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NOTES

HUMAN ORGAN TRANSPLANTATION — THE MEDICAL MIRACLE AND THE LEGAL MAZE

I. INTRODUCTION

On December 3, 1967, in Capetown, South Africa, an historical operation was performed. A specially trained surgical team excised the diseased heart of a fifty-five year old man and replaced it with the heart of a fatally injured young woman. An electric current caused the heart to begin beating, making the "ultimate operation" an initial success.¹

The effect of this operation has been a new awareness of the advanced state of medical science. As this new method of defeating otherwise terminal illness is perfected and becomes more commonplace, certain legal standards must be established to protect the several interests involved. To reach a possible solution to the problems which accompany these medical developments, it is necessary to examine their medical and legal aspects, the applicable statutes which are currently in force, and finally, a proposed remedy, The Uniform Anatomical Gift Act.²

II. THE MEDICAL ASPECTS

The idea of transplanting human tissue from one individual to another is not of recent origin. Although the veracity of the accounts is not seriously considered, legendary heroes were from time to time made whole again after members of their bodies were lost or mutilated in battle. More recently, the tales of Dr. Frankenstein and his famous monster entail the same motif.

Modern human experimentation in the field of organ transplantation began about fifteen years ago.³ There is a natural sensitivity to experimentation on human beings evolving from an interest in self-preservation and the emphasis on the dignity of human life in most religious orders.

As the law has come to accept death from risks in other activities such as driving, flying, and in certain construction activities,

1. TIME, Dec. 15, 1967, Vol. 90, at 64; U. S. NEWS & WORLD REPORT, Dec. 18, 1967, at 63.

2. THE UNIFORM ANATOMICAL GIFT ACT (Tent. Draft No. 2, 1968) (hereinafter cited as THE UNIFORM ACT) will be presented to the National Conference of Commissioners on Uniform Laws at its seventy-seventh meeting in Philadelphia, between July 22 and August 1, 1968.

3. 200 J.A.M.A. 187 (1967).

so it may come to accept the risks of human experimentation.⁴ Such experimentation may be divided into three general classes: (a) practice of therapy when there is no generally accepted form of treatment; (b) use of drugs or procedures on patients for observation, not therapy, with a view to improved treatment of sufferers who may or may not include this patient; and (c) non-patient experimental subjects.⁵ The medical profession will have to rely heavily on a uniform code of ethics to attain public acceptance,⁶ especially in the second and third categories.⁷ The physician will be allowed more freedom in the first class because he is attempting to treat the patient and any course which he chooses could be termed experimental.

Once past the initial public reaction in the experimental stages, transplant teams will find that demand for organs far exceeds the present supply. Of the available sources, animals have proved practically useless; live human beings are limited to the donation of one kidney; artificial organs and parts are not yet sufficiently developed;⁸ the fourth source, the dead human body or "cadaver donor", seems the most plentiful and practical choice at the present time.

The cadaver donor offers several obvious advantages. The hazards and discomforts which accompany the donation of kid-

4. Freund, *Is The Law Ready For Human Experimentation?* TRIAL, Oct.-Nov., 1966 at 46. "As the law has raised up a right of privacy, a creative innovating doctrine, so it could come to recognize a right of experimentation on human beings. Social interests and expectations, if they are in fact justified, can expect eventually to be reflected in the law."

5. *Id.* at 47.

6. For a discussion of possible safeguards and standards which would promote medical and scientific research, yet protect the individual's dignity and safety see Note, *Experimentation on Human Beings*, 20 STAN. L. REV. 99 (1967); Freund, *Is The Law Ready For Human Experimentation?* *supra* note 4; 186 J.A.M.A. 1065 (1963).

7. When there is a passage from therapeutic treatment of the patient to the use of a patient as a means to an end, the rule of thumb should require full disclosure of the risks to the patient. *Hyman v. Jewish Chronic Disease Hosp.*, 21 App. Div. 2d 495, 251 N.Y.S.2d 818 (1964). The patients were told that an injection of cell suspension was planned as a skin test for immunity of response. The patients were incompetent to consent because they were not made aware that the cells were cancer cells. While no harm came to these patients, considerable ill feeling for experimentation was aroused by this case.

8. An estimated 250,000 people have body parts made of silicone, a substance mainly created from quartz. These devices include heart valves, "Pacemakers", substitute ears, noses, jawbones, etc. Artificial organs would have three major advantages over natural tissue; supply would be able to meet demand, storage would be facilitated, and there would be no immune response. U. S. NEWS & WORLD REPORT, Dec. 18, 1967, at 62.

neys from healthy living donors are avoided,⁹ and cadavers may be utilized to obtain organs which, if extracted, would doom the living donors to certain death. With the development of tissue banks, the value of cadaver donors could be greatly enhanced.¹⁰

There is one basic medical problem with cadaver donors—the time factor. Certain organs must be removed from the body within minutes following death to avoid irreparable damage from loss of oxygen.¹¹ In this type of “emergency” transplantation there is a great need for legal clarification of the complex problem which will confront the surgeon. Even with tissues which may be removed more at leisure (*e.g.*, skin, cornea, and arteries) only six to twelve hours may elapse before damage occurs. In this context the physician will be called upon to make a legal decision; no time for a declaratory judgment is allowed. A uniform statutory authority providing for the disposition of such organs would facilitate his judgment considerably.

Another question which arises with cadaver donors is, “Precisely when does death occur?” Death may no longer be defined in terms of cessation of heartbeat and of respiration though they are universally characteristic of death. Artificial means of forcing ventilation and stimulating heartbeat are employed at large medical centers. By employing these mechanical aids “life” may be sustained for an indefinite period. Among the more important factors considered currently in determining when death occurs is the state of unconsciousness. When all chances of recovery of consciousness have been eliminated, brain death has occurred. With all hope of recovery gone the physician should not be required to support the patient by artificial means indefinitely. Ultimately, the legal definition of death will be dictated by well established medical principles. The modern concept of death must be in keeping with the modern concept of life.¹²

9. Physicians currently engaged in transplantation are reluctant to accept a living donor, because, due to the uncertainty of the length of survival of the recipient, the risks involved seem too great. 192 J.A.M.A. 302 (1965).

10. Presently there are no banks for organs such as hearts or kidneys, which cannot be frozen or kept alive for long. Certain body materials such as skin, bone, brain membrane and corneas for eyes are frozen, vacuum dried, and then stored in bottles which may be kept at room temperature for years. U. S. NEWS & WORLD REPORT, Dec. 18, 1967, at 63.

11. The study of this problem in the introductory material in THE UNIFORM ACT, *supra* note 2, lists the heart, liver and kidney as “critical” tissue which must be removed within thirty to forty-five minutes after death.

12. Wasmuth and Stewart, *Medical and Legal Aspects of Human Organ Transplantation*, 14 CLEV.-MAR. L. REV. 442, 464-68 (1965) (definition of death).

III. THE LEGAL ASPECTS

The legal requirements for inter-vivos gifts of human organs are well settled and the problems are few. Generally, the acceptable donor must be fully informed of the risks and consequences of the procedure;¹³ he must effect the gift by a signed written instrument,¹⁴ and he must be an adult capable of giving his voluntary consent.¹⁵

Problems associated with cadaver donors are more complex; to appreciate them it is necessary to trace the law of dead bodies from its ecclesiastical origin through its common law developments to its present status.

Due to a natural fear of the unknown phenomenon of death a rather strict code of sepulture has been followed since the earliest of cultures. Because of the intangibility and the mysticism which surrounded death, its jurisdiction fell within the purview of the spiritual authorities. In 750 A.D., Cuthbert, Archbishop of Canterbury, introduced the practice of churchyard inhumation to England, thus, jurisdiction over the dead body was at this time in ecclesiastical hands.¹⁶ At a later date, the ecclesiastical courts exercised control even of the manner of burial.¹⁷

In early English law no recovery was allowed for disturbing the remains of a deceased person, but the personal representative

13. Freund, *Is The Law Ready For Human Experimentation?* TRIAL, Oct.-Nov., 1966, at 46.

14. For a suggested live donor form, see Wasmuth and Stewart, *Medical and Legal Aspects of Human Organ Transplantation* 14 CLEV.-MAR. L. REV. 442, 470 (1965).

15. A special problem arises when the donor is a minor. Even the combined consent of the minor and the guardian might be insufficient. In 1957 the Supreme Judicial Court of Massachusetts rendered three advisory opinions (not officially published) which allowed kidney transplants between minor twins who consented and were mature enough to understand the consequences of the act. In addition to their consent, the court required that some benefit to the donor be shown. They found this benefit in the emotional trauma avoided in each case which would have resulted had the donor not been allowed to help his twin. Note, *Experimentation On Human Beings*, 20 STAN. L. REV. 99, 107 & n.46 (1967). Query: How will this affect unrelated donors? See also Curran, *A Problem of Consent: Kidney Transplantation in Minors*, 34 N.Y.U.L. REV. 891 (1959).

16. Note, *The Law of Testamentary Disposition—A Legal Barrier To Medical Advance!* 30 TEMP. L.Q. 40 (1956).

17. 22 AM. JUR. 2d *Dead Bodies* § 14 n.13 (1965). No manner of burial was permitted which would retard natural decay because "the dead [have] no legal right to crowd the living . . ."

could recover for damages done to the grave marker or the burial clothes.¹⁸

The dominion of ecclesiastical control over the dead began to be questioned when the corpse became a thing of value. With the increased need for dead human bodies as medical schools increased in number and in size, "the human corpse rose to unprecedented dignity. It became a commercium—a thing of value—to be bargained for and sold to the highest bidder . . . [I]t became worthwhile for men to devote themselves to the occupation of resurrectionism."¹⁹ The penalty for this offense was slight since recovery was limited to stolen graveclothing; the practice, however, was repugnant to the public conscience. Finally, in *Rex v. Lynn*,²⁰ the Court of Criminal Jurisdiction convicted one Lynn of grave robbing because "common decency required that the practice should be put a stop to."²¹ Later, English courts found that since a dead body could be the property of no one it was under the protection of the public.²² The recognition of jurisdiction in these instances indicated that there was some "interest" in a corpse which the law would recognize. The American courts, while accepting the later English view that there was a right or interest to be protected,²³ were not sure exactly what they were protecting. The authorities are almost

18. 3 COKE, INSTITUTES 203. "The burial of the cadaver (that is *caro data vermibus*) is *nullius in bonis*, and belongs to ecclesiastical cognizance; but as to the monument, action is given (as hath been said) at the common law, for the defacing thereof." For a subsequent elaboration of this concept see 2 W. BLACKSTONE, COMMENTARIES *428-29.

But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring a civil action against such as indecently at least if not impiously, violate and disturb their remains when dead and buried. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it; and if any one, in taking up a dead body, steals the shroud or other apparel, it will be a felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral.

It has been suggested that the "no property in dead bodies" concept which was derived from Coke was a misinterpretation; that he was stating rather that there were no property rights which the courts would protect. Comment, *Property Interest in a Dead Body*, 2 ARK. L. REV. 124 (1948).

19. Note, *The Law of Testamentary Disposition—A Legal Barrier to Medical Advance!* 30 TEMP. L.Q. 40, 41 (1956).

20. 2 T.R. 733, 100 Eng. Rep. 394 (1788).

21. *Id.* at 734, 100 Eng. Rep. at 395.

22. Wasmuth and Stewart, *Medical and Legal Aspects of Human Organ Transplantation*, 14 CLEV.-MAR. L. REV. 442, 451 (1965).

23. *In re Widening of Beekman St.*, 4 Brad. 503 (N.Y. 1857). The court recognized that the corpse and its burial were subject to legal rather than ecclesiastical control.

uniform in holding that there is no property right, in a strict commercial sense, in a dead body.²⁴ Perhaps the most widely used terminology for the interest is *quasi-property right*,²⁵ connoting a limited right to custody of the corpse for burial and a duty to see that the burial is properly executed.²⁶

The burial right includes the right to see that the body and the burial place are protected and free from interference.²⁷ This right, in the absence of testamentary disposition, at one time belonged exclusively to the next of kin.²⁸ Modern authority is to the effect that this right rests primarily in the surviving spouse (if any) and secondarily in the next of kin.²⁹ The burial duty which accompanies the burial right has been characterized as a "sacred trust" upon the surviving spouse or next of kin responsible for burial.³⁰ The person upon whom this right and duty falls is considered the proper party to bring suit for damages for interference with or mutilation of the deceased's body.³¹ It is settled that the administrator, acting in his capacity as such, cannot maintain this action. The breach of any duty or the unlawful violation of any right which exists as to a dead body is a tort for which an action in damages will lie.³² Mental suffering is an element of damages when it is the direct, proximate

24. 25A C.J.S. *Dead Bodies* § 2 (1966).

25. The concept of the quasi-property right seems to have its origin in *Pierce v. Swan Point Cemetery*, 10 R.I. 227, 14 Am. Rep. 667 (1872). Recent cases indicate that the *Pierce* concept still prevails. See, e.g., *Gray v. Southern Pac. Co.*, 21 Cal. App. 2d 240, 68 P.2d 1011 (1937); *Parker v. Quinn-McGowen Co.*, 262 N.C. 560, 138 S.E.2d 214 (1964); *Barela v. Frank A. Hubbell Co.*, 67 N.M. 319, 355 P.2d 133 (1960).

26. *Osteen v. Southern Ry.*, 101 S.C. 532, 543, 86 S.E. 30, 32 (1915).

It is the right and duty of the living to bury their dead, and they have such interest in the remains as to enable them to carry the remains to the graveyard, and give the remains . . . [a] decent interment without interference from any one.

27. *Id.* at 541, 86 S.E. at 31.

28. *In re Widening of Beekman St.*, 4 Brad. 503 (N.Y. 1857).

29. E.g., *Larson v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891); *Simpkins v. Lumbermens Mut. Cas. Co.*, 200 S.C. 228, 20 S.E.2d 733 (1942); See generally *Wasmuth and Stewart, Medical and Legal Aspects of Human Organ Transplantation*, 14 CLEV.-MAR. L. REV. 442, 457 & n.48 (1965).

30. *Southern Life & Health Ins. Co. v. Morgan*, 21 Ala. App. 5, 105 So. 161 (1925); *Boyle v. Chandler*, 33 Del. 323, 138 Atl. 273 (1927); *Larson v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891); *Pierce v. Swan Point Cemetery*, 10 R.I. 227, 14 Am. Rep. 667 (1872); 22 AM. JUR. 2d *Dead Bodies* § 6 (1965).

31. *Simpkins v. Lumbermens Mut. Cas. Co.*, 200 S.C. 228, 20 S.E.2d 733 (1942).

32. *Griffith v. Charlotte, C. & A.R.R.*, 23 S.C. 25, 55 Am. Rep. 1, (1885).

and natural result of the wrongful act; recovery is not contingent on proof of monetary loss.³³

The right to have the body of a deceased relative remain unmolested is not an absolute one. When justice requires, the private interest must yield to the public good.³⁴ The public interest often requires an autopsy, a post-mortem examination to determine the cause of death. An autopsy may be performed only with permission of the person having the right to burial, or by order of the coroner³⁵ or the court³⁶ in its discretion. Even with the required consent, an autopsy which exceeds the permission granted constitutes a trespass.³⁷ The permission to perform an autopsy does not include permission to remove and retain portions of the body longer than necessary for microscopic inspection and testing.³⁸ In the case of an unauthorized autopsy, any cutting of the corpse, no matter how slight, will interfere with the right to proper burial. The recovery of damages for an unauthorized autopsy is seldom based on pecuniary or physical injury, but rather on the mental suffering that act caused the next of kin. Although several persons might conceivably suffer mental anguish, the right to recover is in the surviving spouse or next of kin in charge of the burial.³⁹

Concisely stated, the law today recognizes and protects the right to possession of a dead body in a condition unutilized subsequent to death for the purposes of burial and preservation.

33. *Palmquist v. Standard Accident Ins. Co.*, 3 F. Supp. 358 (S.D. Cal. 1933); *Larson v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891); *Gould v. State*, 181 Misc. 884, 46 N.Y.S.2d 313 (1944); *Darcy v. Presbyterian Hosp.*, 202 N.Y. 259, 95 N.E. 695 (1911), *rehearing denied*, 203 N.Y. 566, 96 N.E. 1113 (1911); *Kyles v. Southern Ry.*, 147 N.C. 394, 61 S.E. 278 (1908); *Lyles v. Western Union Tel. Co.*, 77 S.C. 174, 57 S.E. 725 (1907) (recovery allowed for mental suffering due to negligent non-delivery of telegraph bearing message of death); *Koerber v. Patek*, 123 Wis. 453, 102 N.W. 40 (1905).

34. *Kusky v. Laderbush*, 96 N.H. 286, 74 A.2d 546 (1950); *Silvia v. Helger*, 75 R.I. 397, 67 A.2d 27 (1949).

35. The right to perform autopsies is regulated and circumscribed by statutory provisions in many jurisdictions. *See, e.g.*, *Division of Labor Enforcement v. Gifford*, 137 Cal. App. 2d 259, 290 P.2d 281 (1955); *In re Kyle's Autopsy*, 309 P.2d 1070 (Okla. 1957); *Parker v. Quinn-McGowen Co.*, 262 N.C. 560, 138 S.E.2d 214 (1964); J. RICHARDSON, *DOCTORS, LAWYERS AND THE COURTS*, at 185-86 (1965).

36. *Drake v. Bowles*, 97 N.H. 471, 92 A.2d 161 (1952); *Kusky v. Laderbush*, 96 N.H. 286, 74 A.2d 546 (1950); *Annot.*, 21 A.L.R.2d 536 (1950).

37. *Terrill v. Harbin*, 376 S.W.2d 945 (Tex. 1964) citing 87 C.J.S. *Trespass* § 1 (1954). "In a general sense any invasion of another's rights is a trespass."

38. *Palmquist v. Standard Accident Ins. Co.*, 3 F. Supp. 358 (S.D. Cal. 1933).

39. *E.g.*, *Gould v. State*, 181 Misc. 884, 46 N.Y.S.2d 313 (1944) (surviving spouse); 22 AM. JUR. 2d § 43 (1965).

IV. PRESENT STATUS OF THE LAW

It is evident from the time factor involved in obtaining organs from cadaver donors, that unless the law provides a suitable framework in which doctors can function, the progress of medicine in homotransplantation will be impeded. In order to broaden the field of possible donors, it is necessary that not only the surviving relatives be allowed to consent to such use, but that the deceased himself, by proper manifestation, be allowed to control the disposition of his remains after death.

The same "no property doctrine" that blocked recovery for mutilation of a corpse proved to be an early barrier to its testamentary disposition. In *O'Donnell v. Slack*⁴⁰ the court recognized "that the individual has a sufficient proprietary interest in his own body after his death to be able to make valid and binding testamentary disposition of it."⁴¹ One year later, in 1900, the California court ignored its prior stand. In *Enos v. Snyder*⁴² the attempted testamentary disposition of a corpse was invalidated, the court saying in part:

[I]t is quite well established, however, by those authorities, that, in the absence of statutory provisions, there is no property in a dead body; that it is not part of the estate of the deceased person; and that a man cannot by will dispose of that which after his death will be his corpse.⁴³

With the "judicial notice" of a property or quasi-property interest in dead bodies, the reasons for disallowing testamentary dispositions of one's own body began to disappear. The major problem then became whether the courts would allow the directions of the decedent to prevail over the wishes of the bereaved.⁴⁴ In the earlier cases the wishes of the survivors were generally given effect. Since the issue has become more concerned with the

40. 123 Cal. 285, 55 P. 906 (1899).

41. *Id.* at 288, 55 P. at 907 (dictum).

42. 131 Cal. 68, 63 P. 170 (1900).

43. *Id.* at 69, 63 P. at 171.

44. *Pettigrew v. Pettigrew*, 207 Pa. 313, 56 A. 878 (1904). The question was presented whether the rights of the living were to prevail over the wishes of the decedent. The decision was favorable to the rights of the living, but the court said that each case must be considered on its own merits. While leaving open the exact weight that the surviving spouse's wishes might be given, the court said that the desires of the decedent, especially if strongly and recently expressed, should prevail over more remote relatives who might have the right to bury the decedent.

public interest to be served than the private family disturbances, the trend seems to be to give effect to the testator's desires.⁴⁵ In response to this concern for the public good, many states have passed statutes which attempt to bolster the effectiveness of ante-mortem gifts.⁴⁶

Though the states have begun to reflect the public conscience through legislation, the lack of uniformity of content and coverage do little but add to the confusion created by the common law. This is not to say that some of the statutes are not well drafted and effective;⁴⁷ on the whole, however, they serve as but a starting point to finding a workable solution to the problems as they exist.

One of the most obvious problems with the status quo of the state statutes dealing with human tissue donation is the possibility of conflicts of laws. It is readily imaginable that the testator might prepare an instrument of donation valid under the law of the state of his domicile only to have his intentions frustrated when he dies in some other state.⁴⁸

Practical problems with the present statutes stem from their varied provisions and requirements. Most of the states which do have statutes allow for the donation of all or any part of the body, but some are limited to eyes only⁴⁹ or a gift of the com-

45. Compare *In re Estate of Henderson*, 13 Cal. App. 2d 449, 57 P.2d 212 (1936) (testator's wish given effect); with *Enos v. Snyder*, 131 Cal. 68, 63 P. 170 (1900).

46. At present at least 40 states have such statutes on their books. See Appendix I for citations to these statutes.

47. See Appendix I. It is evident that the statutes of several states are fairly complete in their coverage of elements indicated. It should also be noted that, it might be more desirable to have left out some of the requirements; e.g., no remuneration (questionable public policy), delivery or recordation of instrument (more complex administration).

48. Conflicts problems might evolve from the following circumstances suggested by the introduction to The Uniform Act:

(a) X, a legal resident of state A, where statutes expressly authorize human tissue donation, prepares an instrument which effects a valid gift under that law. Thereafter, X dies in state B, where the common law prevails. (Assume that under common law, the donation is not binding on relatives.) If the body were considered personal property, the gift should remain effective, since the law of the domicile will control, but it is not. From a practical standpoint, since X is from state A, his next of kin probably reside there also; hence state B would probably not interfere. Even so, the uncertainty of the common law is good cause for apprehension in these situations.

(b) X, a resident of state B, (common law) dies in state A (statute approved donation) after executing a donative instrument in state A. The survivor's wish to take advantage of the common law of state B and they will likely prevail. This affords no protection to the surgeon who acted in good faith on the instrument.

49. Appendix I.

plete anatomy.⁵⁰ The prerequisite capacity to make an effective donation varies significantly; while the majority requires capacity to make a will, the age qualification varies from eighteen to twenty-one or no age limit at all. Though probably the result of hurried drafting, several statutes fail to provide a means of revocation.⁵¹ Less than half expressly state that the gift is to become effective upon death, and some protect the surgeon only if he acts pursuant to a *validly* executed instrument.⁵² Another shortcoming of the state statutes is the failure to provide uniform definitions of acceptable donors and the rights which the donors may exert.

In this maze of diverse legislation, both the physician and the prospective donor find themselves in need of legal aid.

V. THE UNIFORM ANATOMICAL GIFT ACT⁵³

Because inadequacies do exist in the present state laws on the subject, the drafters of the Uniform Act have compiled a proposed codification which will be effective if adopted by the states.

To achieve minimum variance in interpretation, the Uniform Act begins with a series of definitions of words pertinent to the understanding of key sections. As defined, the word "state" indicates the inclusive coverage of the act.⁵⁴

Accepting the majority view that any individual who is competent to make a will is also competent to make a gift of all or part of his body to be effective after death, the Uniform Act invites the conflicts problems which it seeks to avoid. The difficulty here lies in the varying age qualifications which apply to make one competent to make a will in the states. A better distinction would be achieved if the act read "Any individual who is eighteen (or twenty-one) years of age and otherwise competent to execute a will. . . ."

50. Appendix I.

51. Appendix I.

52. Appendix I. The obvious disadvantage of making liability contingent on the validity of the instrument is the necessity of an almost instantaneous decision by the surgeons. Usually from the facts available, an absolute determination would be impossible within the critical time limit. Several states do recognize the situation and protect the surgeon who acts in good faith, pursuant to a written instrument.

53. Appendix II, THE UNIFORM ACT.

54. Appendix II, THE UNIFORM ACT § 1 (f).

Section 2(b) of the proposed act is drafted to eliminate certain problems of consent by defining the priority right of survivors when the deceased has made no disposition of his remains.⁵⁵ In such a disposition the donee will be held to have accepted the gift in good faith only if he was unaware of any controversy among the classes of relatives.

Section 3 specifies acceptable donees without being unduly limiting. By restricting the purposes to what the bulk of the population finds conscionable and by providing adequately for facilities to effect these purposes, maximum public acceptance and protection are achieved.

The effectiveness of a gift made by will immediately upon death is set out in section 4(a): This provision is an absolute necessity to an acceptable statute. The mechanics of preparing an instrument other than a will signed by the testator and two witnesses (all in the presence of each other, with certain exceptions) are set out in section 4(b). A gift so evidenced will also become immediately effective upon death. When the donee is named and unavailable or is not named, the attending physician, to the extent that he acts in good faith reliance on a writing, may accept the gift as agent of the donee and use it in his discretion.

One important innovation of section 4(c) is the specific approval of a properly executed card or writing carried on the donor's person. It has been suggested that the card take a form similar to an army identification card or driver's license, completed with picture of the donor and verified blood type.⁵⁶

55. Appendix II, THE UNIFORM ACT § 2(b). Though well drafted, the act faces almost certain problems in the area of determining whether the person with highest priority is "immediately available" so as to pass responsibility to the person with the next highest priority. For example, X dies in Z hospital with his adult son at his bedside; Mrs. X is in a taxi en route to the hospital. Will the consent of the son suffice? Logical construction would give effect to the statute—the purpose is to obtain organs before they deteriorate. Again the legal concept must be guided by medical necessity. A physician acting in good faith on the best available consent at the time most proximate to death should be protected.

Presumably, the "next of kin" are included in the sixth classification. It is doubtful that the guardian of the decedent, in the fifth class, who may be merely a hired agent, should enjoy such a priority.

56. Interview with James S. Harvin, M.D., Associate Professor of Surgery, Medical College of S. C., Charleston, S. C., March 22, 1968. The suggested requirements of photograph and blood type are well founded; a positive identification of the donor will save lives and avoid malpractice suits. It was

Throughout section 4 the requirements of the writing, the protections afforded the physician, and possible utilization of the gift are more fully spelled out than in any of the existing state statutes. The Uniform Act also avoids the cumbersome requirements of delivery or recordation of the instrument.⁵⁷ Complete provision is made for revocation, explaining in detail the proper procedure for the several types of situation which might confront the donor.⁵⁸

The rights of the donee are defined in the Uniform Act, including the provision giving him the right to accept or reject the gift which is almost universally overlooked in state statutes. To avoid a possible conflict of interest and to protect the physician and the integrity of his operation, the Uniform Act uniquely requires that the physician who certifies the donor's death be unconnected with the transplant team. At first glance this might seem a slap in the face to the medical profession, but in the end it may be its greatest protection and a reassurance to the wary public.

VI. CONCLUSION

The transplantation of human organs is a growing field of surgery.⁵⁹ A bill recently introduced in the United States

also suggested that including fingerprints on the identification card would be helpful. Dr. Harvin poses the following problem:

Suppose a man carrying a wallet containing identification cards, one of which identifies the man as X, is brought into the hospital with severe brain damage. The card gives X's blood type and his consent to the use of his body for medical science in case of his death. The card does not bear a picture of X. Because of the severe brain damage, X has zero percent chance of recovery: he is the ideal donor. At the same time, Y is in the hospital awaiting a replacement for one of his malfunctioning kidneys. The blood types apparently match, so within minutes both are prepared for surgery; X dies and the transplantation is completed.

It is discovered days later, after Y dies from the unsuccessful transplant due to rejection reaction, that the donor was not X at all, but Z, a thief (having another blood type) who had stolen X's wallet.

Without pondering the surgeon's liability, it is obvious that better identification, through the use of a photograph or fingerprints, would likely have avoided the situation entirely.

57. Appendix II, THE UNIFORM ACT § 5.

58. Appendix II, THE UNIFORM ACT § 6.

59. U. S. NEWS & WORLD REPORT, Dec. 18, 1967, at 62. Since 1954, twelve hundred kidney transplants have been recorded at sixty-three institutions in nineteen countries; twenty liver transplants have been recorded; on lung transplant and, to date, at least four heart transplants.

Senate indicates the importance of the issue.⁶⁰ Though progress is being made in the development of artificial organs, the human cadaver will remain the primary source of replacement tissue throughout the foreseeable future.⁶¹ Realizing the problems which arise in dealing with dead human bodies, the states can avoid much needless litigation in the area of anatomical donations by adopting more adequate and uniform laws. The proposed Uniform Anatomical Gift Act has marked advantages over present legislation in any state. When the Uniform Act is finally approved by the National Conference of Commissioners on Uniform State Laws it will be highly desirable for the states to act immediately on its adoption.

For the law to serve a modern society, it must be adjusted and amended to keep pace with new concepts; otherwise, it will become a stumbling block in the path of progress. Oddly enough, to provide adequate protection for the most advanced practices of medicine, one of the oldest phenomenon of mankind must be considered: "[T]he law—that rule of action which touches all human things—must touch also this thing of death."⁶²

J. HAMILTON STEWART, III

60. S. 2882, 90th Cong., 2d Sess. (1968). On Jan. 19, 1968, a bill was introduced by Senator Jackson of Washington to provide funds to study the medical, technological, social and legal problems and opportunities which confront the nation as a result of the medical progress in organ transplantation as an alternative treatment of disease.

61. Interview with James S. Harvin, M.D. *supra*, note 56. "With the recent progress in miniaturization in associated sciences, such as the space program, it is possible that artificial organs will eventually be functional. The first artificial organ will, in all probability, be the heart, since it is in essence, only a pump; next, there may be a workable replacement for the lung which will oxygenate the blood. Due to the chemical processes of the liver and the filtration system of the kidney, (present artificial kidneys are larger than a conventional bath tub) it is unlikely that any substitute for these organs will be made in the near future."

62. *Louisville & N. R.R. v. Wilson*, 123 Ga. 62, 51 S.E. 24, 25 (1905).

APPENDIX 1

	Written Instrument	Witnesses Required	Capacity Defined	Binding on Relatives	Class of Donces Restricted	Provides For Revocation	Provides Protection to Physician Acting in Good Faith	Donee's Rights Defined	Effective on Death	No Remuneration Allowed	No Special Form Required	Delivery or Recordation Required
ALA. Code tit. 22 § 184.1	-	-	-	-	-	-	-	-	-	-	-	-
ALASKA STAT.	-	-	-	-	-	-	-	-	-	-	-	-
ARIZ. REV. STAT. ANN.	-	-	-	-	-	-	-	-	-	-	-	-
ARK. STAT. ANN. § 82-408	-	-	-	-	-	-	-	-	-	-	-	-
CAL. PROB. CODE § 20	-	-	-	-	-	-	-	-	-	-	-	-
COLO. REV. STAT. ANN. § 91-3-9	-	-	-	-	-	-	-	-	-	-	-	-
CONN. GEN. STAT. ANN. § 19-39(c)	-	-	-	-	-	-	-	-	-	-	-	-
DEL. CODE ANN. tit. 19-139(c)	-	-	-	-	-	-	-	-	-	-	-	-
D.C. CODE ANN. § 2-255	-	-	-	-	-	-	-	-	-	-	-	-
FLA. STAT. ANN. § 736.18	-	-	-	-	-	-	-	-	-	-	-	-
G.A. CODE ANN. § 88-2003	-	-	-	-	-	-	-	-	-	-	-	-
HAWAII REV. LAWS § 50F-1	-	-	-	-	-	-	-	-	-	-	-	-
IDAHO CODE ANN.	-	-	-	-	-	-	-	-	-	-	-	-
ILL. REV. STAT. ch. 3, § 42(a)	-	-	-	-	-	-	-	-	-	-	-	-
IND. ANN. STAT. § 6-510	-	-	-	-	-	-	-	-	-	-	-	-
IOWA CODE tit. 7 § 142.12	-	-	-	-	-	-	-	-	-	-	-	-
KAN. GEN. STAT. ANN.	-	-	-	-	-	-	-	-	-	-	-	-
KY. REV. STAT. ANN.	-	-	-	-	-	-	-	-	-	-	-	-
LA. REV. STAT. § 17:2351	-	-	-	-	-	-	-	-	-	-	-	-
ME. tit. 22 § 2889 (eyes only)	-	-	-	-	-	-	-	-	-	-	-	-
MD. ANN. CODE art. 43 § 149	-	-	-	-	-	-	-	-	-	-	-	-
MASS. GEN. LAWS ch. 113 § 7-10	-	-	-	-	-	-	-	-	-	-	-	-
MICH. COMP. LAWS § 14.532(1)	-	-	-	-	-	-	-	-	-	-	-	-

[illegible]

o Dependent Upon the Validity of the Instrument.

APPENDIX II

Second Tentative Draft As Revised January 2, 1968

UNIFORM ANATOMICAL GIFT ACT

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

SECTION 1. *[Definitions.]*

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

(b) "Body or part of body" includes organs, tissues, bones, blood and other body fluids in the body of the donor, and "part" includes "parts".

(c) "Licensed hospital" includes any hospital licensed or approved by appropriate authorities under the laws of any state, and it also includes any hospital operated by the United States government although not required to be licensed under state laws.

(d) "Licensed physician or surgeon" means a physician or surgeon licensed to practice under the laws of any state. "Licensed Technician" means a medical assistant licensed as such under the laws of any state.

(e) "Licensed bank or storage facility" means a facility licensed or approved by appropriate authorities under the laws of any state.

(f) "State" means any state, territory or possession of the United States, the District of Columbia or the Commonwealth of Puerto Rico.

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

(a) Any individual who is competent to execute a will may give all or any part of his body for any one or more of the purposes specified in this Act, the gift to take effect after death.

(b) Unless he has knowledge that contrary directions have been given by the decedent, the following persons, in the order of priority stated, may give all or any part of a decedents body for any one or more of the purposes specified in this Act:

- (1) the spouse if one survives. If not,
- (2) an adult child,
- (3) either parent,
- (4) an adult brother or sister,
- (5) the guardian of the person of the decedent at the time of his death,
- (6) any other person or agency authorized or under obligation to dispose of the body.

If there is no surviving spouse and an adult child is not immediately available at the time of death, the gift may be made by either parent; if a parent is not immediately available, it may be made by any adult brother or sister; but if the donee or his agent knows that there is controversy among the classes of relatives named with respect to making the gift, it shall not be accepted. The persons authorized by this subsection to make the gift may execute the document of gift either after death or immediately before death during a terminal illness. The decedent may be a minor or a still-born infant.

SECTION 3. *[Persons Who May Become Donees, and Purposes for Which Anatomical Gift May Be Made.]*

The following persons are eligible to receive gifts of human bodies or parts thereof for the purposes stated:

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

(2) any medical school, college or university engaged in medical education or research for educational, research or medical science purposes;

(3) any person operating a licensed bank or storage facility for blood, arteries, eyes, or other human parts, for use in medical education, research, therapy or transplantation to individuals;

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

SECTION 4. [*Manner of Executing Anatomical Gifts.*]

(a) A gift of all or part of the body for purposes of this Act may be made by will, in which case the gift becomes effective immediately upon 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 aced upon in good faith, is nevertheless valid and effective.

(b) A gift of all or part of the body for purposes of this Act may also be made by document other than a will. The document must be signed by the donor, in the presence of two witnesses who shall in turn sign the document in his presence. If the donor cannot sign in person, the document may be signed for him at his direction and in his presence, and in the presence of two witnesses who shall in turn 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. The document may consist of a properly executed card carried on the donor's person or in his immediate effects. The gift becomes effective immediately upon the death of the donor.

(c) The gift may be made either to a named donee or without the naming of a donee. If the latter, the gift may be accepted by and utilized under the direction of the attending physician at or following death. If the gift is made to a named donee who is not reasonably available at the time and place of death, and if the gift is evidenced by a properly executed card or other writing carried on the donor's person or in his immediate effects, the attending physician at or following death may, in reliance upon the card or writing, accept and utilize the gift in his discretion as the agent of the donee. The agent possesses and may exercise all of the rights and is entitled to all of the immunities of the donee under this Act.

(d) The donor may designate in his will or other document of gift the surgeon, physician, or technician to carry out the appropriate procedures. In the absence of a designation, the donee or other person authorized to accept the gift may employ or authorize any licensed surgeon, physician, or technician for the purpose.

(e) If the gift is made by a person designated in section 2(b) of this Act, it shall be executed by a document signed by the person authorized by that section and witnesses are not required.

SECTION 5. [*Delivery to Donee.*] If the gift is made to a named donee, the will or other document, or an attested true copy thereof, may be delivered to him to expedite the appropriate procedures immediately after death, but such delivery is not necessary to validity of the gift. Upon request of any interested party on or after the donor's death, the person in possession must produce, for examination the will or other document of gift.

SECTION 6. [*Revocation of the Gift.*]

(a) If the document of gift has been delivered to a named donee, it may be revoked either

- (1) by the execution and delivery to the donee or his agent of a revocation in writing signed by the donor, or
- (2) by an oral statement of revocation witnessed by two persons, addressed and communicated to the donee or his agent, or
- (3) by a statement during a terminal illness addressed to the attending physician, and communicated to the donee, or his agent, or
- (4) by a card or writing, signed by the donee and carried on his person or in his immediate effects, revoking the gift.

(b) If the written document of gift has not been delivered to the donee, the gift may be revoked by destruction, cancellation or mutilation of the document.

(c) If the gift is made by a will, it may be revoked in the manner provided for revocation or amendment of wills.

SECTION 7. [Effect of Gift on Rights of Donee.]

(a) The donee may accept or reject the gift. If the donee accepts, and if the gift is of the entire body, the donee or his agent may, if he deems it desirable, authorize embalming and funeral services. The donee or his agent may, immediately after death of the donor and prior to embalming, cause any part included in the gift to be removed from the body, without undue mutilation. The time of death shall be determined by the physician in attendance upon the donor's terminal illness or certifying his death, and he shall not be a member of the team of surgeons which transplants the part to another individual.

(b) The donee, agent of a donee, or other person authorized to accept and utilize the gift who acts in good faith, in reliance upon, and in accord with the terms of a gift under this Act, or any similar Act, or upon a document carried by the donor as herein provided, and who is without actual notice of revocation of the gift, shall not be held liable for damages in any civil suit brought against him for his act.

(c) 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.

SECTION 10. [Repeal.] The following acts and parts of acts are repealed:

- (1)
- (2)
- (3)

SECTION 11. [Time of Taking Effect] This Act shall take effect
