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ANATOMICAL GIFTS IN ILLINOIS

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RECENT HEART transplant operations have captured the attention of the world. Not nearly as much interest has been generated by kidney transplants, though they too were initially unique and startling. Apparently, public identification of the heart as a symbol of life itself has drawn attention to heart transplant operations, thereby stimulating speculation and reconsideration of transplant operations of all kinds.[1] Another dramatic development has been the multiple donation of several organs by one donor for the benefit of several patients in simultaneous transplant operations. Doctors in Houston, Texas, on August 31, 1968, removed the heart, one lung, and both kidneys from a donor and transplanted the organs in four other patients.[2] Earlier, on May 3, 1968, doctors in Loma Linda, California, with parental consent, removed the kidneys, spleen, and much of the skin of an eleven-year old boy killed in a traffic accident, thus giving the means of life to four other patients.[3]

Our reaction is to marvel at these medical accomplishments, to applaud them, and to hope both for further refinement in technique and for greater accessibility of such operations. At the same time, we must realize that these accomplishments depend upon a legal environment for their furtherance. We must inquire whether existing laws in Illinois are conducive to the advancement of medicine in the field of transplantation. As a practical beginning, let us address the legal problems of a surgeon who wishes to undertake a transplant operation and who must first obtain the organ to be transplanted from a deceased patient. To see the range of possible cases, we should examine at least four situations. First, let us consider the case in which there is an unexpected

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[1] For comment on the public's involvement, *see* Appel, *Ethical and Legal Questions Posed by Recent Advances in Medicine*, 205 J. AMER. MED. ASS. 513 (1968).

[2] N.Y. Times, Sept. 1, 1968, at 24, col. 1.

[3] Chicago Tribune, May 4, 1968, at 14, col. 4.

death and relatives either cannot be located or do not exist. Next, we should consider the case in which death seems imminent and relatives are available. What courses are open to the doctor? Third, assuming that there is ample opportunity for planning by the prospective donor, what steps can be taken in estate planning to clarify the legal situation? Fourth and finally, how could the legal environment for transplants in Illinois be improved by enactment of the *Uniform Anatomical Gift Act?*

DEATH WITHOUT OPPORTUNITY FOR PLANNING

How should a lawyer advise the surgeon who must know immediately whether he may use organs or tissue from a recently deceased hospital patient? What laws bear on the questions involved?

In some cases it may be that the controlling law is to be found in the statutes concerned with abandoned bodies. In Illinois there is a statute entitled "Use of Bodies of Deceased Persons to Promote Medical Science."[4] It empowers coroners, sheriffs, and other public officials to release a body only to physicians and surgeons or to medical and mortuary schools, and only if the body would otherwise be required to be buried at public expense. The body must be used within the state "for advancement of medical, anatomical, biological or mortuary science."[5] There are other limitations: no delivery can be made if other disposition of the body is directed by will or other written instrument; proper notice must be given to the relatives or guardians and the body is to be surrendered to them for burial if they ask for it; a school is directed to furnish the body to students for scientific study. Despite these limitations, it is arguable that, in some cases, organs could be taken from the body for transplantation, construing that as "advancement of medical science."

Before proceeding under the statute discussed above, the surgeon should be certain that he is not faced with a case in which the coroner has jurisdiction. Where the death was violent, accidental, incidental to abortion, was under suspicious circumstances, where drug addiction was involved, or where there was no attending physician, the coroner is given control of the body by statute.[6] Where the cause of death can-

[4] ILL. REV. STAT. ch. 91, §§ 19-22 (1967). For a discussion of the "abandoned body" statutes, *see* Comment, *The Law of Dead Bodies: Impeding Medical Progress*, 19 OHIO ST. L.J. 455, 459 (1958).

[5] ILL. REV. STAT. ch. 91, § 19 (1967).

[6] ILL. REV. STAT. ch. 31, § 10 (1967).

not be established except by means of an autopsy, the coroner is empowered to hold an autopsy.[7]

The time factor can become a prohibitive condition for some types of transplant operations. Critical organic tissue, such as the heart, kidney, lung and liver must be removed from a deceased donor within minutes of death. It must be transplanted within hours. Certain noncritical tissue, such as that in the skin and cornea, can be removed after a greater lapse of time and still be used. But there must usually be sufficient time to determine whether the organ involved is infected by a disqualifying disease. The surgical team needs time to prepare. Further, there must be time to ascertain the compatibility of blood and tissue.[8] In addition to considerations of time, an attempt to proceed to remove organs for a transplant operation in the case where the coroner has jurisdiction may be inadvisable in that it interferes with those functions the coroner is charged with performing. Questions of criminal responsibility, as in homicide and manslaughter, and questions of civil liability may depend for their solution upon the coroner's work. A proper analysis of the cause of death may require an intact corpse. Related to this is the problem of prosecution for homicide, where the victim becomes a heart-donor after entering the hospital. The prosecution may be confounded, depending upon the definition of death which is applied. Was the cause of death the homicidal assault or the loss of a heart? The definition of death for transplantation purposes must be acknowledged for criminal law purposes as well. Until a new uniform standard is reached, the problems will remain. One physician-lawyer has publicly stated that where the coroner has taken charge, or should take charge, no transplantation should be contemplated.[9]

Thus, it becomes obvious that a surgeon may be severely limited in a situation where there has been no opportunity for planning. He may have the problem of determining whether there are relatives of the deceased or not. He may choose not to proceed where the coroner may be concerned. Leaving these conditions aside, there may be troublesome administrative rules and ordinances to contend with.[10]

[7] ILL. REV. STAT. ch. 31, § 10.2 (1967).

[8] Conditions for successful transplantation of some organs and tissue are outlined in Couch, Curran, and Moore, *The Use of Cadaver Tissues in Transplantation*, 271 NEW ENGLAND J. MED. 691 (1964).

[9] Address by Dr. Cyril Wecht, Legal Aspects of Organ Transplants, *Society of Hospital Attorneys*, in Chicago, Illinois, June 28, 1968.

[10] Physicians concerned with transplantation must be aware of Rules and Regulations

It has been suggested that a coroner could remove organs for transplantation incidental to his conduct of the autopsy.[11] This seems a most dubious proposition which would surely expose the coroner to risks of liability. The primary function of the coroner's autopsy is to determine the cause of death. Any additional activity would be beyond the scope of his authority.[12]

An autopsy conducted pursuant to the coroner's authority is on a different footing from an autopsy conducted with the consent of the deceased or a relative.[13] Such consent can be granted and it could encompass the removal of organs for transplantation. If the physician exceeds the scope of the consent, he can be liable in damages, as it goes without saying that he can be liable where he proceeds in the absence of consent.[14] The courts will protect the sensibilities of those who are entitled to have the body for the purpose of burial; while the monetary damages awarded are not usually great, the real sanction is the harm done to the reputation of the physician who exceeds consent.

"Those who are entitled to have the body for the purpose of burial" —this is the crucial point both in determining who has control of the deceased body and its parts and in determining whose consent the sur-

for the Transportation and Disposal of the Dead promulgated April 12, 1962 by the Illinois Department of Public Health. Rule 8.01 imposes restrictions on holding or moving a body. A funeral director must obtain a Permit for Disposition of Dead Human Body. The Permit can authorize use of the body for teaching purposes with provision for eventual final disposition. Such a Permit applies in the case of a medical school, mortuary school or a hospital or where the body is to be preserved as a medical specimen. Transplantation seems to be no exception to the rules. Obtaining a Permit may take time.

Further, physicians in Chicago must comply with CHICAGO, ILL., ORDINANCES ch. 93, § 10 (1939), which prevents movement of a body or a part without permission from the Board of Health. Removals for limited purposes are allowed on telephone permission obtained from the Board by a funeral director as outlined by the Board of Health in *Diary and Year Book 1968*, Funeral Directors Services Association of Greater Chicago, (Leach ed.), at 13-14.

Manifestly, both the ordinance and the rule should be amended to encompass transplantation so that the protective measures provided can be accomplished without hampering transplant operations.

[11] Vestal, Taber, and Shoemaker, *Medico-Legal Aspects of Tissue Homotransplantation*, 18 U. DET. L.J. 171, 189-92 (1954).

[12] This is the position asserted by the writer of the Comment, *supra* note 4, at 465. To the same effect is Wasmuth and Stewart, *Medical and Legal Aspects of Human Organ Transplantation*, 14 CLEV.-MAR. L. REV. 442, 459 (1965).

[13] ILL. REV. STAT. ch. 91, § 18.12 (1967) provides authority to physicians to perform an autopsy where consent is obtained.

[14] *E.g.*, Eastin v. Ochsner Clinic and Ochsner Foundation Hosp., 200 So. 2d 371 (La. App. 1967), *aff'd*, 251 La. 34, 202 So.2d 652 (1967).

geon must obtain. Such determinations have been made by common law.[15] For the present, it is important to note a statement of policy by the legislature with regard to these persons which is contained in the act on coroners. The pertinent language reads, in part:

> As a guide to the interpretation and application of this Act it is declared that the public policy of the State is as follows:
>
> That as soon as may be consistent with the performance of his duties under this act the coroner shall release the body of the decedent to the decedent's next of kin, personal representative, friends, or to person designated in writing by the decedent or to the funeral director selected by such persons, as the case may be, for burial, and none of the duties or powers of coroners enumerated in this act shall be construed to interfere with or control the right of such persons to the custody and burial of the decedent upon completion of the coroner's investigation.[16]

This statement of policy clarifies the existing common law and brings us logically to the second of the aforesaid situations: the case in which there is limited opportunity for planning and in which relatives are available.

DEATH AFTER LIMITED OPPORTUNITY FOR PLANNING

Let us suppose that a patient is dying and his relatives are available to the surgeon. How should the doctor proceed in order to assure legal protection? Why may he rely upon the consent of relatives immediately after death?

The first principle to understand is that a decedent's next of kin have a right to possession of the body in order to bury it properly. This is made clear in an Illinois appellate court decision, *Fischer's Estate v. Fischer*.[17] The facts in *Fischer* are not helpful, since the case is concerned with the right of disinterment and reinterment, but the dicta and premises of the court make clear what is taken to be the law in Illinois. The court's position is consistent with the declaration of policy noted above in the act on coroners. The court quotes from an early landmark case with approval:

[15] For the general background, *see* JACKSON, THE LAW OF CADAVERS 41-55 (2d ed. 1950), and Note, *Legal Problems in Donations of Human Tissues to Medical Science*, 21 VAND. L. REV. 352, 356-59 (1968). The note alludes to cases which have held that there are under various circumstances the following rights with respect to a dead body: the right to possession of it for burial, the right to recover damages for mutilation, the right to determine the manner and place of burial, and the right to permit autopsy pursuant to life insurance contract.

[16] ILL. REV. STAT. ch. 31, § 10.7 (1967).

[17] 1 Ill. App. 2d 528, 117 N.E.2d 855 (1954).

While it may be true there is no right of property in a dead body, in the ordinary sense, it is also true that the nearest relatives of the deceased are and have been in all ages, so far as known, except under ecclesiastical law, recognized as legally entitled to its custody, to lay it away in burial. It is the duty no less than the right of such relatives to protect it from unnecessary violation, and any infringement upon that right, except where made necessary for the discovery and punishment of crime, violates the tenderest sentiments of humanity.[18]

It follows from this fiat that in order to clarify the right of the surviving spouse and the next of kin to give consent which is effective to permit the use of the cadaver, the right to bury must include the right of disposition in a variety of appropriate ways—especially donation of the body and its parts. The right to bury must simply be construed as a right of disposition. There is some doubt that this can be done.[19]

None of the cases dealing with the right of burial are addressed to the problems of transplantation. We must therefore generalize and draw inferences in a different context from that in which the rules are expressed. One writer, after extensive survey of the cases, has summarized the rights of the next of kin as follows:

1. The person who has possession of the body holds the same in trust for those who are charged with the duty of burial or are privileged to exercise the right thereof.
2. The person charged with the duty of burial or the person who has the prior privilege thereof is entitled to the possession of the body for the purpose of interment.
3. Such person is entitled to possession in such a manner as not to delay, impede, or prevent interment.

[18] *Id.* at 531-32, 117 N.E.2d at 857. The quotation is from *Palenzke v. Bruning*, 98 Ill. App. 644 (1901). *Palenzke* was a case in which a coroner arrived late, interfered with the burial arrangements in order to conduct an autopsy and then failed to return the corpse intact. The court awarded damages to the decedent's parents.

As a contrast to the *Palenzke* court's assumptions about the preference to bury the dead, *compare* Biörck, *When is Death?* 1968 WIS. L. REV. 484 (1968). "The problem with death is that it usually leaves a dead body behind. This fact causes many different reactions among humans. Some feel nothing, or next to nothing, before the dead body. Others retain a profound attachment to the body." *Id.*

[19] Comment, *supra* note 4, at 468-469: "Recent cases have loosely referred to the right of the kin to 'dispose of the body'; the authors of the *Homotransplantation* article preceptably change from writing of 'burial' to writing of 'disposition.' There is no case authority in point and no apparent legal principle with which to buttress the conclusion that disposition by donating to science is the equivalent of according the common law right of decent burial." The writer goes on to conclude that the next of kin probably do *not* have an absolute right to donate the decedent's remains for medical purposes, thereby overriding the common human wish to be buried. Such a deficiency in the law is a serious drawback to medical progress. Failing the decedent's pre-mortem consent, there is some doubt whether his survivors *can* in all events donate the body or its parts. This question is merely clouded further by the old principle often found in the cases that there is no "property" right in a dead body.

4. Such person is likewise entitled to possession of the body in the same condition it was in when death occurred.[20]

With the emphasis placed upon the right of burial, we should next note the order of priority among the persons who may be entitled to possession. In *Fischer* the rule is stated thusly: "Right of possession of a dead body in the absence of any testamentary disposition belongs usually to the husband or wife or next of kin."[21]

The important words are "in the absence of any testamentary disposition." The majority rule solely regarding disposal of the body after death appears to be that the decedent's wishes are entitled to "respectful consideration" and " substantial weight."[22] In some cases the testator's wishes have not prevailed, as, for example, where he attempted to assign the right of disposition to a non-relative in derogation of the right of his surviving spouse.[23] Through a long evolution, the priority is presently determined as follows: first the wishes of the testator (within limits), then of the surviving spouse, then of the children, then of a parent, and so on, depending upon the facts of the case.[24]

With the priorities in mind, it is important to note next that, as a matter of theory, we are talking about an action sounding in tort. In his section on intentional infliction of mental distress, Prosser points out that many courts have allowed damages in cases involving mishandling of dead bodies.[25] Once the remedy for interference with the right of possession of a dead body is seen to be in tort law, it is then clear that those who exercise the right can give valid consent to its infringement. The practical consequence is that such consent is a defense for the surgeon who relies upon it.[26]

[20] JACKSON, *supra* note 15, at 142-43.

[21] *Supra* note 17 at 531, 117 N.E.2d at 857, quoting People v. Harvey, 286 Ill. 593 at 601, 122 N.E. 138 at 141 (1919).

[22] 22 AM. JUR. 2d *Dead Bodies* § 12 (1965).

[23] *Id.*, citing *Enos v. Snyder*, 131 Cal. 68, 63 P. 170 (1900).

[24] JACKSON, *supra* note 15.

[25] "In most of these cases the courts have talked of a somewhat dubious 'property right' to the body, usually in the next of kin, which did not exist while the decedent was living, cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses. It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that it is in reality the personal feelings of the survivors which are being protected, under a fiction likely to deceive no one but a lawyer." PROSSER, TORTS 51 (3d ed. 1964).

[26] This conceptual basis is developed at more length in Packel, *Spare Parts for the Human Engine*, 37 PA. B.Q. 71 (1965).

We can now evaluate the position of the surgeon in the case where the relatives are known and are available and willing to donate the remains for the cause of medical science. The next of kin have the capacity, if legally competent, to give consent permitting the surgeon to proceed with a transplant operation.

A theme we have thus far left undeveloped is the power of the testator or an intestate decedent to give a valid consent well in advance of death. Let us now turn to these questions and examine them in the context of a case in which the emphasis is on inter vivos planning. What steps in estate planning should be accomplished?

INTER VIVOS PLANNING FOR DISPOSITION

Thus far we have made the cases difficult by postulating that death was imminent or had already occurred and there was little time for reaction. Suppose, however, that there is time to make proper plans. This could occur where the patient involved has a terminal illness or where a person in good health wishes to benefit medical science by a bequest of his body.[27] What are the steps necessary to effectuate a valid gift of a person's body or organs?

In Illinois the legislature has provided special statutory authority regarding the gifts of organs or bodies in the Illinois Probate Act, section 42a. The section is entitled "Gift of Body" and was enacted in 1959, well before the most notable recent developments in transplantation:

1. Every person of testamentary capacity may give by will or other written instrument executed during that person's lifetime, the whole or any part of his body to a charitable, educational or research institution, university, college, State Director of Public Health, State Director of Public Welfare, legally licensed hospital or any other organization intended and equipped to distribute human bodies or parts thereof, either for use as such institution, organization, university,

[27] On the need for bodies, *see Schools Report Cadaver Shortage*, 200 J. AMER. MED. Ass. 38 (1967). Gifts of organs from living donors, as between twins in the kidney transplant operations, are beyond the scope of this article. Suffice it to say that the key is to have fully informed, fully voluntary, written consent. *See* Plante, *An Analysis of "Informed Consent,"* 36 FORDHAM L. REV. 631 (1968). Professor Plante illuminates the distinction between the cases in which a physician exceeds the scope of the consent given and the cases in which the physician fails to provide sufficient information upon which to base the decision to give consent. *See* Note, *supra* note 15, for a development of the view that the extraordinary risks involved in transplant operations call for a higher standard of understanding on the part of a recipient in giving consent. For the same reason, the writer of the note would require a higher standard in informing a living donor of the risks involved, for instance, in a kidney transplant.

college, Director or hospital may see fit, or for use as expressly designated in the will or other instrument, and the gift shall become effective immediately upon death.

2. If the instrument making the gift does not purport to be a will, it shall be executed by the donor or by some person in his presence and by his direction and attested in the presence of the donor by two or more credible witnesses. The instrument shall become immediately effective upon the donor's death, and no person acting in good faith pursuant to the direction of the instrument and without knowledge of a subsequent revocation thereof shall be liable for so doing, notwithstanding the subsequent revocation in whole or part by a will, codicil, or other instrument executed in accordance with this Section.[28]

Far-sighted though this section may have been at the time of its enactment, subsequent events have manifested its limitations. For instance, note the limitations on recipients. Only institutions in the specified classes may qualify; individuals cannot. Note also that the purposes for which gifts can be made may be somewhat limited in practice.

If we look particularly at the language, "or for use as expressly designated in the will or other instrument," we can see room for gifts for purposes of transplantation. The donation, however, can only be made to institutions. If it were desired to benefit a given individual, the gift would have to be "in trust" to the institution. Such a "trust," which of course is not really a trust because it lacks a *res* (there being no "property" in a corpse), is not enforceable.

Nevertheless, the Illinois statute provides a fundamental, if limited, means for donors to make effective anatomical gifts which cannot be defeated by their next of kin after their death. Several organizations in Illinois provide assistance in carrying out such gifts. The Illinois Society for the Prevention of Blindness has prepared forms, including cards, for use of donors. The card, designed to be carried on the person of the donor, is meant to overcome the problem of removing critical tissue, namely the cornea, while it may still be used. A bequest in the donor's will is advisable also, lest a will be deemed to revoke a gift executed earlier on the form.

The medical schools in the state have organized a non-profit corporation to handle gifts for anatomical dissection and study. Entitled Demonstrators Association of Illinois, the corporation also has provided

[28] ILL. REV. STAT. ch. 3, § 42a (1967). "Statutes have been enacted in 41 jurisdictions which specifically provide authority for the ante-mortem donations of all or part of a body for medical, scientific, or therapeutic purposes." Sadler & Sadler, *Transplantation and the Law: The Need for Organized Sensitivity*, 57 GEO. L.J. 5 at 17-18 (1968). The authors have summarized the provisions of all existing statutes in Appendix C to their article.

forms specifically to meet the requirements of section 42a of the Probate Act. A card to be carried on the person is included.[29]

An executor in Illinois is given certain statutory powers before the issuance of letters of office. Among these powers is "the carrying out of any gift of the decedent's body or any part thereof."[30] This provision in the Probate Act is thus co-ordinated with section 42a and provides one with authority to make gifts promptly after death. Often knowledge of the gift, if the next of kin are not aware of it, will be dependent upon the card carried on the person. The executor is thus brought in at the earliest stage without having to wait to file the will and be appointed. Speed is essential and in this way is assured.[31]

While Illinois law has many desirable features and can be partially adapted to the needs of transplant operations, what improvements are suggested by recent experience?

THE UNIFORM ANATOMICAL GIFT ACT

The National Conference of Commissioners on Uniform State Laws approved the *Uniform Anatomical Gift Act* on July 30, 1968, the culmination of three years of consultation and drafting.[32] They have codified for us the benefits of recent transplant experience.

[29] Each of the agencies in Illinois is described in Stevens, *Planning for the Disposition of Human Remains*, 52 ILL. B.J. 870 (1964). A more specialized agency is the Temporal Bone Bank at the University of Chicago. Research using inner ear structures from persons who were deaf has been the means of helping the living who cannot hear.

[30] ILL. REV. STAT. ch. 3, § 79 (1967).

[31] As noted, section 79 confers certain pre-appointment powers upon a nominated executor. Among these is the right to bury the decedent. How is this to be reconciled with the common law power of the next of kin to bury the decedent? This is all the more crucial in that we have construed the power to bury as the power of disposition generally. Absent a direction in the will, does the nominated executor obtain a power of disposition superior to that of the next of kin? Most American jurisdictions have answered no. This is the conclusion in Annot., 21 A.L.R.2d 465 at 482 (1952). We could expect the same rule to prevail in Illinois, especially in light of the *Palenzke* and *Fischer* cases. An interesting case may be found in Annot., 7 A.L.R.3d 747 (1964), in which a testator's gift for research could not be carried out. The next of kin challenged the representatives regarding a funeral which had been expressly forbidden in the will. The next of kin desired a funeral. The representatives, probably at the behest of the residuary legatee, sought to enjoin it. The Supreme Court of New Hampshire allowed the funeral, since the medical gift could not be carried out. The court reasoned that since the testator's purpose failed, the interests of her surviving spouse and children ought to be honored. Holland v. Metalious, 105 N.H. 290, 198 A.2d 654, 7 A.L.R.3d 747 (1964).

[32] The Act was approved by the House of Delegates of the American Bar Association on August 7, 1968, at the annual meeting in Philadelphia, Pennsylvania. The proceedings were noted in 54 A.B.A.J. at 1026 (1968). For an informed discussion of the medical and legal problems flowing from present law and how they may be overcome through

To briefly summarize the provisions, the Act empowers any competent person who is eighteen years old to give his body or a part thereof, such gift to take effect at his death.[33] After death, if the decedent made no gift, surviving relatives may make gifts according to an order of priority. If there is disagreement among a class of donor–relatives of which the donee actually knows, he cannot accept the gift. The gift can also be made by the relatives immediately *before* death.[34]

Recipients may be hospitals, surgeons, or physicians who all may receive gifts for the purposes of "advancement of medical or dental science, therapy, or transplantation."[35] In addition, recipients may be accredited medical or dental schools, or licensed anatomical banks or storage facilities. Most importantly, a recipient may be an individual who can receive the gift "for therapy or transplantation needed by him."[36]

The gift may be made by will. Probate is not required for a valid gift. Later invalidity of the will, if such is the case, is disregarded to the extent that the gift has been accepted and acted upon in good faith.[37] Further, the gift may be made by another instrument, signed before two witnesses. Such an instrument may be a card. Delivery of the instrument is specifically excused, so as to leave no question about formalities.

If a gift is made without a specified donee, it may be accepted by the attending physician, as also where the specified donee is for some reason not available. The physician who accepts the gift is barred from participating in the transplant operation, including removal of parts.[38] However, a specific surgeon may be designated to perform the operation.[39] If a relative makes a gift, it must be in writing or if by telephone or otherwise, it must be recorded.[40]

the *Uniform Anatomical Gift Act*, *see* Stason, *The Uniform Anatomical Gift Act*, 23 BUS. LAWYER 919 (1968). Professor Stason was a principal draftsman of the Uniform Act.

[33] THE UNIFORM ANATOMICAL GIFT ACT § 2(a) (1968) (hereinafter cited as Act). See Appendix for reprint of the Act.

[34] *Id.* § 2(b)-(e).

[35] *Id.* § 3(1).

[36] *Id.* § 3(4).

[37] *Id.* § 4(a).

[38] *Id.* § 4(c).

[39] *Id.* § 4(d).

[40] *Id.* § 4(e).

Revocation may be by a number of means; for example, by revoking a will if the gift were made by will. But it also may be by a signed statement, an oral statement before two witnesses communicated to the donee, or an oral statement to an attending physician during terminal illness or injury, even if the original document of gift has been delivered to the donee.[41] To be valid, a revocation after death by a signed statement, if not delivered to the donee, must have been found on the person of the decedent or in his effects.[42]

The donee may accept or reject the gift, as well as allow for funeral services, if appropriate. Removal of a part is to be accomplished without unnecessary mutilation. After removal of parts, custody of the body returns to those entitled to have it for burial. There is an exoneration clause to protect those who conform to the Act in good faith, or for that matter, the similar act of another state. Such a provision prevents serious conflict of laws problems.[43]

A most significant provision is that the time of death is to be determined by an attending physician who is then barred from participating in the transplant operation.[44] This is intended to prevent a serious conflict of interest. The Act is expressly made subject to the law regarding autopsies and rights of the coroner.[45]

Many features of the *Uniform Anatomical Gift Act* recommend themselves when we consider the less complete law under which we must operate in Illinois. Giving survivors the powers to make gifts and establishing a priority among them seem especially valuable. The priority descends when survivors in a prior class are not available at death. Further, they must not have actual notice of contrary intentions of the decedent. If the decedent has made it clear that he wished no gift to be made, the person with actual knowledge of that is barred from making the gift. It also seems worthwhile to empower survivors to make the gift "immediately before death." The possible psychological difficulties in approaching the donor at such a time are evident. Yet medical requirements make speed essential if the organs donated are to be usable. Without some such provision, doctors may be defeated in their effort to obtain consent. The donor's condition may have de-

[41] *Id.* § 6.

[42] *Id.*

[43] *Id.* § 7.

[44] *Id.*

[45] *Id.* § 7(d).

teriorated so that he can no longer give competent consent. Doctors could resort only to relatives for consent. Until eventual enactment of the Act, however, relatives cannot usually give consent upon which doctors can heavily rely.

It is most significant that individuals may be recipients of parts that they may need. This in itself affords an opportunity to accomplish what may be in some cases a vital purpose. But for this power, some gifts would probably not be made. Another creative feature provides for a gift to the attending physician for use as he directs.

The more liberal variety of means of revocation should remove inhibitive influences which might prevent such gifts. It allows for a change of mind.

The Commissioners have chosen to omit consideration of some problems from the Act, adjudging them not to be susceptible to legislative solutions.[46] These are the problems of payment for gifts, of defining death, and of allocating organs and tissue in precious supply when several patients may need them.

Payment might very well be harmless. Yet in some cases harm could result. Physicians have criticized payment on several counts. One objectionable case involves relatives who, being themselves unwilling to donate a kidney, seek to pay someone else for a kidney. Certain donors have blackmailed the recipient or his family. Physicians often feel it is important that the donor not be subjected to added financial pressure in reaching a decision.[47] To allow anything like a "going rate" to develop would seem to invite trouble. Both the Uniform Act and the present Illinois statute refer to "gift" in their title, thus making no attempt to deal in monetary values.

The need for a definition of death has become more acute with the advent of transplant operations. As aptly stated in one editorial, this is "the problem of the surgical gardener: Can the transplanter afford to wait for a dying organ just to be certain that he is not also a surgical criminal? Can the recipient afford to have him wait?"[48] The problem is even more acute in the case of sustaining "life" by artificial means.[49] Altogether, current developments indicate the advisability of waiting

[46] Stason, *supra* note 32, at 927-29.

[47] *See* DISCUSSION IN ETHICS IN MEDICAL PROGRESS: WITH SPECIAL REFERENCE TO TRANSPLANTATION 37 (G. Wolstenholme & M. O'Connor ed. 1966).

[48] Editorial, *What and When is Death?* 204 J. AMER. MED. ASS. 219, 220 (1968).

[49] *Supra* note 47, at 70-74.

for physicians to refine the standards.[50] Perhaps legislative definitions will never be adequate or appropriate. The attempt now would clearly be premature.

The problems of allocation of precious resources have become ever more disturbing. Before the question of transplantation, there were questions of dialysis and other procedures limited by economics. Perhaps the answers must eventually come from panels of qualified citizens. Many doctors, though, view this problem of allocation as the question they have always faced—which patient to treat first. They treat the one most in need who can best benefit from the treatment.[51]

New attitudes towards the advances of medicine will change still other attitudes, such as feelings about the body; and in time, public opinion may become more informed about the seemingly intractible problems which the advances bring.

Recognition of the need for orientation of the public undoubtedly prompted the proposal of a Senate Joint Resolution which would establish a commission to probe the "legal, social, and ethical implications of medical research."[52]

CONCLUSION

The state of the art in transplantation is constantly being advanced and refined. As it is, we must consider the major question posed in this

[50] As examples of the efforts of the profession to come abreast of the problem, *see* Halley and Harvey, *Medical vs. Legal Definitions of Death*, 204 J. AMER. MED. ASS. 423 (1968), and *A Definition of Irreversible Coma, Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death*, 205 J. AMER. MED. ASS. 337 (1968).

[51] Moore et al., *Cardiac and Other Organ Transplantation*, 206 J. AMER. MED. ASS. 2489 (1968). "By analogy with the other situations, the heart should go to the patient likely to derive the greatest benefit, that is, to the patient in whom the likelihood of a successful transplant is greatest; and case by case, this must be a medical decision." *Id.* at 2496. This reference is a position paper growing out of a conference sponsored by the American College of Cardiology, September 28 and 29, 1968, which included many of the best informed, most experienced physicians and other professionals associated with transplant operations.

[52] S.J. Res., 145 90th Cong., 2d Sess. (1968). *Note also* S. 2882, 90th Cong., 2d Sess. (1968), to provide review of the problems related to transplants, artificial organs, kidney disease and dialysis (proposing financial support for the latter, as well as training).

One physician, half-humorously, sees the day when the state will obtain the right to claim organs at death, having provided public health measures which benefited the body during life. Warwick, *Organ Transplants: A Modest Proposal,* Wall Street J., June 24, 1968, at 12, col. 3.

Further, on the subject of attitudes and the resulting impediments to advance in the law, *see* Diamond, *Are We Ready to Leave Our Bodies to the Next Generation?* N.Y. Times, April 21, 1968, § 6 (Magazine) at 26.

article: Is the legal environment suitable for transplant operations in Illinois? Upon comparison with the more complete answers of the *Uniform Anatomical Gift Act*, we must objectively conclude that Illinois law, with its many unanswered questions, would be considerably improved by enactment of the Uniform Act.[53] Each of the cases we have considered could have been resolved more easily under its provisions. Initial reaction from the medical profession favors the Uniform Act.[54] It offers a greater degree of certainty and greater harmony in the adjustment of all the interests involved: those of donors and their relatives, those of recipients and their relatives, those of the medical profession, and those of the public at large.

APPENDIX

UNIFORM ANATOMICAL GIFT ACT

An act authorizing the gift of all or part of a human body after death for specified purposes.

SECTION 1. [Definitions.]

(a) "Bank or storage facility" means a facility licensed, accredited or approved under the laws of any state for storage of human bodies or parts thereof.

(b) "Decedent" means a deceased individual and includes a stillborn infant or fetus.

(c) "Donor" means an individual who makes a gift of all or part of his body.

(d) "Hospital" means a hospital licensed, accredited or approved under the laws of any state and includes a hospital operated by the United States government, a state, or a subdivision thereof, although not required to be licensed under state laws.

(e) "Part" includes organs, tissues, eyes, bones, arteries, blood, other fluids and other portions of a human body, and "part" includes "parts".

(f) "Person" means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association or any other legal entity.

(g) "Physician" or "surgeon" means a physician or surgeon licensed or authorized to practice under the laws of any state.

(h) "State" includes any state, district, commonwealth, territory, insular possession, and any other area subject to the legislative authority of the United States of America.

SECTION 2. [Persons Who May Execute an Anatomical Gift.]

(a) Any individual of sound mind and 18 years of age or more may give all or any part of his body for any purposes specified in Section 3, the gift to take effect upon death.

[53] In their detailed analysis Sadler and Sadler, *supra* note 28, at 18-28, discuss thirteen provisions which an adequate act should contain and note in Appendix C, at 41, that the Illinois act contains only six of them. The Sadlers were consultants to the draftsmen of the *Uniform Anatomical Gift Act* and regard it as the workable ideal against which existing laws should be judged.

[54] The position paper, *supra* note 51, at 2496, endorses the *Uniform Anatomical Gift Act*. A companion editorial urges enactment, *Transplantation*, 206 J. AMER. MED. ASS. 2514 (1968).

(b) Any of the following persons, in order of priority stated, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent, or actual notice of opposition by a member of the same or a prior class, may give all or any part of the decedent's body for any purposes specified in Section 3:

(1) the spouse,
(2) an adult son or daughter,
(3) either parent,
(4) an adult brother or sister,
(5) a guardian of the person of the decedent at the time of his death,
(6) any other person authorized or under obligation to dispose of the body.

(c) If the donee has actual notice of contrary indications by the decedent, or that a gift by a member of a class is opposed by a member of the same or a prior class, the donee shall not accept the gift. The persons authorized by this subsection (b) may make the gift after death or immediately before death.

(d) A gift of all or part of a body authorizes any examination necessary to assure medical acceptability of the gift for the purposes intended.

(e) The rights of the donee created by the gift are paramount to the rights of others except as provided by Section 7(d).

SECTION 3. [Persons Who May Become Donees, and Purposes for Which Anatomical Gifts May be Made.]

The following persons may become donees of gifts of bodies or parts thereof for the purposes stated:

(1) any hospital, surgeon, or physician, for medical or dental education, research, advancement of medical or dental science, therapy or transplantation; or

(2) Any accredited medical or dental school, college or university for education, research, advancement of medical or dental science or therapy; or

(3) any bank or storage facility, for medical or dental education, research, advancement of medical or dental science, therapy or transplantation; or

(4) any specified individual for therapy or transplantation needed by him.

SECTION 4. [Manner of Executing Anatomical Gifts.]

(a) A gift of all or part of the body under Section 2(a) may be made by will. The gift becomes effective upon the death of the testator without waiting for probate. If the will is not probated, or if it is declared invalid for testamentary purposes, the gift, to the extent that it has been acted upon in good faith, is nevertheless valid and effective.

(b) A gift of all or part of the body under Section 2(a) may also be made by document other than a will. The gift becomes effective upon the death of the donor. The document, which may be a card designed to be carried on the person, must be signed by the donor, in the presence of 2 witnesses who must sign the document in his presence. If the donor cannot sign, the document may be signed for him at his direction and in his presence, and in the presence of 2 witnesses who must sign the document in his presence. Delivery of the document of gift during the donor's lifetime is not necessary to make the gift valid.

(c) The gift may be made to a specified donee or without specifying a donee. If the latter, the gift may be accepted by the attending physician as donee upon or following death. If the gift is made to a specified donee who is not available at the time and place of death, the attending physician upon or following death, in the absence of any expressed indication that the donor desired otherwise, may accept the gift as donee. The physician who becomes a donee under this subsection shall not participate in the procedures for removing or transplanting a part.

(d) Notwithstanding Section 7(b), the donor may designate in his will, card or other document of gift the surgeon or physician 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 gift may employ or authorize any surgeon or physician for the purpose.

(e) Any gift by a person designated in Section 2(b) shall be made by a document signed by him, or made by his telegraphic, recorded telephonic or other recorded message.

SECTION 5. [Delivery of Document of Gift.]

If the gift is made by the donor to a specified donee, the will, card or other document, or an executed copy thereof, may be delivered to the donee to expedite the appropriate procedures immediately after death, but delivery is not necessary to the validity of the gift. The will, card or other document, or an executed copy thereof, may be deposited in any hospital, bank or storage facility or registry office that accepts them for safekeeping or for facilitation of procedures after death. On request of any interested party upon or after the donor's death, the person in possession shall produce the document for examination.

SECTION 6. [Amendment or Revocation of the Gift.]

(a) If the will, card or other document or executed copy thereof, has been delivered to a specified donee, the donor may amend or revoke the gift by:

(1) the execution and delivery to the donee of a signed statement, or

(2) an oral statement made in the presence of 2 persons and communicated to the donee, or

(3) a statement during a terminal illness or injury addressed to an attending physician and communicated to the donee, or

(4) a signed card or document found on his person or in his effects.

(b) Any document of gift which has not been delivered to the donee may be revoked by the donor in the manner set out in subsection (a) or by destruction, cancellation, or mutilation of the document and all executed copies thereof.

(c) Any gift made by a will may also be amended or revoked in the manner provided for amendment or revocation of wills, or as provided in subsection (a).

SECTION 7. [Right and Duties at Death.]

(a) The donee may accept or reject the gift. If the donee accepts a gift of the entire body, he may, subject to the terms of the gift, authorize embalming and the use of the body in funeral services. If the gift is of a part of the body, the donee, upon the death of the donor and prior to embalming, shall cause the part to be removed without unnecessary mutilation. After removal of the part, custody of the remainder of the body vests in the surviving spouse, next of kin or other persons under obligation to dispose of the body.

(b) The time of death shall be determined by a physician who attends the donor at his death, or, if none, the physician who certifies the death. This physician shall not participate in the procedures for removing or transplanting a part.

(c) A person who acts in good faith in accord with the terms of this Act, or under the anatomical gift laws of another state [or a foreign country] is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his act.

(d) The provisions of this Act are subject to the laws of this state prescribing powers and duties with respect to autopsies.

SECTION 8. [Uniformity of Interpretation.]

This Act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

SECTION 9. [Short Title.]

This Act may be cited as the Uniform Anatomical Gift Act.