

## TRUSTS—WILLS & ADMINISTRATION OF ESTATES—THE GEORGIA ANATOMICAL GIFT ACT—A LOOK AT THE NEW GEORGIA LAW

Transplantation of organs from one body to another is not a new concept in our society. However, the recent heart transplant operations have created complex issues involving ethics, law, and public policy. The rapid advances in the field of organ transplantation, coupled with the general inadequacy of both statutory and judicial authority to meet the needs of the public and the medical profession, brought about a recognition of the need to formulate legislation to cope with these problems in the field of anatomical gifts. In *Holland v. Metalious* the New Hampshire court voiced this modern trend concerning organ transplantation when it stated “. . . in the light of current medical advances existing ‘anatomical’ statutes . . . are inadequate.”<sup>1</sup> The result of this recognition was the Uniform Anatomical Gift Act<sup>2</sup> which has been widely accepted<sup>3</sup> and which was adopted in its entirety by Georgia in 1969.<sup>4</sup> Prior to this time, Georgia had provided statutory authority for the donation of eyes only.<sup>5</sup> The issue has not been before the courts. If in the future a problem of this nature arises, due to the enlightened action of the legislature, the problem will be governed by the statute—the provisions of which and its implications are discussed herein.

The Act provides that “any individual of sound mind and eighteen years of age” may give all or any part of his body, the gift to take effect upon his death.<sup>6</sup> At his death, if the decedent has made no gift, surviving relatives may make gifts according to an order of priority.<sup>7</sup> The donee may not accept the gift if he has actual knowledge of a contrary intention on the part of the deceased. Also, relatives may make a gift immediately before death.<sup>8</sup> A gift of all or part of a body authorizes any medical examination necessary to insure that the gift is acceptable for the purpose intended.<sup>9</sup>

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1. 105 N.H. 290, \_\_\_\_, 198 A.2d 654, 656 (1964).

2. HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 185-193 (1968).

3. Sadler and Sadler, *Transplantation and The Law: The Need for Organized Sensitivity*, 57 GEO. L.J. 5, 9 (1968).

4. GA. CODE ANN. § 48-4 (Rev. 1969) [hereinafter cited as Act].

5. GA. CODE ANN. § 88-20 (Rev. 1964).

6. GA. CODE ANN. § 48-402(a) (Rev. 1969).

7. *Id.* § 48-402(b).

8. *Id.* § 48-402(c).

9. *Id.* § 48-402(d).

Any hospital, surgeon, or physician may become a donee for the purposes of "advancement of medical or dental education, research, advancement of medical or dental science, therapy or transplantation."<sup>10</sup> In addition, any specified individual may receive the gift for "therapy or transplantation needed by him."<sup>11</sup>

Gifts may be made by will and become effective upon the death of the testator without waiting for probate. Even if the gift is later found to be invalid, the extent to which it has been acted upon in "good faith" is still effective.<sup>12</sup> The Act also provides that the gift may be made by an instrument other than a will. A card, signed by the donor in the presence of two witnesses, would be a valid instrument. The requirement of delivery of the document during the donor's lifetime is specifically waived.<sup>13</sup> While this elimination of the necessity of delivery does away with such rigid formality, it does not assure that the authorization will be effectual. May not it be a matter of practical necessity to have such a delivery requirement?<sup>14</sup>

The gift may be made to a specified donee or without specifying a donee. In the case of the latter, the attending physician may act as the donee in accepting the gift. However, the physician who acts as a donee is prohibited from taking part in any transplantation operation.<sup>15</sup> The Act does permit the donor to designate the physician to carry out the operation.<sup>16</sup> Any relative who makes a gift, as allowed in GA. CODE ANN. § 48-402(b), must do so in writing or if it is done by telephone, it must be recorded.<sup>17</sup>

The donor may amend or revoke the gift in a number of ways.<sup>18</sup> If the gift was made by will, the will may be revoked. The donor may also revoke by an oral statement made in the presence of two witnesses and communicated to the donee, or an oral statement made during a terminal illness to the attending physician.<sup>19</sup>

The donee may accept or reject the gift. If the donee accepts the entire body as the gift, he may, following the terms of the gift, authorize funeral services. If the gift is a part of the body, it is the

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10. *Id.* § 48-403(1).

11. *Id.* § 48-403(4).

12. *Id.* § 48-404(a).

13. *Id.* § 48-405.

14. Good discussion of this is found in Jinks, *California's Response To The Problems of Procuring Human Remains For Transplantation*, 57 CAL. L. REV. 671, 674 (1969).

15. GA. CODE ANN. § 48-404(c) (Rev. 1969).

16. *Id.* § 48-404(d).

17. *Id.* § 48-404(e).

18. *Id.* § 48-406.

19. *Id.* § 48-406(a).

donee's obligation to see that the part is removed without unnecessary mutilation. After removal of the part, possession of the remainder reverts to those entitled to it for burial.<sup>20</sup>

The donee-physician is specifically protected from civil liability in Georgia if he acts "in good faith in accord with the terms of this Chapter . . . ."<sup>21</sup>

One of the most important provisions in the Act is the one which provides that the attending physician is to determine the time of death. This attending physician shall not take part in any transplantation of organs from the deceased.<sup>22</sup> No attempt is made to define the point in time at which life is terminated. While many people feel that a statutory definition of death is impractical,<sup>23</sup> there does seem to be a definite need for some concrete guidelines to be followed in the determination of the time of death.

#### THE CONCEPT OF DEATH

Historically, neither the medical nor the legal definition of death has been characterized by any uniformity or scientific exactness. The question of determining the time of death traditionally has been left to the medical profession. The classical definition of death as being manifested by the absence of cardio-respiratory activity is under considerable attack from surgeons who claim that such requirements unnecessarily inhibit full use of transplantable tissue. There are two major arguments for establishing new criteria in the determination of death. First, the improved resuscitative equipment and techniques along with improved life support measures have led to increased efforts to save those who are desperately injured. Second, obsolete criteria for the determination of death can lead to controversy in obtaining organs for transplantation.

Diagnosis of death as manifested by the absence of heart beat and respiration may be adequate in most medical proceedings, but not in sophisticated transplantation surgery. Biologically, death is a

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20. *Id.* § 48-407(a).

21. *Id.* § 48-407(c).

22. *Id.* § 48-407(b).

23. The Comment to Section 7 of the Uniform Anatomical Gift Act takes this position. Also in agreement: Dr. Adrian Kantrowitz, director of surgery at Maimonida Medical Hospital in New York, who testified before the New York Commission on Transplantation that he was against any statutory definition of death. He hoped lawyers would not get too deeply involved in the issue, because they might "mess things up." Sommer, *Additional Thoughts On Legal Problems of Heart Transplantation*, 41 N.Y. St. B.J. 196, 200-201 (1969).

continuous process, beginning at the cellular level, progressing to include tissue, then organs and organ systems and finally terminating in the cessation of the life process in the entire organism as a whole. However, the medical profession is not interested in preserving merely isolated cells or even tissues or organs, but the whole organism.<sup>24</sup>

The human organism is an integrated personality, dependent upon the coordinated activities of the brain, heart, lungs and kidney for the maintenance of life. Critical damage to any one of these will almost instantly interfere with the action of the others. The most vulnerable of all man's organs is the brain. Interference with the blood flow to the brain will cause unconsciousness within ten seconds and regular breathing movements will cease within one minute. Irreversible damage, with death of the brain cells begins within five minutes in the cortex of the brain and within five minutes in the remaining parts thereof. With the development of life support techniques, the unconditional interplay between circulation, respiration, and brain activity has been replaced by a machine.<sup>25</sup> Logical arguments are now being made to use the death of the brain as the criterion for determining death.

Several new definitions of death have been proposed, all very similar, and all based on neurological criteria. One of the new definitions is cerebral death. Its criteria are: (1) no reflexes or spontaneous breathing; (2) no clinical or EEG response to noise or pinch; (3) repetition of above twenty-four hours and forty-eight hours later. This neurological triad, no reflexes, no spontaneous breathing and a flat isoelectric EEG repeated twenty-four hours later appears to be gaining support.<sup>26</sup> Probably the best definition put forward to date is the concept of irreversible coma drawn up by the Ad Hoc Committee of Harvard Medical School to Examine the Definition of Brain Death.<sup>27</sup> The patient in this state is in a deep coma characterized by:

(1) *Unreceptivity and Unresponsivity*—the patient is totally unaware of any externally applied stimuli and inner need. There is complete unresponsivity. Even the most intensely painful stimuli evoke no vocal or other response, not even a groan, withdrawal of a limb, or increase in respiration.

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24. Brickman, *Medico-Legal Problems With The Question of Death*, 5 CAL. WEST. L. REV. 110, 116 (1968).

25. Biorck, *When Is Death?*, 1968 WIS. L. REV. 484, 493.

26. Corday, *Life-Death In Heart Transplantation*, 55 A.B.A.J. 629, 630 (1969).

27. Ad Hoc Committee of Harvard Medical School to Examine Definition of Brain Death, 205 J.A.M.A. 337, 338-340 (1968).

(2) *No Movements or Breathing*—absence of spontaneous breathing. After the patient has been placed on a mechanical respirator, the total absence of spontaneous breathing may be established by turning off the respirator for three minutes and observing whether there is any effort on the part of the subject of breathing spontaneously.

(3) *No Reflexes*—extinction of central nervous system activity as evidenced by the absence of elicitable reflexes. The pupil of the eye is dilated and fixed and will not respond to a direct source of bright light. Even when irrigated with ice water there is a lack of ocular movement. Swallowing is also absent.

(4) *Flat Electroencephlogram (EEG)*—used as confirmatory data. Basically, the EEG is a device used by physicians to determine electrical impulses of the nervous system. A flat EEG is indicative of a lack of spontaneous neurological activity.

Both the legal and medical professions are in need of an analysis such as that which the irreversible coma provides. At present the law of the fifty states and that of the federal courts treats the question of human death as a question of fact to be decided in each case. The Supreme Court of Arkansas in a leading case in point used the dictionary definition of death:

Death is cessation of life; the ceasing to exist; defined by physicians as total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc.<sup>28</sup>

Examining the medical approach as distinguished from the legal approach to the problem, the main principle upon which transplantation as a form of treatment is based is that of replacement. In a situation where the disease is confined to one part of the body and that part of the body is damaged beyond repair, restoration of health depends upon some form of replacement of that part. There are three general categories of replacement: first, the functional replacement, such as injection of insulin for a patient with diabetes due to a disease of the pancreas; second, replacement in the form of an artificial device such as an artificial limb or pacemaker of the heart; third, replacement of artificial entire vital organ such as an artificial kidney.<sup>29</sup> Transplantation of tissues and organs falls in the third category.<sup>30</sup>

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28. *Smith v. Smith*, 229 Ark. 579, 317 S.W.2d 275, 279 (1958), quoting from Black's Law Dictionary (4th ed. 1951).

29. An excellent article dealing with the use of artificial kidneys and the transplantation of kidneys is Sanders and Dukeminier, *Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation*, 15 U.C.L.A. L. REV. 357 (1968). Many of its conclusions are applicable to the transplantation of other organs.

30. Stickel, *Organ Transplantation In Medical and Legal Perspective*, 32 LAW & CONTEMP. PROB. 597 (1967).

The moral and ethical questions inherent in heart transplantation are beyond the scope of this paper.<sup>31</sup> However, one of the main objections to continued heart transplants at this time is that they offer only a small chance of success, that is, only "short term palliation." This is the position taken by Doctors Goodwin and Oakley of the Royal Postgraduate Medical School, London, England:

The correct attitude toward continued cardiac transplantation requires definition at the present time and it would seem wise to call a halt until the problem of rejection and preservation have been more successfully met. The unhesitating way in which Dr. Barnard's lead was followed suggested that a major breakdown of the immunological barrier had been achieved. This has not been so, and it is not only the public that has been carried away by the dramatic events . . . Prognosis in heart disease is notoriously difficult and a possible few months of uncertain existence does not necessarily justify adoption of transplantation for routine treatment of patients. . . . Work in tissue-matching and immunosuppression must be intensified until cardiac transplantation offers predictable and worthwhile prospects.<sup>32</sup>

#### CONCLUSION

The diagnosis of death is a medical test and it will and must always be based on the present state of medical knowledge. No absolute rule can be established concerning the definition of death, for as medical science progresses, the criteria for determining death will necessarily change with it.

There is a conflict between the legally recognized concept of death at a precise moment in time and the present medical definition of death as an irreversible process.<sup>33</sup> The Georgia Anatomical Gift Act is an attempt to make clear the right of every person to donate his organs for transplantation or medical study. The Act is by no means a panacea, but it undoubtedly lays a solid foundation for laws in the field of organ transplantation. The Act falls short in avoiding the determination of the time of death. The irreversible coma definition

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31. A good discussion of this topic appears in Collins, *Heart Transplantation: Ethical Considerations*, 15 CATH. LAWYER 56 (1969); Moffat, *Indispensable Role of Independent Medical Judgment*, 21 U. FLA. L. REV. 477 (1969); Appel, *Ethical and Legal Questions Posed By Recent Advances In Medicine*, 205 J.A.M.A. 513 (1968).

32. 77 AM. HEART J. 437, 437-440 (1968).

33. Brickman, *Medico-Legal Problems With The Question of Death*, 5 CAL. WEST. L. REV. 110, 121 (1968).

proposed by the Harvard Committee is medically sound, and it would seem an easy task to incorporate this into the Georgia Anatomical Gift Act by way of amendment.

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