



# Louisiana's Legislative Framework for Organ Donation and Right to Die Issues

By Judge William J. Knight

**T**his article addresses the current state of the law in Louisiana in relation to organ donor statutes, advance directives and the definition of death. Public policy issues surrounding these delicate topics are outside the scope of this article.

A review of the statutory framework regarding these subjects leaves the distinct impression that while the individual acts are well thought out and written, they would benefit from coordination to resolve some conflicts and gaps between the statutes. The interested reader is directed to the applicable cited statutes, the text of which has been omitted for the sake of brevity.

## Background

There is a tremendous shortage of suitable tissues and organs available on the national and local scenes for use in organ transplants and other medical procedures requiring the harvesting of human tissue and/or body parts. The issues of allocation and rationing of resources raised by this crisis are both fascinating and potentially explosive, and provoke strong sentiments. For an excellent discussion of this problem, and other information on organ transplant issues, see Barry F. Furrow, Thomas L.

Greaney, Sandra H. Johnson, Timothy S. Jost and Robert L. Schwartz, *Health Law Cases, Materials and Problems*, Fifth Edition (2004). The National Organ Transplant Act (NOTA) requires that the Department of Health and Human Services (HHS) establish an Organ Procurement Transplant Network (OPTN). This network is managed by a private, non-profit organization, UNOS (United Network for Organ Sharing). Louisiana has its own organ procurement agency, the Louisiana Organ Procurement Agency (LOPA). LOPA maintains a Web site ([www.yourlegacy.org](http://www.yourlegacy.org)) that gives general information concerning organ donation and allows online access to necessary legal documents to effectuate an organ donation.

The relatively limited knowledge of the American public, together with a relatively unsuccessful attempt to promote organ and tissue donation, has created a crisis in this arena. While most Americans are generally aware of organ transplants, many individuals are not aware of the value of other body tissue, including ligaments, corneas, skin and even bone. The value of these tissues has, however, been recognized by some individuals who have participated in the illegal harvest of body parts from funeral homes. *See, e.g.*, "Body Parts Scandal," Associated Press, Tom Hayes, Houston Chronicle, Jan. 24, 2006. This lack of public knowledge is surprising, given the time that transplant procedures have been taking place. For an interesting review of some statistics about transplant history and procedures in general, and within Louisiana in particular, see [www.yourlegacy.org](http://www.yourlegacy.org).

One thorny issue, from an ethical perspective, has been the rationing of these scarce resources. According to the UNOS Web site, [www.unos.org](http://www.unos.org), as of Jan. 6, 2006, there were 90,728 individuals in the United States awaiting a transplant. This figure contrasts sharply with the number of willing donors, that, as of Jan. 6, 2006, was 12,084. Heated ethical debates have arisen as a result of this extreme shortage about how these scarce resources should be rationed. See *Health Law Cases, Materials and Problems*,

*supra*. One method supported in the literature on the subject is preference in receipt of organs based upon willingness to become an organ donor. The leading organization in the United States promoting this methodology is LifeSharers ([www.lifesharers.org](http://www.lifesharers.org)), whose mission statement provides: "Members agree to donate their organs when they die. They also agree to offer them first to fellow members. This creates an incentive for others to donate their organs and join LifeSharers."

Louisiana is beginning to confront the legal issues and problems of finite resources but high demand. La. R.S. 17:2353 provides that any organ procured in Louisiana will first be offered to a Louisiana resident. Several areas of Louisiana's statutory scheme directly or indirectly affect the questions of when and from whom organs can be obtained, what liability may attach to the medical professionals involved, what authority a person or that person's family may have to allow or object to the use of particular organs, and many other issues.

### The Statutory Scheme

Louisiana has chosen to make organ donation a favored practice under its legislative schematic. Four Titles of the Louisiana Revised Statutes deal with organ donation:

- ▶ the Anatomical Gift Act, La. R.S. 17:2351 *et seq.*;
- ▶ the Louisiana Natural Death Act, La. R.S. 40:1299.58.1 *et seq.*;
- ▶ the Motor Vehicle Regulatory Act, La. R.S. 32:410, *et seq.*; and
- ▶ the definition of death, La. R.S. 9:111.

### Motor Vehicle Regulatory Act

Most citizens' first exposure to this subject may well come during their driver's license application. Title 32 Motor Vehicles and Traffic Regulation § 410 is a lengthy statute that deals with driver's license applications and the availability to indicate one's desire to be an organ donor. The Legislature attempted to make it relatively simple to become an organ donor and be registered as such on



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the state registry. Unfortunately, however, a review of the more detailed provisions in Title 17 becomes necessary in order to determine the actual mechanics of executing a valid donation of one's organs at the time of death.

It is noteworthy that R.S. 32:410B(1)(a) specifically uses the disjunctive when referring to the methods available for the donation of organs, and refers to usage of the methodology set out by the Anatomical Gift Act, R.S. 17:2351, *et seq.*, but does not provide any additional method for donating organs in Title 32. The reasonable conclusion then is that the only effective method of donation of organs is as set out in the Anatomical Gift Act. Also, the Legislature specifically references R.S. 40:1299.58.1 *et seq.* relative to advanced directives regarding life-sustaining procedures. Unfortunately, these statutes do not always agree.

#### **Anatomical Gift Act**

The Anatomical Gift Act provides for making a gift of body parts in La. R.S. 17:2354 through a valid will or through a stand-alone document executed by the donor in the presence of two witnesses. It specifies that any gift made becomes effective at the death of the donor, La. R.S. 17:2352. The act allows donation of a particular organ or organs to a specific person, hospital or physician, to an organ procurement organization, or to anyone listed on the organ transplant list, La. R.S. 17:2353. It gives broad personal discretion should the donor wish to specify a recipient.

The act further specifies that organs harvested in Louisiana are to be utilized for Louisiana recipients on a preferential basis, La. R.S. 17:2353. This is in contrast to the national rationing process that provides for distribution anywhere in the nation, based on a needs priority formula. This act also provides for immunity to physicians and other health care providers participating in the organ procurement process, La. R.S. 17:2357.

The Anatomical Gift Act also allows the decision to donate to be made by certain exclusive classes of persons, listed

in an order of preference, after the death of the individual. The first class of persons listed has the right to make the decision to donate or not, to the exclusion of all lower classes. La. R.S. 17:2354.4 provides in pertinent part:

- H. The following persons shall be requested to consent to a gift, in the order of priority stated:
  - (1) The spouse if one survives; if not,
  - (2) An adult son or daughter,
  - (3) Either parent,
  - (4) An adult brother or sister,
  - (5) The curator or tutor of the person of the decedent at the time of his death,
  - (6) Any other person authorized or under obligation to dispose of his body.
  
- I. When a donation is requested, consent or refusal need only be obtained from the person in the highest priority class available after best efforts have been exercised to contact those persons in a higher priority class. If there is more than one person within an above named class, then the consent to the donation shall be made by all members of that class reasonably available for consultation.

This classification sets the stage for a conflict between the Anatomical Gift Act and the Louisiana Natural Death Act.

#### **Definitions of Death**

Since organs and other body parts and tissue can only be harvested upon the death of the donor, it becomes critical to determine when death occurs. Death is defined in La. R.S. 9:111, and the Legislature has adopted a bifurcated test for determining the time of death. Obviously, in the event of "heart-lung" death, in the absence of medical intervention, the brain is soon to follow, simply because of the lack of oxygen. If artificial means of support have been utilized, the statute

contemplates a declaration of death based upon an “irreversible total cessation of brain function.” This necessarily means that death is pronounced only upon cessation of function of the whole brain. This becomes a critical issue in the cases of “higher brain death” which involves loss of cerebral function, with continued brain stem function, thereby allowing the patient to have the capacity to breathe, maintain heart activity and react reflexively. However, that same individual would have no cognitive ability.

Since the Louisiana Legislature adopted the two-pronged test, there can be no question definitionally, since a person breathing on his own, even if he had experienced higher brain death, would not be dead under the act’s definition. Also, when the person’s organs are to be used in a transplant, “then an additional physician, . . . not a member of the transplant team, must make the pronouncement of death.”

### Louisiana Natural Death Act

The careful medical practitioner, by a reading of these statutes, can now conclude that if a person has executed an anatomical gift document, either through a valid will or a stand-alone document, that person’s organs and other tissues intended for donation are available for harvesting. However, several problems exist for the practitioner: first, who determines whether the will is valid; second, without access to the stand-alone document, how is the health care professional to know which organs or tissues are available for harvest; and, finally, in the event the patient has been placed on life support systems, who has the authority to make the decision to remove those systems. The need for statutory immunity is readily apparent.

An examination of the definition of death reveals that removal of an individual from life support is certainly contemplated by the statutes. The actual mechanism for making this decision is found in the Louisiana Natural Death Act, La. R.S. 40:1299.58.1, *et seq.* This act allows a competent individual to authorize the withholding or withdrawing

### Anatomical Gift Act

1. Surviving spouse
2. Adult son or daughter
3. *Either* parent
4. *Adult* brother or sister
5. Curator or Tutor
6. Persons authorized or obligated to dispose of body

### National Death Act

1. Designated person(s)
2. Tutor or Curator
3. Spouse not judicially separated
4. An adult child
5. The *parents*
6. Sibling
7. Other ascendant, or descendants

of life-sustaining procedures if that person has been properly informed, under the normal standards of informed consent. The statute also makes clear that action under this statute will not be construed to be euthanasia and will not be considered suicide. La. R.S. 40:1299.58.10. This is significant in view of Louisiana Constitutional Article 1, section 20, which states in pertinent part that, “no law shall subject any person to euthanasia, . . . .” The key provision of the act that allows it to pass muster in light of this provision is that the act does not allow a third person to deny treatment for a patient which would reverse that patient’s condition, (La. R.S. 40:1299.58.2(8) defining “terminal condition”), but instead allows the withholding of “extraordinary” treatment which would only delay the imminent death process. For an interesting discussion of this issue, see “Louisiana’s Natural Death Act and Dilemmas in Medical Ethics,” Michael Vitello, 46 La. L. Rev. 259 (1985). The distinction seems to be between some active intervention to bring about death quicker versus a refusal to treat the patient so that the patient can naturally die. Most commentators now feel there is little, if any, ethical distinction between withholding aid versus some active intervention. See, *Health Law Cases, Materials and Problems, supra.*

The Natural Death Act, similar to the Anatomical Gift Act, in connection with the donation of organs, provides a method for obtaining consent to withdraw or withhold life-sustaining measures. The decision is made by an individual or class specified by the act and is reserved to the highest class of decision makers avail-

able. The Natural Death Act, in La. R.S. 40:1299.58.5 (2) and (3), designates the classes of persons who “have the authority to make a declaration for the patient in the event of the patient’s inability to do so.”

When comparing the classes created under the Natural Death Act and the Anatomical Gift Act, several key differences are noted (*see chart above*).

The first major difference is that the judicially appointed tutor or curator occupies a very high rank in the National Death Act, second only to a person previously designated by the patient, while the tutor or curator is near the bottom of the class structure under the Anatomical Gift Act.

The second difference deals with the Anatomical Gift Act’s referral to the surviving spouse, as opposed to the National Death Act’s referral to the “patient’s spouse not judicially separated.” It remains to be determined how this will be interpreted in view of the change in divorce laws and procedures. Is a person who has filed a Civ.C. Art. 102 divorce action “judicially separated” under this provision?

Only one parent’s consent is needed to harvest organs, but both parents’ consent is needed to withhold or withdraw life-sustaining measures. An adult brother or sister occupies the next class under the Anatomical Gift Act, while a “sibling” qualifies under the National Death Act. Does sibling include half, step and adoptive siblings; does it include minors since it does not specify adult as does the designation in the Anatomical Gift Act?

Both acts have “good faith attempt” provisions that may obviate many of these

questions as a practical matter. As a matter of legislative structure, it would seem to be preferable to adopt totally consistent approaches to consent under both these acts unless there is a clearly stated legislative purpose for granting this authority in a different order to somewhat different classes.

## Jurisprudence

Litigation in Louisiana has been relatively sparse, but there will be controversies to be decided by the court under these various legislative schemes. One question that has arisen under the Natural Death Act is whether a particular action is a "life-sustaining procedure" or "comfort care." See, e.g., *Pettis v. Smith*, 880 So.2d 145 (La. App. 2 Cir. 8/13/04), *writ denied, stay denied*, 882 So.2d 551 (La. 8/18/04), holding that artificial nutrition and hydration did constitute life-sustaining procedures, and not comfort care, and therefore the decedent's living will constituted an informed consent for the withdrawal of same.

Another interesting case is *Perrier v. Bistes*, 650 So.2d 786 (La. App. 4 Cir. 1995). In that case, the decedent's husband, in keeping with the exclusive class of decision makers under the statute, made the decision to allow the physician to withdraw life support. The decedent had not executed a living will declaration or other permitted advance directive. After the decedent then died, the

decedent's adult children filed suit against their father and the hospital, alleging a cause of action for violation of the Louisiana Natural Death Law. The court dismissed their lawsuit on an exception of no right of action since the plaintiffs were not the legal representatives of the decedent under the statute.

The court in *Causey v. St. Francis Medical Center*, 719 So.2d 1072 (La. App. 2 Cir. 1998), recognized the right of the next of kin under La. R.S. 40:1299.58.5 to make withdrawal of life support decisions, but found, "The Court as the protector of incompetents, however, can override an intolerable choice by a surrogate decision-maker," citing *In re P.V.W.*, 424 So.2d 1015 (La. 1982). This reliance was interesting since the *In re P.V.W.* case was decided before the enactment of the Louisiana Natural Death Act and was decided on the constitutional principles of the right to privacy of the individual as weighed against the state's legitimate public interest in the protection of life. See, e.g., *In matter of Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976).

An issue that has not been dealt with through any reported decision is how a physician would obtain authority to withdraw life-sustaining measures if there has been a declaration under Title 32 and/or Title 17, but there is no advance directive under Title 40, and an incompetent's representative under La. R.S. 40:1299.58.5 refuses to grant authority to withdraw life-sustaining mea-

asures. Will there be liability for a physician's unilateral decision to withdraw those measures? Will our courts face a case like *Quinlan*? Will the immunity provisions of the organ donor statute under Title 17 or Title 32 shield the physician? These and many other questions, if not dealt with by the Legislature, will in due course be presented to our courts.

## Conclusion

While there is little doubt that there will be many difficult questions presented to our courts for resolution in this fascinating area of the law, and while there is little question that these will be controversial questions in light of the religious, ethical, moral and personal issues which are raised, the Louisiana Legislature has done a good job of providing a framework within which to make those decisions. The worthwhile objectives of providing healthy organs and tissue for transplant to others, allowing individuals the autonomy to make end-of-life decisions, and of providing a logical methodology by which these objectives can be carried out has been largely achieved. One could say that now is a great time to live, or perhaps even a great time to die.



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