

Implementing the Wishes of a Client to Donate Organs and Tissue in New York State

By Pamela Ehrenkranz

This article discusses two important components of organ and tissue donation: (i) how to carry out the wishes of a client regarding organ and tissue donation under New York law, and (ii) how to advise the hospital or other medical or research institution of those wishes.

A client calls you at your office and tells you that her 70-year-old husband, Neal, has just had a stroke. He had been resuscitated at his apartment and taken to a nearby hospital. You locate Neal's health care proxy and living will and dash off to the hospital emergency room. The health care proxy names Neal's wife as his health care agent to make health care decisions for him in the event that he cannot make those decisions for himself. The living will explicitly states Neal's wish that his organs and tissues be donated for transplantation or research. By the time you arrive at the hospital, Neal is brain dead (there has been an irreversible loss of all function of his brain). You give the living will to Neal's wife but she folds the document and places it in her pocketbook, telling you that no one would be able to use Neal's 70-year-old organs.¹ Neal dies the next day and he and his organs are cremated.

To Whom Should You Have Given the Living Will and Organ Donation Directive?

By giving the living will with the organ donation requests to Neal's wife, as health care agent, the attorney introduces a third party to the situation. The effectiveness of the client's instructions becomes subject to the exclusive actions of the third party. To avoid this, the attorney should give the living will and organ donation request both to the agent and a copy to the attending physician or hospital administrator. Then the procurement of organs and tissue can be addressed directly by the physician, the hospital, and the agent.²

The best practice would be for the attorney to advise the client as part of the client's estate planning initiatives to complete a Life Organ and Tissue Donor Registration Enrollment Form with the Donate Life Registry. The Donate Life Registry is an online service that is accessed by an organ procurement organization to determine whether an individual has consented to the procurement of organs and tissues. The procurement agency is notified of a patient's condition when brain death is impending or when ventilator support is being withdrawn (for organ donation), or at the time of death (in the case of tissue donation). It is also accessible to every hospital throughout the United States, which is critical as one never

knows when and where someone is going to die.³ If an individual registers with the New York State Donate Life Registry, as with any valid organ donation document, family members and loved ones will be informed of the registration at the relevant time and given information regarding the donation process, but their permission is *not* required to proceed with the donation.

Registering as a Life Organ and Tissue Donor does not compromise the level of care an individual receives or intimate that a patient will be allowed to die any sooner than if the individual did not register. (The physicians involved with the care of a patient are unlikely to know if a patient is an organ donor and the physicians involved in the procurement process are unlikely to know about the specific treatment of a patient.)⁴ This option also bypasses any need to involve a health care agent or family member, and avoids the need to locate the card, drivers' license, living will, or other valid document of donation when time is of the essence.

Organ donation raises complicated issues regarding end of life treatment. A desire to donate organs requires the coordination of all of an individual's end of life care instructions, including, for example, orders not to intubate (DNI), orders not to resuscitate (DNR), orders not to put a patient on a ventilator, or other wishes or instructions routinely contemplated if a client does not want to be kept alive when death is imminent. The client, as patient, will need mechanical ventilator support in order for the option of organ and tissue donation to be preserved. Use of such means may be inconsistent with other instructions. Therefore, inclusion of language in living wills and other documents providing instruction on end of life care must contemplate the care that is necessary to safeguard organs and tissues for donation.⁵ Furthermore, the intrusion of life sustaining endeavors may significantly interfere with the precious personal and private moments that family and loved ones have with a patient who is so close to death. There is a delicate balance between medical necessity and intimate personal relations that must be thoughtfully, solicitously, and sympathetically addressed, which makes the topic that much more complicated.

Applicable New York Law on Donations

An anatomical gift of all or any part of a body for any purpose may be made by any individual of sound mind who is at least 18 years of age. The gift is effective at death.⁶

For potential donors, the New York Public Health Law contemplates that a gift of the organs, tissues, and eyes⁷ may be made for a number of different purposes as specified by the donor, such as for science, research,

medical teaching and education, and transplantation. A gift may be made either to a specified donee (*i.e.*, to an individual in need of a transplant) or, as is usually the case, without specifying a donee. If the gift is made to a specific donee, delivery of the document to the donee is not necessary to validate the gift.⁸

Although there are many options for effecting the gift, the surest method is the first option listed below, which is to enroll in the New York State Department of Health *Donate Life Registry*.

A. Documents That Can Be Used to Make Organ and Tissue Donations

1. Donate Life Registry

An individual may enroll in the New York State Department of Health *Donate Life Registry* on line at www.nyhealth.gov or www.donatelifeny.org. This enrollment program was created in 2006. In order to donate, the donor signs a form including the donor's name, address, and certain demographics, birthdate, gender, eye color, and height. It also requests the individual to provide his or her driver's license ID number.

2. Last Will and Testament

An individual may make a gift of all or part of the body by a last will and testament, which gift becomes effective upon the death of the testator.⁹ If the will is presented as evidence of an individual's direction, the will can be acted on if such actions are taken in good faith. If the will is not actually probated or proved in court to be the valid last will and testament of the decedent 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.¹⁰

3. Organ Donation Card or Driver's License

An individual may make a gift using a card or other form of documentation "designed to be carried on the person."¹¹ This would include an organ donor card or driver's license.¹² This card or other document must be signed by the donor. It is not necessary for this form of documentation to be either witnessed or notarized. It is also not necessary for the document to be delivered to the donee of the gift prior to death in order to be effective.¹³

4. Voter Registration

An individual may complete an organ donation form when he or she registers to vote in New York. This form has to be signed and dated by the donor. Completing this form authorizes the Board of Elections to provide the donor's name and identifying information to the Department of Health for enrollment in the *Donate Life Registry*.

5. Living Will

An individual may execute a living will, which should be signed by the individual before two witnesses

and signed by the two witnesses, indicating his or her wish to donate organs.¹⁴

6. Health Care Proxy

An individual may execute a health care proxy indicating his or her wish to donate organs. The agent has an ethical obligation to follow the principal's wishes. The New York health care proxy must be signed by the individual before two witnesses and signed by the two witnesses. The failure to include specific instructions advising the agent of a wish to donate organs shall not be construed to imply a wish not to donate.¹⁵ If an individual has not specifically made a gift in a document, the agent for the individual has the priority to authorize consent to organ and tissue donation. (Priority is discussed further in Section 8.)

7. Appointment of Agent to Control Disposition of Remains

An individual may execute a document appointing an agent to control the disposition of his or her remains. The person given control of the disposition of remains of a decedent can also be given authority to consent to organ or tissue donation (though a health care agent would have priority). Failure to state wishes in the Disposition of Remains document or other instructions shall not be construed to imply a wish not to donate.¹⁶ A Disposition of Remains document must be signed by the individual before two witnesses and signed by the two witnesses.

8. Consent from an Agent, Next of Kin, or Guardian

Where a patient has not properly executed an organ donor card, driver's license authorization, registered, or otherwise given written authorization for a donation, procurement services may be obtained with the consent from an individual's agent, next of kin, or guardian. Consent forms must clearly specify the tissues and/or non-transplant anatomic parts to be retrieved. Consent may be obtained by telephone, but such consent must be recorded or documented in writing by the procurement organization requesting the donation.¹⁷

Any of the persons, in the order of priority set forth below, may give consent when persons in prior classes are not reasonably available,¹⁸ willing, and able to act, 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 class or prior class specified below, or reason to believe that an anatomical gift is contrary to the individual's religious or moral beliefs.¹⁹

- a) The person designated as the health care agent (subject to any written statement regarding organ or tissue donation included in the health care proxy form).
- b) The person designated in a written instrument as the decedent's agent to control the disposition

of the individual's remains. (This agent would presumably only be able to act if the individual is deceased and would be subject to any written statement regarding organ or tissue donation included in the disposition of remains document.)

- c) The spouse, if not legally separated from the patient, or the domestic partner.²⁰
- d) A son or daughter eighteen years of age or older.
- e) Either parent.
- f) A brother or sister eighteen years of age or older.
- g) A guardian of the person of the decedent at the time of his or her death.
- h) Any other person authorized or under the obligation to dispose of the body.

B. Revocation of the Gift

The decision to donate is revocable by the prospective donor while the individual is living and competent.²¹ A gift made in a will may be revoked by codicil or by revoking the will. Any other document evidencing the gift may be revoked by i) the destruction, cancellation, or mutilation of the document *and all executed copies thereof*; or by ii) the execution and delivery to the donee of a signed statement revoking the gift, iii) an oral statement of revocation made in the presence of two persons, communicated to the donee, iv) a statement during a terminal illness or injury addressed to an attending physician and communicated to the donee, or in a signed card or document, found on his person or in his effects. If the will, card, or other document has been delivered to a specified donee, the donor may amend or revoke the gift only as set forth in ii through iv, above. If an executed original living will, health care proxy, or other document has been delivered to a third party agent, that original must be retrieved and destroyed.

Authorization for organ or tissue donation may not be rescinded by a family member unless the family member knows that the donor has revoked the authorization.²² In other words, in any case where the donor has properly executed an organ donor card, driver's license authorization, registered in the New York state organ and tissue donor registry, or has otherwise given written authorization for organ or tissue donation, authorization for donation may not be rescinded by the next of kin or guardian except upon a showing that the donor revoked the authorization. If an individual registers with the New York State *Donate Life Registry*, the family will be informed of the registration and given information regarding the donation process, but their permission is **not** required to proceed with the donation.

Correspondingly, a donee shall not accept a gift when (a) the donee has actual notice of contrary indication by the decedent, (b) where the donor has not properly executed an organ donor card, driver's license authorization to make an anatomical gift, registered in the New York state organ and tissue donor registry, or

otherwise given written authorization for organ or tissue donation, or has revoked any such authorization, and the gift is opposed by a person or persons in the highest priority available of the classes specified above, or (c) the donee has reason to believe that an anatomical gift is contrary to the decedent's religious or moral beliefs.²³

Conclusion

Research into the area of organ donation raises many questions that are beyond the traditional scope of trust and estate practice. Organ donation is a valuable public health service. It clearly falls within the purview of estate planners, as it is one of the end of life directives on which estate planning lawyers typically focus clients. Albeit important, it can be the forgotten child of estate practitioners. However, if organ donation is desired, it is important that the planner assist the client in executing the requisite documents to facilitate and provide a mandate for those wishes to be fulfilled.

Endnotes

1. Note: organs from an older person are not *per se* unusable; they may be highly useful either for transplantation or research.
2. New York Public Health Law ("PHL") § 4301(7) provides that the rights of the donee created by the gift are paramount to the rights of others except as provided by PHL § 4308 (regarding the prohibition on charging a fee to a donor's estate for any cost incurred in testing or removing a human organ or tissue).
3. PHL § 4310.
4. See also fn 8 below. *Racial Disparities in Preferences and Perceptions Regarding Organ Donation*, Laura A. Siminoff, PhD., Christopher J. Burant, MACTM, MA, Said A. Ibrahim, MD, MPH, *Journal of General Intern Medicine* 2006 Sept. 21 (9):995-1000, *Caring for organ donors: The intensive care unit physicians' view*, Maria Lùcia Aruajo Sadala, RGN, PhD, Marisa Lorençon, RGN, Màrcia Cercal, RGN, and Arthur Schlep, PhD, *Heart & Lung*, May/June 2006. *Two perspectives on organ donation: experiences of potential donor families and intensive care physicians of the same event* Margareta A. Sanner, PhD, *Journal of Critical Care* (2007) 22, 296-304.
5. Choice of language depends on whether the document is being used to make the anatomical gift:

Option A

"I hereby make a gift of my organs and tissues, including eyes, upon my death, for purposes of transplantation, therapy and research. Notwithstanding any directive contained in any other section of this document, I consent to the commencement and maintenance of any medical procedure necessary to evaluate, maintain or preserve my organs or tissues for purposes of donation, including, but not limited to administration of medication, mechanical respiration and artificial nutrition and hydration."

Option B

"Notwithstanding any directive contained in any other section of this document, I consent to the commencement and maintenance of any medical procedure necessary to evaluate, maintain or preserve my organs or tissues for purposes of donation, including, but not limited to administration of medication, mechanical respiration and artificial nutrition and hydration."

6. PHL § 4301(1). Donations from a living donor are determined using different criteria. See, e.g., *Official Compilation of Codes, Rules and Regulations of the State of New York*, 10 NYCRR Subpart 52-3.

General Technical Standards for Tissue Banks 52-3.3 provides that a comprehensive or limited tissue procurement service must obtain a signed informed consent from a living donor of tissue for clinical use. The acceptability of a donation from a living donor is determined by a physical examination of and health history interview with the donor. 52 3.3(d).

7. Anatomical gifts can be general or specific (e.g., heart, heart valves, lungs, liver, kidney(s), pancreas, small bowel, other abdominal organs, bones, connective tissues, middle ear tissues, skin grafts, saphenous veins, and more recently, hands and faces).
8. PHL § 4303. The statute provides as follows: If no donee is specified, "the gift may be accepted by and utilized under the direction of the attending physician 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 subdivision shall not participate in the procedures for removing or transplanting a part." PHL § 4304 provides that "[i]f a 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." Note, however, that when a donor is determined dead based on irreversible cessation of circulatory and respiratory functions, the time of death must be certified by a physician. In all other cases the time of death must be certified by the physician who attends the donor at his death and one other physician. Any of such physicians may not participate in the procedure to remove or transplant the body part. PHL §§ 4303(4) and 4306(2).
9. Estates, Powers and Trusts Law ("EPTL") 1-2.19 provides that a will includes a written instrument, made as prescribed under the statute, to take effect upon death, whereby a person disposes of property or directs how it shall not be disposed of, or disposes of his body or any part thereof. Property is defined in EPTL 1-2.15 as anything that may be the subject of ownership, and is real or personal property.
10. PHL § 4303(1).
11. PHL § 4303(2).
12. There is no requirement that the driver's license be a New York state license.
13. PHL § 4303(2).
14. *In re Westchester County Medical Center*, 72 N.Y.2d 517, 534 N.Y.S.2d 886 (1988).
15. PHL § 2981(5)(f). This would be consistent with the rules applicable to a disposition of remains document. PHL § 4201(4)(a).
16. PHL § 4201(4-a).
17. PHL § 4303(5).
18. "Reasonably available" is defined in PHL § 4301(3) to mean that a person "can be contacted without undue effort and willing and able to act in a timely manner consistent with existing medical criteria necessary for the making of an anatomical gift."
19. PHL § 4301(2). Note that most organized religions do not prohibit the donations of organs and tissue.
20. Domestic partner is defined in PHL § 4301(4).
21. PHL § 4305.
22. PHL § 4301(2).
23. PHL § 4301(5).

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