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January 7, 2003

Mr. Marion Borowiecki
Chief Executive Officer
Transplant Resource Center of Maryland
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Dear Mr. Borowiecki:

At the request of the Transplant Resource Center, I am writing to address the legal status of an organ donor designation on a Maryland driver's license. In my view, the designation serves as legally sufficient consent for organ or tissue donation. Assuming that death has been properly determined, an organ recovery agency or hospital may take clinically appropriate steps to recover an organ in reliance on the driver's license designation.¹

I

Analysis

In §12-303(a) of the Transportation Article ("TR"), a part of the Maryland Vehicle Law, the General Assembly instructed the Motor Vehicle Administration to "provide for a method by which an applicant for a driver's license or identification card can designate that the applicant consents to the gift of all body organs or parts for the purposes of transplantation, therapy, or medical research and education." If someone decides to make

¹ This letter concurs with the conclusion in an advice of counsel letter to the Transplant Resource Center from Thomas V. Monahan, Jr., Esquire, dated October 23, 2002.

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this designation – that is, to “consent” to be an organ donor – the notation to this effect on the individual’s driver’s license “is sufficient legal authority for the removal of a body organ or part on the death of the donor.” TR §12-303(c)(1). In addition, the Vehicle Law provision specifies that, “Notwithstanding any other provision of law, the donor designation noted on the driver’s license ... is valid and effective for all purposes under Title 4, Subtitle 5 of the Estates and Trusts Article, including the immunity from civil or criminal liability set forth in §4-508(b) of the Estates and Trusts Article.” TR §12-303(d).

Title 4, Subtitle 5 of the Estates and Trusts Article is the Maryland Anatomical Gift Act. This statute provides a variety of means by which an adult “may give all or any part of his body for any one or more of the purposes specified in [the Anatomical Gift Act],” including transplantation. §4-503(a) of the Estates and Trusts Article (“ET”). A designation on a driver’s license is one such means. ET §4-505(c). When an anatomical gift has been made without the donor’s naming a donee, as would be the case with a driver’s license designation, “the gift of an organ for transplantation may be accepted by an organ procurement organization and utilized in accordance with federal and State policies regarding organ allocation.” ET §4-505(d). *See also* ET §§4-504(b)(1) and (f) (authority for hospitals, physicians, and organ procurement organizations to receive an anatomical gift for, among other purposes, transplantation) and 4-508(b) (immunity from liability for organ removal in good-faith reliance on authorization under Anatomical Gift Act).

Neither the Vehicle Law provision nor the Anatomical Gift Act requires that, once an individual has consented to be an organ donor by means of a designation on the driver’s license, a donor’s next of kin must also consent as a prerequisite to the use of an organ for transplantation. To be sure, ET §4-509, dealing with the provision of organs for transplant from bodies in the charge of the Office of the Chief Medical Examiner, implies that next of kin have a role in decision making about organ donation. That is, one prerequisite for the provision of an organ by the medical examiner is that “[n]o objection by the next of kin is known” ET §4-509(a)(3). Moreover, the immunity provision in this section, ET §4-509(b), recognizes the possibility that next of kin who arrives after the transplant might contend “that authorization of that kin was required” Nonetheless, this language, limited in any event to medical examiner cases, appears to be addressing access to organs for transplant under circumstances where the decedent had *not* made a gift. In the absence of a gift, the consent of the next of kin would ordinarily be sought, as this provision recognizes.

If there were any lingering doubt about the legal sufficiency of donor consent alone, yet another statute resolves the matter definitively. This statute, §19-310 of the Health-

General Article (“HG”), generally describes the procedures to be carried out in a hospital when an organ donation is sought. When HG §19-310 was originally enacted in 1986, it provided that, when someone died in a hospital, a representative of the hospital was to “request, with sensitivity, ... that the individual’s representative consent to the donation of all or any of the decedent’s organs or tissues as an anatomical donation if suitable.”² Obviously, the decedent’s representative could grant or deny the request.

The 1986 “required request” statute was not altogether clear about the effect of a prior decision by the decedent to be an organ donor. The original statute merely stated that the requirement for the hospital to ask the decedent’s representative about an anatomical gift did not apply if the decedent’s driver’s license contained an organ donor designation. This former language, which did not mention other means of making an anatomical gift, might have left some doubt about the exact relationship between the decedent’s prior consent to organ donation and the authority of next of kin to prevent the donation.

In Chapter 1 of the Laws of Maryland 1998, the General Assembly amended the provision on required request, now HG §19-310(d)(1), to include an explicit exception related to all types of anatomical gifts by the decedent. The current language is as follows:

Except as provided in subsection (j) of this section, when an individual dies in a hospital in accordance with §5-202 of this article [specifying the criteria for death], a representative of the appropriate organ, tissue, or eye recovery agency or a designated requester [certain hospital employees] shall request, with sensitivity, in the order of stated priority, that the individual’s representative consent to the donation of all or any of the decedent’s organs or tissues if an anatomical donation is suitable.

The exception “provided in subsection (j)” is now phrased as follows (with emphasis added):

The consent of the decedent’s representative is not necessary
and the provisions of subsection (d) of this section do not apply
if:

² The priority listing for service as “the individual’s representative” is set forth in HG §19-310(d)(2).

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(1) The decedent's drivers' license or identification card contains a notation that the decedent is an organ donor; or

(2) The decedent has consented to the gift of all or any part of the decedent's body in accordance with the provisions of:

(i) §5-604.1 of this article; or

(ii) Title 4, Subtitle 5 of the Estates and Trusts Article.

II

Conclusion

In my view, those involved in the process of obtaining an organ for transplant need not obtain consent from the decedent's representative if the decedent consented to be an organ donor via designation on the driver's license or other means recognized by law and the donor's death is properly determined under HG §5-202. Of course, the fact that, under the circumstances, consent from next of kin is unnecessary does not imply that family members should be excluded from discussions about organ donation. Family endorsement of the donation may be a constructive part of their coming to terms with the death of a loved one. These considerations, however, are left to the skill and discretion of the organ recovery agency and hospital personnel and are not an aspect of legal consent for the use of the organ.

I hope that this letter of advice, although not to be cited as an opinion of the Attorney General, is fully responsive to your inquiry. Please let me know if I may be of further assistance.

Very truly yours,

Jack Schwartz
Assistant Attorney General
Director, Health Policy Development

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cc: Brian H. Childs, PhD
Thomas V. Monahan, Jr., Esquire