

## TRUSTS AND ESTATES

## Expert Analysis

# My Kidney to Yours: The Organ Shortage Crisis

**A**lthough almost every citizen in the United States is aware of the organ donation program, generally because of the option to become one when renewing your license, very few people are aware of the crisis underlying that question. There is a steady demand for donated organs, with an ever-declining supply. The federal government and individual states have enacted various legislations in an attempt to offer more avenues for donations. However, as of April 2020, New York state has approximately 10,000 people awaiting an organ donation, and there are over 120,000 people waiting for an organ donation nationally. Every 10 minutes another person is added to the transplant list, and 22 people die each day waiting for a transplant.

Medical surgeries have been performed throughout the world for hundreds of years, but organ transplants are a relatively new concept. Organ



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transplants have been performed for only approximately 60 years, and the demand for organ donations have steadily increased since. Early common law writings found there was no value in a corpse. See 3 Edward Coke, *Institutes of the Laws of England*, at 203 (1644). Throughout judicial history, the courts have held there is no property right in a dead body for commercial purposes. However, as history developed, human body parts were found to be valuable for the study of medicine and anatomy, and many of the concepts we know today are based off these studies. See *Colavito v. New York Organ Donor Network*, 8 N.Y.3d 43, 50-51 (2006).

In an effort to address the organ shortage, the National Conference of Commissioners on Uniform State Laws introduced the Uniform Anatomical Gift Act (UAGA) in 1968. See

Anatomical Gift Act—Uniform Law Commission, *The National Conference of Commissioners on Uniform State Laws*, <https://organdonationalliance.org/resources/uaga/> (last visited Sept. 3, 2020). The intention behind UAGA was to encourage voluntarism while still respecting the right to the proper disposition of the remains of a person. The UAGA gives individuals of sound mind, over 18 years old, the right to donate all or any part of their body for any purpose specified within UAGA. If an individual does not express the desire to donate during their lifetime, family members may donate the organs posthumously, but only if they know it is consistent with the decedent's wishes. In 1987, UAGA was revised to include a prohibition of the purchase or sale of organs, an increased emphasis on the wishes of the deceased over the surviving family's rights, and immunity for medical professionals acting in good faith.

The UAGA was revised again in 2006, in another effort to help the shortage. See Revised Uniform Anatomical Gift Act (2006), *The National Conference of Commissioners on Uniform State Laws*, <https://www.donornetworkwest.org/>

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org/wp-content/uploads/uaga\_final\_aug09.pdf (last revised 2009). The 2006 revisions include the permission to use life support systems at or near death for the purpose of maximizing the procurement of suitable organs. However, this may collide with an advanced health care directive of the individual to withhold or withdraw life-saving systems at end of life. The 2006 revision addresses this by providing for presumed consent to life-saving systems for the sole purpose of procuring suitable organs, but only if the individual has opted-in to be a donor. A donor can explicitly deny these life-saving systems in their advanced health care directive, but they will only be denied by an explicit instruction. Some variation of the revised UAGA was adopted by all 50 states.

As every state adopted the UAGA, the shortage of organs continued to grow, whereby the federal government instituted the National Organ Transplant Act ("NOTA") in 1986. NOTA specifically covers the donation of living organs, and prohibits the purchase or sale of human organs if the transfer affects interstate commerce. NOTA provides a national registry for organ matching, known as the Organ Procurement and Transplantation Network, enabling easier matching for donors and donees. See "Organ Donation Legislation and Policy," Health Resources and Services Administration, <https://www.organdonor.gov/about-dot/laws.html> (last visited Sept. 3, 2020).

Although UAGA and NOTA taken together provide support for organ donation and transplants, there is

still a severe shortage. The reasons for this may include religious or cultural views about the body, and the reluctance to "desecrate the body." Many also distrust the medical community, and fear the unsupported idea that the medical community may not make any effort to save them or allow their organs to be taken prior to their death. Some may not even be aware of the ability to donate an organ while still living. Additionally, the shortage is now exacerbated by the current COVID-19 pandemic. Prior to the pandemic, approximately 750 living-kidney transplants were performed a week in the United States. In March 2020, this number declined to 350 a week and

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continues to decline. Organs that are infected with COVID-19 are not suitable for donation or transplant, therefore donors who may have been viable for donation may no longer be due to COVID-19 exposure. In addition, those who seek to transplant their living organs to another may refrain for fear of going to the hospital and contracting COVID-19. There are fewer hospital beds and fewer ventilators for surgeries.

There are viable solutions that may help the organ shortage, but in the face of the current COVID-19 pandemic, these solutions may still fall short. For example, the United States currently

runs under an opt-in system, where a person can only be designated as a donor if they "opt-in" to the system. The presumed consent model, which is utilized in Europe, presumes that everyone is a donor unless they "opt-out." This method provides a larger number of viable donors, and every single donor can save up to eight lives. However, "silence as consent" is contrary to basic American values and has yet to be adopted.

The organ shortage crisis has many advocates, and laws, which provide avenues for maximum exposure. However, the current state of the world, and the COVID-19 pandemic, do not provide any comfort to those waiting on the transplant lists. There is hope that the end of the current COVID-19 pandemic will signify the beginning of a renewed supply of viable donors.

—*Special thanks to Marie Puntillo, who provided research for this article. Ms. Puntillo is a student at St. John's University School of Law.*