in Section 2 of the UAGA are specifically made secondary to the autopsy laws in Section 7(d).

211. For a discussion of earlier presumed consent laws, see Sanders & Dukeminier, *supra* note 7, at 412-13 n.189 (California); Note, *The Sale of Human Body Parts*, *supra* note 2, at 1212-14 (Hawaii, Maryland, Virginia, Nebraska, Nevada, California); Sadler & Sadler, *supra* note 64, at 16-17 (California, Hawaii, Virginia, D.C.); Dukeminier, *supra* note 2, at 843 (Hawaii, Virginia); Quay, *supra* note 64, at 924-26 (Florida, Louisiana, Kentucky, Missouri, California, Washington, Oregon, Virginia, Maryland, Hawaii, Nebraska).

Thus, the hierarchy right of the family to donate and to object to a donation, as provided by the 1987 UAGA, should be maintained. The 1987 UAGA merely extends the approach of the 1968 UAGA by providing that when no family are available, the duty to bury then falls to the state. As a result, the duty to bury is correlative to the right to donate.

Both the 1968 and 1987 UAGA reflect the preferred approach to donation rights. Moreover, since every state adopted the 1968 UAGA, the present statutes that permit removal without a search and meaningful opportunity by the family to object should have precedence over the pure presumed consent removal statutes. When, however, the family is not available after a reasonable search, then the coroner's right should be allowed. This approach is both desirable as well as historically sound. But, by not requiring a modicum of a search, the traditional approach is compromised.²¹²

2. Section 5(a)

The second section that has apparently sparked more controversy than Section 4 is Section 5(a). Out of the eight adopting states, only Connecticut has included the section, and Hawaii has adopted only a diluted version.

Section 5(a) requires that a patient be asked if he is a donor at the time of his hospital admission. The Act does not require that the patient be pressured into making a donation. In fact, if the patient says yes, the response is simply recorded. For a patient who has made the decision to donate, there should not be trauma associated with being a declared organ donor. If the patient says no, then, and only if his doctor consents, can the hospital give the patient information about the option to refuse or to consent.²¹³

There has already been experience with the routine hospital ad-

212. *Powell*, 497 So. 2d at 1195, 1198 n.2 (dissenting opinion).

213. One problem with this section is when a patient, who is asked about being a donor, replies in the negative but asks for more information. Under the strict interpretation of the Act, the nurse must await his physician's permission to discuss organ donation options. When the nurse returns, an obvious conclusion the patient may draw is that his physician considers him to be a prime candidate for donation. Thus, unnecessary trauma is potential with the specific, and somewhat overprotective, wording of Section 5(a).

However, the above criticism is not intended toward the aim of Section 5(a); rather, there should be many more routine settings and questions imposed about organ donation. For instance, a comfortable setting is with life insurance sales. It is not uncommon for an estate planner or financial adviser to emphasize the importance of a will. The topic of donation could be comfortably broached at such a time. Therefore, the routineness of Section 5(a) type inquiries should be the responsibility of any professional group involved with the aspect of death: lawyers, clergy, funeral homes, and not just the medical profession.

mission inquiry. Several states incorporated the policy when adopting their routine inquiry law. By examining the states that have used the routine inquiry procedure, there may be a clue as to the reasons for the unpopularity of Section 5(a). The proponents state that the question should be as routine as asking about allergies and thus should help to increase a potential donor pool as well as to make the public conscious of the potential decision to donate.²¹⁴ The opponents of the section, however, argue that the question may actually dissuade potential donors because of the timing or setting.

a. State routine inquiry types. Presently, there are four states with varying versions of routine hospital admission inquiry. These states are Arizona,²¹⁵ Georgia,²¹⁶ Maryland,²¹⁷ and New Jersey.²¹⁸ Mississippi represents the most recent state to have passed an admission policy and then to have repealed it within a year.²¹⁹ The action taken in Mississippi is indicative of the negative attitude towards a mandatory inquiry in the hospital setting.

b. Surveys. On the other hand, a study conducted by the Maximus

214. 1987 UAGA, *supra* note 6, at § 5(a) comment (citing a HASTINGS CENTER REP.).

215. ARIZ. REV. STAT. ANN. § 36-849E (Supp. 1989). Arizona's version is permissive inquiry to the patient. The provision provides that an authorized person "may obtain consent to donate from a patient . . . on admission to the hospital as part of its standard admission procedure." *Id.* (effective 1986).

Delaware has a broadly worded provision that allows for a protocol to be developed that could require or merely allow inquiry to the patient or to his family at the time of an hospital admission. DEL. CODE ANN. tit. 16, § 2721(b) (Supp. 1988).

216. GA. CODE ANN. § 44-5-143(d), -143.1(d) (Supp. 1989). The Georgia provisions are part of its routine inquiry statute. The wording is very similar to what Massachusetts required at one time.

When Massachusetts adopted the UAGA, it added the following section:

Upon admission of a patient to any hospital at his request, the hospital shall record in a book kept for the purpose the expression of intent of such patient with regard to the disposition of his body and such expression shall be deemed sufficient notice under this section.

MASS. GEN. L. ch. 113, §§ 7-13 (repealed 1986).

Thus, the Georgia and Massachusetts provisions could be interpreted as requiring only that a book be maintained, but not necessarily that each patient must be asked whether he is a donor.

217. MD. HEALTH-GEN. CODE ANN. § 19-310 (Supp. 1988). The Maryland provision requires that the patient or his family be asked whether he is a current donor, if the admission is non-emergency.

218. N.J. STAT. ANN. § 26:6-60.1 (West Supp. 1988). New Jersey's provision is mandatory and requires inquiry of the patient at the time of admission. This provision is part of New Jersey's routine inquiry law.

219. MISS. CODE ANN. § 41-39-15(2) (Supp. 1989) was enacted in 1987 but repealed in 1988. 1988 Miss. Laws ch. 355 (effective 7/1/88). The present version of § 41-39-15(2) does not require an inquiry upon admission.

The earlier version required that each patient on admission be asked whether he was a donor, and if he replied no, then the patient was to be informed of his options to donate. Thus, Mississippi's version is substantially similar to the 1987 UAGA, which was drafted and proposed before Mississippi repealed its version.

organization in 1987 revealed that "[h]ospitals that had initiated a request on admission program, reported no opposition from patients and believed the program, when handled appropriately, to be beneficial."²²⁰

But an earlier Gallup survey conducted in January 1985 revealed several barriers to why people would not permit organ donation. One of the stated reasons given was a fear that the doctors might hasten death.²²¹

The overwhelming lack of acceptance of Section 5(a) thus far could indicate a serious problem in the continuing struggle to gain the acceptance of directly raising the topic of organ donation. Although Section 5(a) appears to present a rather innocuous question to a patient as to whether the patient is an existing donor, the states that have so far omitted Section 5(a) signal a continuing distaste for confronting the question of whether one is a donor. It may only be the setting of the hospital admission that generates the opposition. However, the more recent Maximus study indicates that the public has become more conscious and informed of organ donation options and procedures and thus amenable to Section 5(a).

B. Conclusion

Only sixteen states have formally considered the 1987 UAGA, with only eight states adopting a version of the 1987 UAGA within the two-year period since its proposal.²²²

Given the potential confusion that resulted when the states were adopting required request, it is important that the legislators carefully examine all of the laws that treat donation (unclaimed bodies, warranties of services, organs/tissues) to avoid conflicts between any provisions. So, deliberate consideration of the 1987 UAGA is advisable.

To promote the 1987 UAGA, a state need only add to the procedures of Sections 4 and 5(a). Section 4 could be improved by detailing a procedure of what constitutes a "reasonable" search. Section 5(a) should be expanded to develop the concept that physicians and insurance companies should routinely document the answer to organ donation as the highway departments have, in order to establish an environment less threatening than a hospital upon admission. Expanding the potential settings is the better approach, instead of ignoring the possible

220. Maximus, Inc., Evaluation of Methods Used by States to Expand the Number of Organ and Tissue Donors, at Es-29 (Apr. 1988) (Final Report) (prepared for the U.S. Health Resources and Services Dep't. (HRSA Contract No. 240-86-0048)).

221. Task Force Report, *supra* note 9, at 38.

222. Rhode Island and Utah have recently joined the eight states listed in this article who have adopted versions of the 1987 UAGA. See 1987 UAGA, *supra* note 6 (Supp. 1990).

advantage of Section 5(a). In this way, the public's consciousness can be raised in more than one environment, and the goal of family discussions promoted. The result helps to avoid the more distressful time when the family has to be confronted and asked about organ donation when a family member has just died or is near death.

It is the belief in immortality or the fear of dying that prevents some people from ever confronting the issue of organ donations. However, once the question becomes more routine, the more often an individual will be aware that all admissions are asked the same question. As the public begins to compare their experiences, the topic of organ donation will become more discussed and acceptable, and less feared and unknown.

Organ donation was available on a limited basis even before the UAGA of 1968, but organ donation has been continuously available since the success of the uniform procedures granted by the 1968 Act. If special interests groups are influencing the elimination of routine inquiry upon admission, then the consciousness of the public toward donation is only being delayed. The public and the medical community have come far in valuing giving, but Sections 4 and 5(a) of the 1987 UAGA should not be rejected without appreciating that the public is more amenable to organ donation than other groups seem to understand. Until there is uniformity in approaching the topic, the overall acceptance of a systematic approach to donation will only produce sporadic results.