Organ Donor Rights Legislation (Note)

Nationwide there is a shortage of donor organs, which means only a fraction of those on the waiting list receive a transplant. More than 82,500 men, women and children are currently on the waiting list for an organ. Underlying the shortage of donated organs and tissues is the disparity between how many people say they believe in donation, but how few transplants actually occur.

The Uniform Anatomical Gift Act (UAGA) Section 2(h) states:

“An anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor's death.”

Although many states have enacted the UAGA, including Section 2(h), health care providers still routinely seek the approval of family members before proceeding with donation, due to liability concerns. Often grieving family members will refuse organ and tissue donation, even when they know their deceased loved one desired to donate. Accordingly, this issue is a significant problem, with studies showing that about 50 percent of families refuse consent for donating a loved one’s organs when given the opportunity.

In response to this problem, an increasing number of states are addressing this issue by strengthening legislative language regarding the rights of organ donors. Legislation typically states that if there is evidence that an individual wished to donate organs and tissues (e.g., a driver’s license or advanced directive), the next of kin cannot refuse donation. Then, hospitals and physicians inform family members of their loved one’s decision to donate, in the same way that a lawyer informs the family about the contents of a deceased person’s will. Recently the Association of Organ Procurement Organizations (AOPO) have also come out in favor of state legislation that supports donor rights. Listed below are examples of legislation from various states that strengthen donor rights.

Delaware

SB4 passed in 2001 adds the following language to Section 2711 of Title 16 of the Delaware Code:

(g) A donor's gift of all or any part of the individual's body, as indicated pursuant to this chapter, including, but not limited to, a designation on a driver's license or identification card, donor card, advance health care directive, will or other document of gift, may not be revoked by the next-of-kin or other persons identified in subsection (c) of this section, nor shall the consent of any such person at the time of the donor's death or immediately thereafter be necessary to render the gift valid and effective.

Indiana

Indiana House Bill 1628 passed in 2001 provides civil immunity to hospitals and physicians who follow donors’ wishes. HB 1268 reads:

SECTION 1. IC 29-2-16-2.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2001]:

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Sec. 2.5.
(a) This section applies if:
(1) a donor makes an anatomical gift in writing under section 2(a) of this chapter or IC 9-24-17; and
(2) the gift is not revoked by:
(A) the donor before the donor's death; or
(B) a guardian under section 11 of this chapter.
(b) The individuals identified in section 2(b) of this chapter have no legal standing or authority to:
(1) modify a deceased donor's gift of any part of the donor's body made in writing under section 2 of this chapter or IC 9-24-17; or
(2) prevent the donor's anatomical gift from being made.
(c) This section does not limit the individuals identified in section 2(b) of this chapter from:
(1) making a gift of all or any part of a decedent's body; or
(2) revoking a gift of all or any part of a decedent's body; as provided in section 2(b) of this chapter.
(d) Actual notice obtained by:
(1) a recovery agency acting under section 3.5(a) of this chapter; or
(2) a hospital acting under section 3.5(b) of this chapter; of an individual's written anatomical gift that is made under section 2(a) of this chapter or IC 9-24-17 creates a rebuttable presumption that the individual made an anatomical gift for purposes of this section.
(e) Actual notice obtained by:
(1) a recovery agency acting under section 3.5(a) of this chapter; or
(2) a hospital acting under section 3.5(b) of this chapter; of an individual's written revocation of an anatomical gift that is made under section 2(a) of this chapter or IC 9-24-17 creates a rebuttable presumption that the individual revoked the anatomical gift for purposes of this section.
(f) A health care provider is immune from civil liability for following a donor's unrevoked anatomical gift directive under this chapter or IC 9-24-17.

SECTION 2. IC 29-2-16-3.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2001]:
Sec. 3.5. (a) If:
(1) a hospital's designated organ recovery agency determines that an individual whose death is imminent or who has died is medically suitable for organ donation;
(2) a hospital's designated organ recovery agency, in the absence of alternative arrangements by the hospital, and:
(A) using the standards of a potential tissue and eye donor;
(B) using the notification protocol developed by the hospital; and
(C) consulting with the hospital's designated tissue recovery agency and eye recovery agency; determines that an individual whose death is imminent or who has died is medically suitable for tissue or eye donation;
(3) a hospital's designated tissue recovery agency determines that an individual whose death is imminent or who has died is medically suitable for tissue donation; or
(4) a hospital's designated eye tissue recovery agency determines that an
individual whose death is imminent or who has died is medically suitable for eye donation; the respective recovery agency shall attempt to ascertain whether the individual has made a written anatomical gift under section 2(a) of this chapter or under IC 9-24-17 and, if so, whether the individual has subsequently revoked the anatomical gift in writing. The recovery agency shall consult with the individuals identified in section 2(b) of this chapter who are reasonably available and may consult with any other sources that are available to the recovery agency.

(b) The recovery agency shall provide to the following any information obtained by the recovery agency under subsection (a):
   (1) The hospital.
   (2) The attending physician.
   (3) The physician who certified the individual's death if there is not an attending physician.

(c) A recovery agency identified in subsection (a) may enter into a written agreement with a hospital to allow the hospital to ascertain whether an individual made a written anatomical gift under subsection 2(a) of this chapter or IC 9-24-17 and whether any subsequent written revocation of the anatomical gift occurred.

(d) The hospital shall provide to the following any information obtained by the hospital under subsection (c):
   (1) The recovery agency.
   (2) The attending physician.
   (3) The physician who certified the individual's death if there is not an attending physician.

(e) A hospital or a recovery agency is immune from civil liability for determining in good faith and in compliance with this section that:
   (1) an individual made a written anatomical gift; or
   (2) an individual subsequently made a written revocation of an anatomical gift.

SECTION 4. IC 29-2-16-7.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2001]:

Sec. 7.5. (a) The individual's attending physician, or, if none, the:
   (1) physician that certifies the individual's death;
   (2) hospital where the individual is admitted;
   (3) hospital where the individual's remains are being kept; or
   (4) individual identified in section 2 (b) of this chapter;
may petition the probate court in the county where the remains of the individual who is the subject to the petition are located, or the county in which the individual died, for the information referred to in subsection (b).

(b) A person identified in subsection (a) may petition the probate court specified in subsection (a) to determine whether the individual:
   (1) made a written anatomical gift under section 2(a) of this chapter or IC 9-24-17, for purposes of section 2.5 of this chapter; or
   (2) made a written revocation of an anatomical gift under section 2(a) of this chapter or under IC 9-24-17, for purposes of section 2.5 of this chapter.

(c) If the probate court determines under subsection (b) of this chapter that the individual made a written anatomical gift that was not subsequently
revoked in writing by the individual, the court shall order that the anatomical gift of an organ, tissue, or an eye be recovered.
(d) The probate court may modify or waive notice and a hearing if the court determines that a delay would have a serious adverse effect on:
   (1) the medical viability of the individual; or
   (2) the viability of the individual's anatomical gift of an organ, tissue, or an eye.

Tennessee

Act Chapter No. 404, Section 68-30-115(f) enacted in 2001 states:

“The rights of the donee created by the gift are paramount to the rights of others except as provided by section 68-30-108(a).”

West Virginia

HB 4370 passed in 2002 adds the language:

§16-19-2 (h) An anatomical gift may not be revoked by the donor's next-of-kin or other persons identified in subsection (a), section three of this article, nor shall the consent of any of these persons, at the time of the donor's death or immediately thereafter, be necessary to render the gift valid and effective.