

## TRUSTS AND ESTATES LAW

## Expert Analysis

# Balancing Competing Concerns: Law Of Organ Donation and Transplantation

In 1968, the National Conference of Commissioners on Uniform State Laws introduced the first uniform act dealing with anatomical donations—the Uniform Anatomical Gifts Act (UAGA). With minor variation, New York adopted its version of the UAGA in 1970 which, in its current form, is codified in the Public Health Law §§4300-4310 (the NYAGA).

As with any area of the law, litigation has flowed from the statute in an array of situations—many of which demonstrate the tension between the conflicting interests that the UAGA sought to balance. That is “[t]he UAGA was designed to provide a nationwide law to ‘encourage the making of anatomical gifts’ and ‘serve the needs of the several conflicting interests in a manner consistent with prevailing customs and desires in this country

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respecting dignified disposition of dead bodies.” *Colavito v. New York Organ Donor Network*, 8 N.Y.3d 43, 53 (2006) (citing, Prefatory Note to Uniform Anatomical Gift Act of 1968). Principal among these con-

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flicting interests are “the wishes of the deceased during his lifetime concerning the disposition of his body;...the desires of the surviving spouse or next of kin...[and] the need of society for bodies, tissues

and organs for medical education, research, therapy and transplantation.” *Id.*, at 54 (internal citations omitted).

Moreover, inasmuch as the NYAGA did not wholly supplant the common law in this area, courts have often had the difficult task of navigating between the statutory provisions and common law rights.

### The Common Law

The right to make and receive anatomical gifts naturally has some commonality with general principles of gifting, particularly donative intent and acceptance of the gift. But its true genesis is in the long-settled right of a person to determine the manner in which to dispose of his or her remains. *Stewart v. Schwartz Brothers-Jefferson Memorial Chapel*, 159 Misc.2d 884 (Sup 1993); *In re Kaufman’s Estate*, 158 N.Y.S.2d 376 (Sur. Ct. 1956); *In re Harlam*, 57 N.Y.S.2d 103 (Sup 1945). A correlative right is the common law right of sepulcher which

gives the next of kin a right “to the immediate possession of a decedent’s body for preservation and burial.” *Melfi v. Mount Sinai Hosp.*, 64 A.D.3d 26, 31 (1st Dept. 2009); see also *Mack v. Brown*, 82 A.D.3d 133 (2d Dept. 2011).

The Court of Appeals long ago established that these rights, while providing certain causes of action; e.g., for emotional distress relating to the desecration of a deceased next-of-kin’s remains, do not amount to property rights in the remains and organs of a deceased. *Darcy v. Presbyterian Hosp. in City of N.Y.*, 202 N.Y. 259 (1911); see also *Melfi v. Mount Sinai Hosp.*, 64 A.D.3d 26, 32 (1st Dept. 2009) (“The right [of sepulcher] itself “is less a quasi-property right and more the legal right of the surviving next of kin to find ‘solace and comfort’ in the ritual of burial.”)

### Highlights of the NYAGA

The NYAGA provides that persons of sound mind who have reached the age of 18 may give all or any part of his or her body, including organs. N.Y. Pub. H. L. §4301. A gift made under this statute is to take effect upon death of the donor. *Id.*

The gift may be made by several methods. Included among these is by a decedent’s will, in which case the gift becomes effective upon the death of the testator without having to wait for probate. If the will is not probated, or if it is declared invalid,

the gift is still valid so long as it has been acted upon in good faith. *Id.* at §4303(1).

A gift may also be made by a document other than a will, including a signed donor card, which is designed to be carried on one’s person. *Id.* at §4303(2).

Unlike inter vivos gifts of property, delivery of the document of an anatomical gift during the donor’s lifetime is not necessary to make the gift valid. *Id.* at §4304.

In addition to the donor making the gift, certain classes of persons, subject to an order of priority set forth in the statute, may give all or any part of a decedent’s body for any purposes specified by statute, unless such person has actual notice of contrary indications by the decedent, or if the person has reason to believe that anatomical gifts are contrary to the decedent’s religious or moral beliefs. *Id.* at §4301(2).

Whether made by the donor or another authorized person, an anatomical gift may be made either to a specific donee or without naming a specific donee. A gift made without naming a donee may be accepted by the attending physician following the death and utilized under such physician’s direction.

### ‘Colavito’

The Court of Appeals had occasion to analyze the interplay between common law rights and the balancing of interests engendered by the

NYAGA in *Colavito*, *supra*. There, the widow of a decedent named plaintiff the donee of decedent’s kidney (or kidneys). The plaintiff was decedent’s friend who was suffering from end-stage renal disease. As the kidney was being prepared for implantation, the surgeon discovered that the kidney was defective and not suitable for transplantation. The surgeon immediately contacted the organ transplant coordinator, defendant, New York Organ Donor Network (NYODN), requesting delivery of the decedent’s other kidney. However, by then, NYODN had already allocated decedent’s other kidney to someone else.

Plaintiff sued NYODN asserting, inter alia, a claim for conversion. Defendant proffered medical evidence showing that the decedent’s other kidney was also not suitable for transplantation to plaintiff, so he could not have benefited from it in any event. Plaintiff countered that incompatibility is irrelevant to his claim that defendants misappropriated an organ to which he alone was the donee.

The U.S. District Court granted summary judgment to NYODN. On appeal, the U.S. Court of Appeals for the Second Circuit determined that the legal issues necessary to address the causes of action raised novel questions of New York law, and thus certified to the New York Court of Appeals the following questions:

(1) Do the applicable provisions of the New York Public Health Law vest the intended recipient of a directed organ donation with rights that can be vindicated in a private party's lawsuit sounding in the common law tort of conversion or through a private right of action inferred from the New York Public Health Law? (2) Does New York Public Health Law immunize either negligent or grossly negligent misconduct? (Id. at 233.)

*Colavito*, 8 N.Y.3d at 49.

In addressing the first question, the court held that inasmuch as there is no common law property right in dead bodies, and a conversion claim is dependent on there being such a right, the specified donee of an incompatible kidney has no claim for conversion. Id. at 53. Moreover, the right of sepulcher was not applicable because plaintiff was not decedent's next of kin.

The court then went on to address the statutory arguments proffered by both sides. In particular, plaintiff and defendant both focused on the import of the good-faith immunity provision of the New York Act which states that "[a] person who acts in good faith in accord with the terms of this article or with the anatomical gift laws of another state is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his act." N.Y. Pub. H.L. §4306(3).

Plaintiff argued that his claim arose under section 4351 of the NYAGA, which provides that "any person or organization acting pursuant to this section shall be legally responsible for any negligent or intentional act or omission committed by such entity or its employees or agents." He asserted that the good-faith "immunity" provision, when read in conjunction with section 4351 is indeed

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not "a qualified immunity, requiring dismissal unless plaintiff can prove bad faith, but merely an affirmative defense, as to which defendants have the burden of proof." *Colavito*, 8 N.Y.3d at 56.

Noting that the foregoing apparent conflicting language in the statute is "vexing," the court did not deem it necessary to determine the issue as to whether the good-faith provision provides a qualified immunity or affirmative defense. Instead, the court based its decision on another section of the statute; "[w]e rest our answer...on section 4302(4), which provides that a qualified donor may make a gift to any specified donee 'for therapy or transplantation *needed by him* (emphasis added)...'" Id., at 57.

Consequently, the court held that "[u]nder the statutory scheme, gifts of a deceased donor are conditioned upon medical benefit to the intended recipient." As such, the court found that although plaintiff was a specified donee, he could not derive a medical benefit from either of the kidneys. Thus, he had no private right of action against the defendant under the NYAGA. Id.

Although the court in *Colavito* declined to specifically decide the issue as to whether the good-faith provision constitutes a qualified immunity or merely an affirmative defense (because it was not relevant to that case), it did effectively refer to the provision as an immunity when the court noted that "the *immunization* was intended to help increase the organ supply by encouraging medical professionals to participate in the organ procurement process" *Colavito*, 8 N.Y.3d at 55 (citing *People v. Bonilla*, 95 A.D.2d 396, 404-405 [2d Dept. 1983]) (emphasis added). Moreover, this stated intent would seem to weigh in favor of there being a qualified immunity if it was really meant to encourage medical professionals from participating in the organ donation process.

### Filling Gaps Post-'Colavito'

While the Court of Appeals has not answered the question about the scope of the act's good-faith provision conclusively, a decision

rendered in April of this year from the U.S. District Court for the Western District of New York directly addressed the issue. Discussing what it termed the UAGA's "good-faith immunity provision," the court in *Kennedy-McInnis v. Biomedical Tissue Services*,—F.Supp.3d—2016 WL 1445553 (WDNY 2016) held that the "provision clearly bars all the claims asserted in this suit; the statute does not simply bar suits under the Act itself, but provides complete immunity 'for damages in any civil action' within its scope. (Emphasis added.) See *Rahman v. Mayo Clinic*, 578 N.W.2d 802, 805 (Minn.App. 1998) (UAGA's good-faith provision 'provides immunity from suit, not simply a defense to liability')." Id., at \*7. Thus, at least one court has conclusively held that the good-faith provision is a qualified immunity.

Another unanswered question left by *Colavito* concerns the scope of the right of sepulcher. The Court of Appeals in *Colavito* discussed the right of sepulcher, but only to distinguish it from an ownership right. It did not address whether the right of sepulcher extends to organs removed from a body. That specific issue arose in 2015 when the Court of Appeals was asked to determine whether a medical examiner is liable for violating a next-of-kin's right of sepulcher by retaining one or more organs and/or tissues for further examination as part of

an authorized autopsy although a decedent's body is available for burial.

The court's answer was a resounding no. It held that "[b]ecause the right of sepulcher is premised on the next of kin's right to possess the body for preservation and burial... and is geared toward affording the next of kin solace and comfort in the ritual of burying or otherwise properly disposing of the body, it is the act of depriving the next of kin of the body, and not the deprivation of organ or tissue samples within the body, that constitutes a violation of the right of sepulcher." *Shipley v. City of New York*, 25 N.Y.3d 645, 653 (2015). However, the court made clear that "a cause of action for violation of the right of sepulcher will lie where there has been an 'unauthorized autopsy' which the courts of this state consider an 'unlawful mutilation.'" Id., at 654 (internal citations omitted).

Taken together, we can conclude from the foregoing cases that if an organ or body part is taken from a deceased in good faith to make an anatomical gift pursuant to the NYAGA, the medical provider, organ donation coordinator and donee will all be shielded from liability under the statute. Moreover, there will be no common law cause of action for conversion because there is no property right in the organ; and inasmuch as the "mutilation" was authorized by the statute, so long as the body is

not withheld, there will be no viable claim for a violation for the right of sepulcher.

*Colavito* and its progeny illustrate just a few examples of the disputes that arise from organ donation and transplantation. To be sure, there is no dearth of cases addressing other issues and other laws not covered in this article. See, e.g., *Melfi v. Mount Sinai Hosp.*, 64 A.D.3d 26 (1st Dept. 2009) (dealing with the procedural requirements to assert a claim against a governmental agency in conjunction with the accrual of a right of sepulcher claim) and *Kelly v. New York Organ Donor Network*, 950 N.Y.S.2d 723 (Sup Ct New York Co, 2012) (where a negligence claim was asserted against the donor coordinator for the implantation of a diseased organ). By and large however, these cases would seem to arrive at results that represent a fair balancing of the societal concerns and private rights that the UAGA was intended to achieve.