

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 530

SPONSOR: Senator Smith

SUBJECT: Anatomical Gifts

DATE: March 5, 2003 REVISED: 03/10/03 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Harkey</u>	<u>Wilson</u>	<u>HC</u>	<u>Favorable</u>
2.	<u>Matthews</u>	<u>Roberts</u>	<u>JU</u>	<u>Fav/2 amendments</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill creates the “Nick Oelrich Gift of Life Act.” The bill revises Part V of chapter 765, F.S., which governs anatomical gifts, as follows:

- Prohibits a family member, guardian, representative ad litem, or health care surrogate from modifying, denying or preventing a decedent’s prior wish to donate his or her organs;
- Specifies that a written donor document is legally sufficient evidence of informed consent and is legally binding;
- Authorizes a decedent’s medical provider or family member or other third party to furnish upon request information regarding the decedent’s medical and social history;
- Eliminates the option of amending or revoking an anatomical gift through an oral statement made to a spouse;
- Prohibits a spouse from being one of the two witnesses to an oral amendment or revocation of a written document making an anatomical gift;
- Eliminates the validity of a signed document amending or revoking a donor’s anatomical gift if the document is found in his or her effects in lieu of on or about his or her person.

This bill amends ss. 765.512 and 756.516, F.S.

II. Present Situation:

In an effort to encourage organ and tissue donation, the 1969 Legislature enacted legislation modeled after the national Uniform Anatomical Gift Act. Part V of ch. 765, F.S., establishes the

process by which individuals, their families, or others may donate organs and tissue.¹ One of the underlying expressions of legislative intent is to encourage and aid the development of reconstructive medicine and surgery and the development of medical research by regulating the gift of the body, or parts of the body, after the death of a donor.

Any person able to make a will may donate all or part of his or her body for the purpose of transplantation or for medical research.² An adult donor's anatomical gift unless revoked by the donor is irrevocable. The consent or concurrence of another person prior to the procurement of the organ or tissue is not required. However, it is common practice for those entities procuring organs or tissues to acquiesce to the wishes of the family or guardian even it modifies or overrides a decedent's expressed wish to make an anatomical gift. Reportedly, out of compassion and respect for the donor's family/guardian at a very stressful or emotional time, and out of concern for public perception and potential legal ramifications, organ procurement organizations are reluctant to procure organs without that concurrence or additional consent from the family member or guardian.

In the absence of a written document to make an anatomical gift, and provided there is no evidence to the contrary of the deceased donor's wishes, any family member from the specified classes of relatives or persons may make an anatomical gift of a decedent's body or part thereof, unless there is opposition from a member of the same or higher specified class of relatives. Persons who may donate all or part of a decedent's body include the spouse, an adult son or daughter, either parent, an adult brother or sister, a grandparent, the guardian of the person at the time of death, or a representative ad litem appointed by the court.

A person may make an anatomical gift by a will or another signed document including a designation made during the application or renewal for a state-issued driver's license. If the donation is included within the donor's will, the donation becomes effective upon the donor's death without waiting for probate. The document must be executed in the presence of two witnesses.³

A person may actually specify a hospital, a physician, a school, facility or even an individual as a donee of an anatomical gift.⁴ However, the law prohibits restrictions on possible recipients if based on race, color, religion, sex, national origin, age, physical handicap, health status, marital status, or economic status. A person may also designate the surgeon or physician to carry out his or her donation wish but that physician or surgeon who serves as the recipient of the donation cannot participate in the actual removal or transplantation process.

An amendment or revocation of an anatomical gift can be made through: 1) A signed statement delivered to the donee; 2) An oral statement to his or her spouse; 3) An oral statement in the presence of two persons and communicated to the donor's family or attorney or to the donee; 4)

¹ Organs encompass the heart, lung, liver, kidney, pancreas, and intestine. Tissue refers to cornea, bone, cartilage, skin, heart valves, and saphenous vein.

² s. 765.512, F.S.

³ s. 765.514, F.S.

⁴ See s. 765.513, F.S., for the comprehensive list of donees: 1) hospital, surgeon, or physician for medical or dental education, research, therapy or transplantation, 2) medical or dental school, college or university, 3) bank or storage facility for medical or dental science, therapy, or transplantation, or 4) specified individual.

An oral statement to the attending physician during the person's terminal illness or injury; or 5) A signed document found on the donor's person or in the donor's effects.⁵

The Agency for Health Care Administration (AHCA) oversees the organ procurement program in Florida. AHCA certifies procurement organizations⁶ to conduct business in Florida, provides donor education, and maintains an organ and tissue donor registry in cooperation with the Department of Highway Safety and Motor Vehicles (DHSMV). AHCA provides DHSMV with the donor registration forms. DHSMV provides a weekly electronic transfer of these executed forms to AHCA for the registry. These forms are paid for from the Organ and Tissue Donor Education and Procurement Trust Fund. Moneys deposited into the trust fund must be used exclusively for the implementation, administration, and operation of the certification program and the advisory board, for maintaining the organ and tissue donor registry, and for organ and tissue donor education.

Nick Oelrich was the son of Alachua County Sheriff Stephen Oelrich. He was a high school football player and an avid golfer. In 1995, Sheriff Oelrich's 18-year old son died shortly after his graduation from Gainesville High School as a result of a fatal fall. Apparently, 108 people benefited from the donation of the son's organs and tissues. As a result of his experience, Sheriff Oelrich proposed the formation of the Gift of Life Foundation to the National Sheriffs' Association (NSA) in March 1997. The NSA voted to establish the NSA Gift of Life Foundation for the purpose of promoting organ and tissue donation awareness on national, regional, and local levels. The NSA Gift of Life Committee was established with the goal of enlisting the assistance of every Sheriff's Office in the United States in educating the law enforcement community and our society on the importance of giving the gift of life. Sheriff Oelrich serves as the NSA's national spokesperson for organ and tissue donation, as well as chairman of the Gift of Life Foundation.⁷

III. Effect of Proposed Changes:

The bill creates the "Nick Oelrich Gift of Life Act" in honor of Alachua County Sheriff Stephen M. Oelrich's deceased son. The bill amends chapter 765, F.S., to revise procedures relating to anatomical gifts. Amendments to s. 765.512, F.S., prohibit a family member, guardian, representative ad litem, or health care surrogate from modifying "a decedent's wishes" or denying or preventing an anatomical gift from being made. In the absence of contrary indications by the decedent, the organ donation document would be a legally sufficient document of informed consent and would be legally binding. The bill adds an authorization for informational requests concerning the decedent's medical and social history to be directed to the decedent's

⁵ s. 765.516, F.S.

⁶ Fifty-nine organ procurement organizations (OPOs) across the United States identify donors and coordinate organ retrieval by surgical teams. OPOs and tissue banks recover, preserve, and distribute organs and tissues for transplant. Each OPO has a geographic region within which it serves hospitals where potential donors have been identified. Procurement and Transplantation Network, under a government contract, establishes allocation policy based on input from transplant professionals, patients, donor groups, and the public. Ultimately, these policies determine, for any given donor, which waiting patient has the highest priority. See websites on Uniform Network of Organ Sharing <<http://www.unos.org>> and U.S. Department of Health and Human Services, Health Resources and Services Administration <<http://www.hrsa.gov>>.

⁷ See website for the Gift of Life Foundation at <<http://www.nsagiftoflife.org>>

family member or medical provider, or to third parties when a decedent's body or part thereof is donated.

The bill amends s. 765.516, F.S., relating to the ways to revoke or amend an anatomical gift. A donor may no longer amend or revoke an anatomical gift by making an oral statement to his or her spouse. Additionally, a spouse can not be one of the two persons to whom an oral amendment or revocation can be made regarding an anatomical gift. The bill also deletes the acceptability of a signed amendment or revocation found in the donor's effects versus on or about a person's body.

The bill takes effect July 1, 2003.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Constitutional Issues:

This bill appears to create a presumption that a document making an anatomical gift is "legally binding" and will constitute evidence of "a legally sufficient informed consent." Under current law, a minimum amount of information is provided when a person executes a uniform donor card or registration pursuant to a driver's license or other DHSMV-issued identification card. A person is asked to indicate consent and to specify among three options regarding the scope of the donation. The default is "any needed organ or tissue." Other than public awareness and education campaign and the two-witness requirement for proper execution of a designation, there are no other established statutory legal standards for the minimum amount of information necessary to qualify someone's decision as one of "informed consent." Presumptions which are judicially or legislatively created and arise from considerations of fairness, public policy, and probability are used to allocate the burden of proof. *See Owens v. Public Supermarkets, Inc.*, 802 so.2d 315 (Fla. 2001). However, conclusive presumptions are found to be unconstitutional because they violate due process if they fail to afford an opportunity to rebut the presumption in a fair manner. *See Straughn v. K & K Land Management, Inc.*, 326 so.2d 421 (Fla. 1976); *Chandler v. Dept. of Health and Rehabilitative Services*, 593

So.2d 1183 (Fla. 1st DCA 1992). There also must be a rational connection between the fact proved and the ultimate fact presumed.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may facilitate greater participation by those willing to execute pre-death organ and tissue donor designations. As of March 4, 2003, there were nationally 80,559 candidates waiting for organ transplants. There were 24,792 transplants and 12,741 donors between January and December 2002. *See* United Network for Organ Sharing. < <http://www.unos.org>>. According to Florida organ procurement organizations in Florida⁸, there were approximately 2,900 persons last year waiting for a transplant for which there were 340 organ donors. As of March 2003, 3.4 million of the 16 million active Florida driver's licensees carry an organ donor notation.

The top 3 OPOs of the state which consistently rank in the top 10 of the nation report that less than 1% of family members or other authorized persons modify, prevent or deny a donor's validly executed organ and tissue designation. However, the bill makes it much clearer that concurring or additional consent is not required to effectuate an anatomical gift. It will be more difficult for family members and other specified individuals to modify, override or otherwise challenge the validity of a written designation of an anatomical gift.

C. Government Sector Impact:

AHCA does not anticipate any costs associated with this bill.

VI. Technical Deficiencies:

On page 1, lines 27-30, the bill speaks in terms of modifying "a decedent's wishes", or denying or preventing an anatomical gift from being made. It is suggested that this subsection be rewritten to reflect that under subsection (2), it is a person's "wish or intent" to make an anatomical gift. That wish or intent is evidenced by signing an organ and tissue donor card, by expressing his or her "wish" in a will or advance health care directive or other written form, or by expressing his or her "intent" through a designation on a driver's license. It is under these circumstances that a donor's wish or intent to make an anatomical gift should presumably not be modified, denied or prevented. [Amendment prepared]

⁸ LifeLink Foundation, LifeQuest, and TransLife. "[B]etween 1995 and 2000, the number of patients awaiting a transplant grew by 80 percent, while the number of donors grew by only 12 percent." Source: Department of Health and Human Services, Office of Inspector General, Organ Donor Registries: A Useful, but Limited, Tool, Feb. 2002, Report OEI-01-01-00350."

VII. Related Issues:

- The bill's elimination of the spouse as a solo witness or even as one of two witnesses to an oral statement of revocation or amendment by a donor regarding an anatomical gift may limit the opportunities for the donor to express his or her revocation of an anatomical gift. Anecdotally, a donor is most likely to confer with a spouse or other close family member regarding this decision and most particularly in medical emergency situations where he or she is surrounded by close family members including the spouse. [Amendment prepared]
- Under current law, like a health care surrogate, a proxy can make health care decisions on behalf of an incapacitated or developmentally disabled patient in those instances when the patient had not previously executed an advance health care directive or otherwise designated a surrogate or alternative surrogate. *See* s. 765.401 F.S. A proxy may be any one of the persons in the following order: spouse, only adult child or majority of the adult children, parent, only adult sibling or majority of the adult siblings, adult relative or close friend. Subsections (2) and (3) of section 765.512, F.S., could be amended to reflect that a proxy ought to have similar authority as a surrogate to make an anatomical gift on behalf of the decedent in the absence of contrary indications.

VIII. Amendments:

#1 by Judiciary:

Clarifies that specified persons such as a family member or guardian can not modify, deny or otherwise prevent an anatomical gift from being made if the intent or wish to make the anatomical gift was executed in accordance with the statutory requirements

#2 by Judiciary:

Allows one family member including a spouse to be one of the two witnesses to an oral statement by a donor who seeks to amend or revoke his or her anatomical gift. (WITH TITLE AMENDMENT)