

**The Committee on Health Law, the Committee on Uniform State Laws and  
The Committee on Bioethical Issues of  
The Association of the Bar of the City of New York**

**S.5154**

**Senator Hannon**

AN ACT to amend the public health law, in relation to the uniform anatomical gift act; to repeal Article 43 of such law relating to anatomical gifts; and to repeal article 43-a of such law relating to request for consent to an anatomical gift.

**THIS BILL IS APPROVED**

**A. The Committees Strongly Endorse The Bill and Urge Its Swift Passage**

The Committee on Health Law, the Committee on Uniform State Laws and the Committee on Bioethical Issues of the Association of the Bar of the City of New York strongly endorse Senate bill 5154 (the “Proposed Act”), and urge swift passage of this much-needed legislation.

The Association is an organization of over 23,000 lawyers and judges dedicated to improving the administration of justice. The members of the Committees on Health, Uniform State Laws, and Bioethical Issues include attorneys, physicians and in-house hospital counsel who confront issues surrounding medical decision-making and implementation of uniform laws. The Association has always taken great interest in the legal, social and public policy aspects of medical care, public health issues, and issues pertinent to the importance of national uniformity among certain state laws, and through various committees, regularly issues reports and policy statements, and testifies at hearings.

With advances in medicine, organ transplantations are increasingly successful and save many lives. However, a potential organ recipient’s access to a donated organ depends upon the current supply of transplantable organs. This supply, in turn, depends upon the number of organ donors. Today, the number of those in need of an organ donation far outnumbers the current supply of organs, which can be donated at a given time. Current New York State law with respect to anatomical gifts, Public Health Law § 4300 et seq., limits the supply of donated organs by limiting means of access to them, i.e. it limits the

methods through which a person can become an organ donor. The Proposed Act would help to increase the supply of, and access to, organs for transplantation. It would also bring New York in line with other states, which have passed their own versions of the Revised Anatomical Gift Act, thereby ensuring that regardless of location, organ supply will increase and transplantation will occur rapidly and more frequently.

As discussed more fully below, the Proposed Act would improve upon existing New York law in a number of important ways, including: (i) simplifying the process for a potential donor to document his or her anatomical gift; (ii) adding several new classes of persons to the list of those who may make an anatomical gift for another individual after that individual's death; (iii) establishing standards for donor registries that would better enable procurement organizations to gain access to documentation of organ gifts in donor registries, medical records, and records of a state motor vehicle department; and (iv) clarifying and expanding the rules relating to cooperation and coordination between procurement organizations and coroners and medical examiners.

The Committees believe that the Proposed Act would be even stronger in its goal of facilitating anatomical gifts, however, with two additional inclusions: (1) domestic partners should be included as a class of persons who may make an anatomical gift for another individual after that individual's death; and (2) the provisions of the Proposed Act that would allow parents of unemancipated minors to revoke a minor's anatomical gift or a minor's refusal to make an anatomical gift should exclude minors who are authorized pursuant to state law to apply for a driver's license.

## **B. Current Law**

The original Uniform Anatomical Gift Act (the "Act") was promulgated in 1968 by the National Conference of Commissioners on Uniform State Laws (the "NCCUSL"). It was promptly and uniformly adopted in every jurisdiction, including New York, in that year. The Act created the power to donate organs, eyes and tissue in an immediate gift to an individual in need of an organ transplant. In 1987, in response to changes in circumstance and practice of organ donation, the NCCUSL promulgated revisions to the Uniform Anatomical Gift Act. Twenty-four states, including New York, did not adopt the revisions, creating multiple difficulties when anatomical gifts cross state boundaries. This is a critical defect in current law. Since there is already little time to prepare, transport across state lines, and transplant life-saving organs, assessing and complying with disparate state laws may substantially delay, and therefore hinder, efforts to save the life of an individual in need of an organ transplant.

New York law places specific limitations on who may decide to donate on behalf of potential organ donors, whether living or deceased. Currently, the law does not allow for an agent charged with health care decisions during the life of a potential organ donor to designate and consent to organ donation after the potential donor is deceased. Furthermore, the categories of persons permitted to make such decisions for a decedent/potential organ donor are limited to certain immediate family members and

legal guardians. New York law also limits ways in which an organ donor may document that he or she wishes to make an anatomical gift.

### **C. The National Conference of Commissioners on Uniform State Laws and the New York Alliance for Donation**

In 2006, the NCCUSL promulgated the 2006 Revised Uniform Anatomical Gift Act (“NCCUSL 2006 Act”) with the twin purposes of maximizing organ donation and increasing uniformity among state laws. The New York Alliance for Donation, a not-for-profit organization dedicated to increasing organ and tissue donation, drafted a bill that reflects the NCCUSL 2006 Act, and which formed the basis of S5154 – The Revised Anatomical Gift Act.

### **D. S5154 – The Revised Uniform Anatomical Gift Act**

The Proposed Act expands opportunities for organ donation in New York and brings New York law substantially in line with the national standards set forth in the NCCUSL 2006 Act.

The Proposed Act simplifies the documentation required to make an anatomical gift and recognizes, for purposes of New York state law with respect to anatomical gifts, the forms commonly found on the backs of driver’s licenses in the United States. It incorporates current New York law with respect to anatomical gifts (§ 4301 of the Public Health Law), which specifies how to document a religious or moral objection to organ donation for those who wish to refuse to make any organ donation.

The Proposed Act expands upon existing law by allowing certain individuals to make an anatomical gift for another individual during that individual’s lifetime. Health care agents under a health care power of attorney and, under certain circumstances, parents or a guardian, have this power. The donor must be incapacitated and the person authorizing the anatomical gift must be the individual in charge of making health care decisions during the donor’s life.

The Proposed Act also adds several new classes of persons to the list of those who may make an anatomical gift for another individual after that individual’s death. The adoption of better defined rules and procedures, combined with a flexible definition of “reasonably available,” will provide clarity to the decision-making process. If two or more members of a class exist and are reasonably available, the donation is made only if a majority of members of that class support the donation. Minors, if eligible under other law to apply for a driver’s license, are empowered to be donors.

As noted above, the Proposed Act encourages and establishes standards for donor registries and better enables procurement organizations to gain access to documentation of gifts in donor registries, medical records, and records of a state motor vehicle department. This access will make it much easier for procurement organizations to quickly determine whether an individual is a donor.

The tension between a healthcare directive requesting the withholding or withdrawal of life support systems and a donor's wish to make an anatomical gift is resolved in favor of permitting the administration of measures necessary to ensure the medical suitability of the donor's organs prior to the removal of life support systems. The bill provides that a general statement described in a power of attorney or health care directive that the patient does not wish to have life prolonged by the administration of life-support systems should not be construed as a refusal to donate.<sup>1</sup>

The Proposed Act clarifies and expands the rules relating to cooperation and coordination between procurement organizations on the one hand and coroners and medical examiners on the other. It also complies with the policy guidelines articulated by the National Association of Medical Examiners.

S5154 also addresses widely reported abuses involving the intentional falsification of a document of gift, or a refusal to make an anatomical gift in order to obtain a financial gain by selling a decedent's parts to a research institution. A person who falsifies a document of gift for such a purpose is guilty of a felony. Alternatively, the bill provides that a person acting in accordance with the Proposed Act or with the applicable anatomical gift law of another state, or who attempts to do so in good faith, is not liable for his or her actions in a civil action, criminal prosecution or administrative proceeding.

#### **E. Opportunities to Strengthen the Proposed Act**

As explained above, the Health Law Committee, Uniform State Laws Committee and the Committee on Bioethical Issues recommend that two important revisions should be made to the Proposed Act in order to even further promote organ donation.

The first opportunity to strengthen the Proposed Act concerns the inclusion of domestic partners. The Proposed Act currently excludes domestic partners from the list of persons who may make an anatomical gift for a decedent. We believe that domestic partners should have the same level of priority as spouses, which are second only to designated health care agents. NCCUSL and the New York Alliance for Donation have also made this recommendation. The term "domestic partner" should be defined, and we recommend use of the definition set forth in Public Health Law Section 4201.

The second opportunity to strengthen the Proposed Act concerns the unimpeded inclusion of minors authorized pursuant to state law to apply for a driver's license because they are at least sixteen years of age. The Proposed Act provides, under its §4303(1)(b), that such a minor can choose to make an anatomical gift before his or her death. This is an important provision because it empowers a class of persons which have a direct and immediate opportunity to make an anatomical gift through transparent documentation in connection with an application for a driver's license. To ensure consistency with the New York graduated automobile licensure scheme, the provision should be clarified to include the phrase "or any other automobile driving privileges." The Proposed Act also provides that, under its §4306(7) and (8), parents of unemancipated minors may revoke a

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<sup>1</sup> This particular section of the Proposed Act raises ethical questions about which a consensus has not been reached. Therefore, the Association takes no position with respect to it.

minor's anatomical gift or a minor's refusal to make an anatomical gift. In the interest of promoting the autonomy of persons who are empowered to choose whether to make an anatomical gift, the decisions of those minors specified in §4303(1)(b) should be explicitly excluded from the parental revocation provisions in §4306(7) and (8) of the Proposed Act.

**F. The Committees Urge Swift Passage Of The Revised Uniform Anatomical Gift Act With The Revisions Detailed Above.**

The anatomical gift law of the New York is out of date given the medical advancements and social changes that have occurred since it was last amended. Furthermore, it is no longer uniform with the law of other states which have or are in the process of enacting their own versions of the Revised Anatomical Gift Act based on the NCCUSL 2006 Act. Diversity of law from state to state is a great impediment to organ procurement and transplantation. The sooner the Proposed Act is enacted, the sooner more lives will be saved in New York through more comprehensive organ donation laws.