



Organ Donation

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Background

There is a great need for human organs for transplantation. In fact, the need far exceeds the supply of transplantable organs. This disparity has promulgated legislation and important [CASE LAW](#). These laws attempt to regulate the scarce resource (transplantable human organs) and to help establish an equitable national system to allocate the organs where they can do the most good.

There are Extensive federal and state laws regulating organ and tissue donation and transplantation. These many laws and regulations were promulgated to address a variety of issues, including the complicated medical, legal, and moral issues involved in organ donation and transplantation. One of the main issues deals with the enormous demand for human organs in a context where there is an inadequate supply of usable organs. These laws are generally viewed by lawmakers, members of the medical professions, and by the populace as a way to ensure the most equitable distribution of organs. However, the many laws and regulations in this area can complicate the process of obtaining organs. Consequently, people who have questions about organ donation or transplantation, should seek advice of an attorney knowledgeable about this area of law.

There are several reasons for the shortage of organs. Perhaps the most common reason is that people are hesitant to donate organs. There are other reasons as well: for example, physicians may neglect to inquire of family members whether they would consent to donating organs when their loved one dies. In other cases, the deceased's wishes to donate his or her organs may not be known by those in the position to act on those wishes. Finally, family members may object to the harvesting of organs from their deceased loved one, regardless of the deceased's intent or wishes to the contrary.

Legislation

Many federal and state statutes closely regulate organ donation. To understand the laws governing organ donation, one needs to understand the trajectory of some of the most important legislation. While there are many laws pertaining to organ donations, perhaps the most important legislation consists of the following:

- Various early federal legislation
- The Uniform Anatomical Gift Act of 1987
- The National Organ Transplant Act
- The Patient Self Determination Act of 1991

- State Anatomical Gift Acts

Earlier Federal Legislation

Prior to 1968 there were no federal laws dealing with organ and tissue donation. Before the Uniform Anatomical Gift Act of 1968 (AGA), organ and tissue donations were handled at the state level only. Unfortunately, the state laws then on the books differed considerably from state to state. The AGA was intended to address these problems by providing a framework of uniform laws in the United States relating to organ and tissue transplantation. It also attempted to increase the number of available organs by making it easier for individuals to make anatomical gifts.

In 1972, The Uniform Anatomical Gift Act mandated that the Uniform Organ **DONOR** Card be recognized as a legal document in all 50 states. This empowered anyone eighteen years or older to legally donate his or her organs upon death.

In 1984, the National Organ Transplant Act (NOTA) created a national computer registry of donated organs. It was to be operated by the United Network for Organ Sharing (UNOS). NOTA also authorized financial support for organ procurement organizations and outlawed the purchase or sale of human organs.

Uniform Anatomical Gift Act of 1987

This Act overhauled the 1968 Uniform Anatomical Gift Act (UAGA). Even though the 1968 UAGA successfully constructed a consistent pattern for states to follow in revising their own anatomical gift legislation, it failed to increase the number of donated transplantable organs. The 1968 UAGA did not address the issue of commercial sale of organs. Between 1968 and 1987, there were significant advances in transplant science and the practice of organ transplantation. The 1968 UAGA could not have provided for some of these advances. Consequently, the 1968 UAGA did not address many important issues that developed over time.

In an attempt to respond, a new version of the Uniform Anatomical Gift Act was drafted in 1987. The 1987 UAGA attempted to address many of the holes in the 1968 Act. It covered the following:

1. Explicitly prohibited the sale of human organs. Federal law expressly prohibits the sale of human tissue with the exception of blood, sperm, or human eggs.
2. Guaranteed the priority of a decedent's wishes over the decedent's family members with respect to their objections to organ donation.
3. Streamlined the process of completing the necessary documents to effect organ donation.
4. Mandated that hospitals and emergency personnel develop procedures of "routine inquiry/required request." This provision requires hospitals to ask patients, upon admittance to the hospital, or their families, at patient's death, about organ donation. If the patient expresses the intent to donate his or her organs, that information is added to the patient's record.
5. Permitted medical examiners and coroners to provide transplantable organs from subjects of autopsies and investigations within certain conditions.

The 1968 UAGA enjoyed unanimous approval from every state; however, the 1987 UAGA was opposed in many states. The key issues revolved around three of the five new provisions in the 1987 Act. First, the debate focused on the priority of the donor's intent over his or her family's objections. Second, states were concerned about the "routine inquiry/required request" language. Third, there was debate over the new authority that allowed medical examiners to donate a deceased's organs or other body parts. Although it was intended to create uniformity among the disparate state statutes that had been passed to fill gaps left by the 1968 Act, several states enacted transplant legislation on their own, rather than ratify the 1987 UAGA legislation.

Under the 1987 UAGA, medical examiners or coroners may release organs for transplantation only when they have [CUSTODY](#) of a body and the deceased has no next-of-kin. There must be a reasonable search for [NEXT OF KIN](#) by competent authorities. Officials may not remove organs or tissue for transplanting unless a specific state law grants this authority.

The National Organ Transplant Act

In 1984, the National Organ Transplant Act (NOTA) began to provide a comprehensive structure and articulated policy regarding organ transplantation. This legislation reflected Congress's acknowledgement of the advances being made in transplantation technology and procedures. For example, there was now an 80 percent survival rate for those undergoing kidney transplants. And the drug cyclosporin had increased the survival rate of liver transplant patients from 35 to 70 percent for the first year after undergoing a liver transplant. Of course, there was still great concern about the shortage of available organs.

NOTA also provided funds for grants for qualified organ procurement organizations (OPOs) and an Organ Procurement and Transplantation Network (OPTN). The OPTN was intended to assist OPOs in distributing organs that could not be used in the OPO's geographical area. The Act provided grant money for planning, establishing, and operating or expanding organ procurement organizations. To qualify for the grant money, the OPO had to show that it was a nonprofit organization qualified to receive **MEDICARE** reimbursement for kidney procurement. It also had to describe established procedures to obtain payment for organs (other than kidneys) that were provided to transplant centers. The Act expressly forbade selling human organs across state lines. Apparently, the committee responsible for this provision felt strongly that human body parts should not be viewed as commodities.

One of the most important achievements of the Act was the establishment of a 25-member Task Force on Organ Transplantation. This task force studies human transplant policy issues, including organ procurement and distribution. The Task Force published its first report covering medical, legal, social, ethical, and economic issues related to organ procurement and transplantation in 1986. In this report, the Task Force commented on the relatively small percentage of transplantable organs that were actually harvested for transplantation and the need to increase this supply. It urged the continued development of organ transplant policies that encourage individuals to donate organs.

The Patient Self-Determination Act of 1991

The Federal Patient Self-Determination Act (PSDA) was meant to encourage the use of advance directives such as living wills and durable powers of attorney for health care. The PSDA changes key provisions in federal Medicare and **MEDICAID** laws. It mandates that hospitals and other health care providers maintain explicit policies and procedures regarding five issues. The hospital or health care provider must:

1. Provide written information regarding the individual's rights under state law to make decisions concerning medical care, including the right to formulate advance directives.
2. Note in the patient's medical record whether the individual has executed an advance directive
3. Not discriminate against a patient in response to the patient's decision on an advance directive
4. Comply with state laws concerning advance directives
5. Create a policy to provide for education of its staff and community on issues concerning advance directives

State Anatomical Gift Acts

State law governs postmortem organ donations under the original (1968) or revised (1987) Uniform Anatomical Gift Act. These acts have been adopted in every state, although there are some minor variations among the states' laws. Basically, the laws state that competent adults may make gifts of an organ or organs in the event of their deaths. The organs may be used for transplantation, research, or education. If there is no explicit anatomical gift made by a decedent, the decedent's family may consent to harvesting of the decedent's organs.

The Uniform Anatomical Gift Act (AGA) has been adopted in various forms by all 50 states. These laws state that a wallet-sized donor card, signed by a person over 18 and witnessed by two other adults, is a legal instrument permitting physicians to remove organs after death. These cards are often part of state driver's licenses. When the AGAs were passed, there was great hope that they would help to dramatically increase the supply of organs. Unfortunately, donor cards have not produced a significant increase in the supply of organs. There are at least two reasons for their failure to bring about the hoped-for increase in the supply of transplantable organs:

- Many people do not sign the donor cards or do so incorrectly
- Despite being recognized as a legal document, many medical professionals have been reluctant to rely upon the donor card for permission to remove organs from decedents for transplantation purposes

Advance Care Directives

There are three kinds of documents that may provide [EVIDENCE](#) of a person's wish to donate his or her organs in the event of that person's death. These are:

- Living wills: Living wills provide instructions for someone's medical care if that person becomes incapacitated or otherwise unable to make decisions himself or herself. State statutes regulate living wills. In most cases, a [LIVING WILL](#) can direct that one's organs or tissues be taken and donated if medically appropriate. If individuals execute a living will, it is advisable for them to inform their physicians and their families of its existence.
- Durable powers of attorney for health care. A durable [POWER OF ATTORNEY](#) for health care names someone, the individual's "agent," to make important decisions regarding that person's health care should the person become incapacitated. These documents can instruct the person's agent to donate the person's organs or tissues upon the person's death. As with living wills, the durable power of attorney for medical care is only effective if, in addition to the agent, the family and the person's physician know of its existence.
- Advanced care medical directive: An advance care medical directive (ACMD) combines some features of the living will and the durable power of attorney for health care. An ACMD allows individuals to provide instructions for the type of care they do or do not want in a number of medical scenarios. These documents need to be created in consultation with their physician(s).

Several states have passed laws that presume consent of a decedent (to donate organs or tissues) in certain limited circumstances. These laws are very limited in scope. Despite these [STATUTORY](#) provisions, the best way to insure that a person's organs or tissues will be made available for transplantation after his or her death is for the person to let relatives know of his or her desire to donate. This is especially true when one considers that medical personnel rely so heavily on the wishes of the next of kin when deciding whether to harvest useful organs.

Competent living persons may donate renewable tissues (e.g. blood, platelets, plasma, and sperm), and those not essential to the donor's health (e.g. eggs). However, a person may not donate organs or tissues necessary for sustaining the donor's life (e.g. heart, lungs, liver). There are two more ways to let others know of about one's decision to donate. First, the person can complete an organ donor card, or sign the back of the person's driver's license. Second, the person can execute a living will, durable power of attorney for medical care, or create an advance care medical directive informing the prospective medical care provider of the extent of care the person wishes to receive prior to the death. This document will also provide specific instructions for the [DISPOSITION](#) of the person's body after death, including donating your organs. By taking these steps, individuals are best assures that their decision to become an organ and/or tissue donor will be fulfilled.

Additional Resources

Dying & Death in Law & Medicine: a Forensic Primer for Health and Legal Professionals. Berger, Arthur S., Praeger, Arthur S., 1993.

The Ethics of Organ Transplants: The Current Debate Caplan, Arthur L., and Daniel H. Coelho, eds., Prometheus Books, 1999.

<http://www.organdonor.gov/>. "Organ Donation." First-Gov.com, 2002. Available at <http://www.organdonor.gov/>.

Organ and Tissue Donation for Transplantation. Edited by Chapman, Jeremy R., Wight, Celia, and Deierhoi, Mark, eds., Edward Arnold Publishers, 1997.

Organ Transplantation: Meanings and Realities. Edited by Youngner, Stuart J., Stuart J., Fox, Renee C., and O'Connell, Laurence J., eds., University of Wisconsin Press, 1996.

Organizations

The Living Bank

P.O. Box 6725
Houston, TX 77265 USA
Phone: (800) 528-2971
E-Mail: info@livingbank.org

National Transplant Assistance Fund (NTAF)

3475 West Chester Pike, Suite 230
Newtown Square, PA 19073 USA
Phone: (800) 642-8399
Fax: (610) 353-1616
URL: <http://www.transplantfund.org/homepage2.html>

The Transplant Network

1130 Ryland
Reno, NV 89502 USA
Phone: (775) 324-4501

Encyclopedia of Everyday Law: Organ Donation

Fax: (775) 323-1596

E-Mail: thetransplantnetwork@gbis.com

United Network for Organ Sharing (UNOS)

1100 Boulders Parkway, Suite 500

Richmond, VA 23225-8770 USA

Phone: (804) 330-8576

Fax: (804) 323-3794

URL: http://www.unos.org/frame_Default.asp

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