

## ANATOMICAL GIFTS AND FUNERAL PLANNING

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#### **Anatomical Gifts**

This paper covers House Bill 1372<sup>1</sup> from a planning perspective. It does not address all aspects of anatomical gifts.

Representative Dale Folwell, a primary sponsor of this legislation, spearheaded this bill based on deeply personal concerns. The bill originally was titled: "The Heart Prevails." Its primary thrust is that the "heart" designation on a driver's license, which under the old law merely showed an intent to be an organ donor, will function as an organ donation.

Representative Folwell was concerned that this important objective become law without further delay. He understood that some further adjustments will be required and provided in House Bill 1372 that the General Statutes Commission would study the statutes related to organ donation and propose recommendations to the 2008 short session.<sup>2</sup> This paper makes some suggestions for improvements below under "Need for Clean-Up."

#### The Heart Prevails

People who apply for drivers licenses, or special identification cards issued by the Division of Motor Vehicles, are asked if they would like to be an organ donor and are furnished with organ, eye and tissue donor cards and information.<sup>3</sup> Those choosing to do so may request that the organ donor symbol be placed on the license or identification card. Also, the choice to place the symbol on one's license or identification card is shown on the internet organ donor registry maintained by the Division of Motor Vehicles.<sup>4</sup>

Prior to October 1, 2007, the organ donation symbol on one's driver's license or identification card indicated only an *intent* to be an organ donor.<sup>5</sup> Any actual donation had to be effected by a will or by a donor card or other document attested by two witnesses.<sup>6</sup>

House Bill 1372 makes the authorization of the organ donation symbol an actual anatomical gift.<sup>7</sup> An anatomical gift based only on the heart symbol will only be a gift of an organ or an eye; it will not include a gift of "tissue" (defined<sup>8</sup> as any portion of the human body other than an organ an eye, or blood donated for non-research purposes) or of the donor's entire body.<sup>9</sup> The

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<sup>1</sup> Session Law 2007-538, effective October 1, 2007.

<sup>2</sup> Section 13 of Session Law 2007-538, effective October 1, 2007.

<sup>3</sup> N.C.G.S. § 20-7.3 (amended by Section 7 of Session Law 2007-538, effective October 1, 2007).

<sup>4</sup> N.C.G.S. § 20-43.2(amended by Section 2 of Session Law 2007-538, effective October 1, 2007).

<sup>5</sup> N.C.G.S. § 20-7.3(1)(prior to amendment made by Section 7 of Session Law 2007-538, effective October 1, 2007).

<sup>6</sup> N.C.G.S. § 130A-406(a) and (b)(repealed by Section 3(b) of Session Law 2007-538, effective October 1, 2007).

<sup>7</sup> N.C.G.S. § 130A-412.7(a)(1)(added by Section 1 of Session Law 2007-538, effective October 1, 2007). It appears the law now presumes that the symbol on the license was authorized and therefore constitutes a gift.

<sup>8</sup> N.C.G.S. § 130A-412.4(30)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>9</sup> N.C.G.S. § 130A-412.7(a)(1)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

gift is not affected by the revocation, suspension, expiration, or cancellation of a driver's license.<sup>10</sup> The entry on the donor registry is itself a gift, and will be effective even if the license or identification card is not available.<sup>11</sup>

**Bottom Line: People with the heart symbol on their license have now, by virtue of a retroactive provision, made an *unspecific* and *limited* anatomical gift. As discussed below, this gift generally may not be revoked or amended by their relatives or agents after their death.**

What if a driver in good standing or a special identification card holder decides to get a new one issued, prior to expiration, to add the heart symbol?

Or, what if a person wants to delete the symbol because, though they chose to put the symbol on their license, they do not want to be deemed to have made an irrevocable and unspecific gift that their family may not second guess?

Whether one can get a new one under these circumstances is unclear. The statute on duplicate drivers license provides for their issuance only (a) for loss or destruction, (b) for change of name or address, (c) if, "[b]ecause of age, the person is entitled to a license with a different color photographic background or a different color border," or (d) for restoration after revocation.<sup>12</sup> Until the law is cleared up, whether duplicates will be available for people with recent photographic backgrounds and color borders, and no other reason to obtain a duplicate is, as a practical matter, in the hands of the Division of Motor Vehicles. The statutes on special identification cards provide that their cost is the \$10.00 fee for a duplicate license, and requires notices of address changes, but omits provisions for duplicate special identification cards.<sup>13</sup>

If the local Division of Motor Vehicles will not cooperate, the best course of action may be to accidentally lose the license in a body of water or run over it with a lawn mower.

It also appears that a person with the heart symbol on their license or identification could either revoke the gift or refuse to make an anatomical gift, as discussed below under "What if Someone Does Not Want to be a Donor?" It also may be possible to enter that revocation or refusal on the internet web site maintained by the Division of Motor Vehicles, as House Bill 1372 now provides that this web site include information on whether a donor has "amended or revoked" the anatomical gift. But a person who really does not want to make an anatomical gift had better get the heart off their license or card, because that may be the only document that shows up in the emergency room. And they had better see that the registry is corrected.

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<sup>10</sup> N.C.G.S. § 130A-412.7(c)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>11</sup> N.C.G.S. § 130A-412.4(7)(added by Section 1 of Session Law 2007-538, effective October 1, 2007); N.C.G.S. § 20-43.2(as amended by Section 2 of Session Law 2007-538, effective October 1, 2007).

<sup>12</sup> N.C.G.S. § 20-14.

<sup>13</sup> N.C.G.S. §§ 20-37.1 and -37.9.

## Advance Planning for Anatomical Gifts

There are several methods of advance planning for anatomical gifts. All have their limitations.

*Heart Symbol:* The heart symbol on the driver's license operates as a gift of all organs or eyes, but it has no specificity. That manner of gift does not include gifts of body parts other than organs or eyes, or of the entire body, as the law allows. House Bill 1372 allows the donor to specify a qualified institution to receive the gift.<sup>14</sup> In the case of an organ donation to an institution, the organ probably will be distributed on a nationwide basis under protocols established by federal laws and regulations,<sup>15</sup> but the client may still want to specify the institution to initially receive the gift. Specification of an institution may be especially important to a client who wishes to donate his body or tissue for research.

*Donations by Will:* Donations may be made by will. As provided in prior law, a donation in a "will" is effective before probate of the will.<sup>16</sup> An anatomical gift by will has obvious limitations. Though the statute provides that a will not yet probated (really a purported will) is effective, the will document often is not located before it is too late to procure the organs. Also, someone may claim the will is forged or proffer another will document. And the will may be inconsistent with some other anatomical gift document.

*Donation Cards and Instruments:* Like purported wills, these cards or instruments may not be available when needed and may be lost. Even people that carry the card or document on their persons will not feel the sense of urgency about replacing that document, when their billfold or purse is lost, that they feel about replacing their driver's licenses and credit cards.

*Donor Registry:* House Bill 1372 provides that use of a registry is a method of *making* an anatomical gift.<sup>17</sup> Most people think of a registry as a record repository, rather than the instrument itself, but the intent is to make clear that the record itself will function as an anatomical gift even if the record itself is unavailable.

Confusion arises because the statute defines a "donor registry" as *any* "database that contains records of anatomical gifts and amendments to or revocations of anatomical gifts," it also designates the internet site maintained by the Division of Motor Vehicles under N.C.G.S. 20-43.2 as *the* State donor registry for anatomical gifts."<sup>18</sup> Designating this database as "the" site is a bit confusing because (a) the "donor registry" definition does not limit the registry to one site;

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<sup>14</sup> N.C.G.S. § 130A-412.13(a)(1) and (3)(added by Section 1 of Session Law 2007-538, effective October 1, 2007). N.C.G.S. § 130A-412(a)(2) also allows gifts to an individual, but such gifts arise *ad hoc* and seldom involves planning by lawyers.

<sup>15</sup> See N.C.G.S. §§ 130A-412.32 and .33 (former N.C.G.S. §§ 130A-412.1 and .2, recodified by Section 3(a) of Session Law 2007-538, effective October 1, 2007).

<sup>16</sup> N.C.G.S. § 130A-412.7(a)(2) and (d)(added by Section 1 of Session Law 2007-538, effective October 1, 2007); *cf.* former N.C.G.S. § 130A-406(a)(repealed by Section 3(b) of Session Law 2007-538, effective October 1, 2007).

<sup>17</sup> N.C.G.S. §§ 130A-412.4(7) and -412.7(b)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>18</sup> N.C.G.S. § 130A-412.4(9)(added by Section 1 of Session Law 2007-538, effective October 1, 2007)(emphasis added).

and (b) the North Carolina Secretary of State also maintains the Advance Directive Health Care Directive Registry, which House Bill 1372 addresses.

In any event, clients interested in assuring they make anatomical gifts will want to consider using both registries.

*Health Care Powers of Attorney:* As under prior law, **the health care power of attorney must affirmatively provide authority for anatomical gifts.** House Bill 1372 provides that a health care agent may make an anatomical gift before<sup>19</sup> or after<sup>20</sup> the principal's death *to the extent provided* in the health care power of attorney. The revised health care power of attorney statute allows a principal to authorize his or agent "to exercise any and all rights the principal may have with respect to anatomical gifts, . . . provided this authority is limited to incurring reasonable costs related to exercising these powers, and a health care power of attorney does not give the health care agent general authority over a principal's property or financial affairs."<sup>21</sup> Subject to these same financial limitations, the decedent's health care agent has precedence over the person named executor in a will "to make *body*, funeral, and burial arrangements."<sup>22</sup> The statutory health care power of attorney allows a principal to "opt in" to organ donation, and leaves blanks for special limitations or instructions.<sup>23</sup> *Note:* Amendments made to House Bill 1372 eliminated the rather presumptuous presumptions in the original bill, based on the Uniform Act, that (a) any health care agent had authority to make an anatomical gift unless the health care power of attorney explicitly stated otherwise,<sup>24</sup> and (b) that anyone with a living will intends to be an organ donor.<sup>25</sup>

*During Last Illness:* A person may make a gift during a terminal illness "by any form of communication" addressed to at least two adults,<sup>26</sup> one of whom must be a "disinterested witness." (See discussion below under "Need for Clean-Up" on the substantial problems with the definition of "disinterested witness.")

*Clients who Do Not Wish to Make Anatomical Gifts:* If your client wishes to ensure he or she does **not** make an anatomical gift, see discussion below under "What If Someone Does Not Want to Be a Donor?"

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<sup>19</sup> N.C.G.S. § 130A-412.6(2)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>20</sup> N.C.G.S. § 130A-412.12(a)(added by Section 1 of Session Law 2007-538, effective October 1, 2007)(referring to preceding statute).

<sup>21</sup> N.C.G.S. § 32A-19(b)(as amended by Section 3 of Session Law 2007-502, effective October 1, 2007).

<sup>22</sup> N.C.G.S. § 28A-13-1(as amended by Section 3 of Session Law 2007-502, effective October 1, 2007)(emphasis added).

<sup>23</sup> Paragraph 6 of statutory form set forth in N.C.G.S. § 32A-25.1 (added by Section 3 of Session Law 2007-502, effective October 1, 2007).

<sup>24</sup> Revised Uniform Anatomical Gift Act, § 2(2) (2006)(defining an agent for purposes of anatomical gifts as any holder of a health care power of attorney, § 4(2)(providing that health care agent may make anatomical gift before donor's death unless health care power of attorney explicitly prohibits the gift).

<sup>25</sup> Id. § 21 (providing that all person with living wills will nevertheless continue to receive life-prolonging measures to ensure medical suitability of the organ transplantation, unless they have made a refusal or have executed living wills that explicitly provide to the contrary).

<sup>26</sup> N.C.G.S. § 130A-412.7(2)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

## Donations After Death

Provided that the donor has not made a contrary instruction, anatomical gifts can be made after a person's death, in the following order of priority, by the decedent's:

- a health care agent, if and to the extent authorized by the power of attorney
- spouse
- adult children
- parents
- adult siblings
- adult grandchildren
- grandparents
- "an adult who exhibited special care and concern for the decedent"
- "[t]he persons who were acting as the guardians of the person at the time of death," and
- "any other person with authority to dispose of the decedent's body."<sup>27</sup>

The statute then provides:

- if any person higher in the order of priority is reasonably available, no one in a lower class may make an anatomical gift contrary to the gift or objection of the person in the higher class;<sup>28</sup> and
- if there are multiple members of a class, and anyone in that class objects, then an anatomical gift may be made only by a majority of the members of that class who are reasonably available.<sup>29</sup>

This statutory order needs some work. It is particularly unclear why a *guardian* falls so low on the list. (See discussion below under "Need for Clean-Up.")

This gift must be made in writing or, if it is made orally, confirmed by the signature of the person making the donation in a record that is either "electronically recorded" or "contemporaneously reduced" to a paper record.<sup>30</sup>

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<sup>27</sup> N.C.G.S. § 130A-412.11(a)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>28</sup> N.C.G.S. § 130A-412.11(c)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>29</sup> N.C.G.S. § 130A-412.11(b)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>30</sup> N.C.G.S. § 130A-412.12(a)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

## What If Someone Does Not Want to Be a Donor?

What should you do if your client *does not want* to be an organ donor? First, you will need to help your client effect a **revocation** of any previous intentional or inadvertent donations. Second, to try to ensure that someone does not make a donation after death, your client may wish to consider executing a **refusal** to make an anatomical gift.

*Revocation Before Death by Donor:* The donor may revoke an anatomical gift at any time by before he dies. All the donor needs to do is sign any "record."<sup>31</sup> A "record" is any information stored tangibly or electronically.<sup>32</sup> There are no witness requirements, unless the revocation is executed by another person at the direction of the donor.<sup>33</sup>

Of course, the key to making the revocation effective is to give the revocation as much notice as the original gift. Revocations may be listed on the same donor registry as the original gifts. (See discussion above under "Donor Registry"). **A driver's license symbol needs special attention.** See "The Heart Prevails," above, for discussion about steps to take if your client has the heart symbol on their driver's license or identification card.

*Refusals:* A revocation only revokes a gift made by the donor. To preclude others from making a gift after his or her death, the potential donor needs to execute a "refusal" to make an anatomical gift, defined as any record "that expressly states an intent to bar other persons from making an anatomical gift."<sup>34</sup> As with a revocation, there are no witness requirements, unless the revocation is executed by another person at the direction of the donor.<sup>35</sup> The refusal may not be set aside by any person other than the person who executed the refusal,<sup>36</sup> except for a refusal executed by an unemancipated minor.<sup>37</sup>

Note that refusals must be explicit. No revocation is treated as a refusal, and an anatomical gift to one person is not presumed to be a refusal to make, or limitations on, other anatomical gifts.<sup>38</sup>

The tricky part about refusals is making sure the refusal is known when the question arises. A person is unlikely to carry a "refusal card" on their person, though they could do so. A refusal may be made by will, and the refusal is effective even before the will is admitted to probate.<sup>39</sup> But the will may not be accessible at the time the donation is considered. A refusal also may be made by a communication to two persons, at least one of whom is a "disinterested witness."<sup>40</sup> (See discussion below under "Need for Clean-Up.")

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<sup>31</sup> N.C.G.S. § 130A-412.8(a)(1)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>32</sup> N.C.G.S. § 130A-412.4(25)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>33</sup> N.C.G.S. § 130A-412.8(b)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>34</sup> N.C.G.S. § 130A-412.4(26)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>35</sup> N.C.G.S. § 130A-412.9(b)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>36</sup> N.C.G.S. § 130A-412.9(d)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>37</sup> Id. (referencing N.C.G.S. § 130A-412.10(h)(added by Section 1 of Session Law 2007-538, effective October 1, 2007)).

<sup>38</sup> N.C.G.S. § 130A-412.10(b), (e) and (f)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>39</sup> N.C.G.S. § 130A-412.9(a)(2)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>40</sup> N.C.G.S. § 130A-412.9(b)(1)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

The laws establishing the Division of Motor Vehicles and Secretary of State databases (discussed above under "Advance Planning for Anatomical Gifts — *Donor Registry*") do **not** provide for recording refusals, as they do for revocations. It remains to be seen whether refusals will be accepted as a practical matter on these registries. The law should be amended to make clear that refusals also may be recorded on these registries.

### What if Someone Else Wants to Revoke A Donor's Gift?

*Revocation **Before** Death of Gifts Made by Others on Behalf of Donor:* A health care agent or other authorized person who makes an anatomical gift on behalf of a donor before the donor's death may revoke it before the donor's death.<sup>41</sup> There are no witness requirements, unless the revocation is executed by another person at the direction of the person authorized.<sup>42</sup> As discussed below under "*Revocations **After** Death*," it is not clear whether this revocation authority applies after death.

#### *Revocation **After** Death:*

- Gifts Made by Donor: If a donor makes an anatomical gift, or amends one made on the donor's behalf, no one else may make, amend, or revoke that gift,<sup>43</sup> except that this rule does not apply to unemancipated minors.<sup>44</sup>
- Gifts Made on Behalf of Donor:
  - *By Persons in Prior Class:* House Bill 1372 provides that, a gift made for a decedent after death by a person authorized to do so (see "*Donations After Death*" above) may be revoked by a person in a prior class of persons authorized to make the gift. It further provides that if more than one member of a prior class is reasonably available, a majority of those reasonably available members must join in an amendment, and there must be at least an even division to make a revocation.<sup>45</sup> However, the revocation must be made before an "incision" is made or an "invasive procedure" is begun to effect the donation.<sup>46</sup>
  - *By Person Who Made Gift before Donor's Death:* It is not clear whether a health care agent or other person who made an anatomical gift on behalf of the donor *before* the donor's death may revoke it *after* the donor's death: the caption of the statute authorizing revocation by a person who makes the gift on behalf of the donor<sup>47</sup> refers to revocation before death, but the actual provision does not limit revocation to this period.
  - *By Person Who Made Gift after Donor's Death:* House Bill 1372 appears to be silent about revocation by a person who made the donation on the decedent's behalf after death. The drafters apparently assumed that so little time would elapse between the donation and the removal that providing for that revocation was unnecessary.

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<sup>41</sup> N.C.G.S. § 130A-412.8(a)(1)(b)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>42</sup> N.C.G.S. § 130A-412.8(b)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>43</sup> N.C.G.S. § 130A-412.10(a)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>44</sup> N.C.G.S. § 130A-412.10(g)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>45</sup> N.C.G.S. § 130A-412.12(b)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>46</sup> N.C.G.S. § 130A-412.12(c)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>47</sup> N.C.G.S. § 130A-412.8(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

*Minor's Gift:* If your client wants to revoke a minor's anatomical gift, see the revocation discussion below under "Minors."

### Amendments

The rules discussed above for revocations, under "What if Someone Does Not Want to be a Donor?" and "What if Someone Else Wants to Revoke a Donor's Gift?" also apply to amendments to anatomical gifts.

### Minors

Prior law required one to be 18 to make an anatomical gift.<sup>48</sup> Minors, of course, commonly apply for driver's licenses just as soon as they are eligible to do so. House Bill 1372 allows a minor to make an anatomical gift if (a) eligible to apply for a drivers license because he or she is 16 years old or (b) emancipated.<sup>49</sup>

Parents who are "reasonably available" may revoke the gift of any unemancipated minor after the minor's death.<sup>50</sup> There is no explicit provision allowing parents to revoke an anatomical gift before the death of an unemancipated minor. From a close reading of the statute, it does seem that a parent *or* a guardian may revoke the minor's gift prior to the minor's death, although this inference may not be absolutely clear.<sup>51</sup> Also, this provision should have included guardians of minors. It does appear that "[t]he persons who were acting as guardians" may revoke any donor's anatomical gift, but this provision may be limited to revocation after death and it applies only if they are the only ones "reasonably available" after eight categories of persons are excluded.<sup>52</sup> (See discussion below under "Priority" and "Need for Clean-Up").

Few minors today are emancipated. Only minors who are at least 16 may petition for emancipation.<sup>53</sup> The only other circumstances in which a minor may be emancipated is if they are married, when emancipation occurs automatically.<sup>54</sup> Minors under 16 may marry only if they are over 14 and the bride is marrying the putative father of her child.<sup>55</sup>

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<sup>48</sup> N.C.G.S. § 130A-404(a) and (b)(repealed by Section 3(b) of Session Law 2007-538, effective October 1, 2007).

<sup>49</sup> N.C.G.S. § 130A-412.6(1)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>50</sup> N.C.G.S. § 130A-412.10(g)(added by Section 1 of Session Law 2007-538, effective October 1, 2007).

<sup>51</sup> N.C.G.S. § 130A-412.8 (added by Section 1 of Session Law 2007-538, effective October 1, 2007). This statute allows revocation by a donor or an "other person" authorized to make a donation. The persons authorized to make a donation include the parent of an unemancipated minor or any donor's guardian. N.C.G.S. § 130A-412

<sup>52</sup> N.C.G.S. § 130A-412.12(b)(added by Section 1 of Session Law 2007-538, effective October 1, 2007) governs revocation of anatomical gifts after a decedent's death. The persons authorized include parents as fourth in the order of priority and "persons acting as guardians" as eighth in the order. *Id.* (referring to N.C.G.S. § 130A-412.11(added by Section 1 of Session Law 2007-538, effective October 1, 2007)).

<sup>53</sup> N.C.G.S. § 7B-3500.

<sup>54</sup> N.C.G.S. § 7B-3509.

<sup>55</sup> N.C.G.S. § 51-2.1.



## Need for Clean-Up

House Bill 1372 was adapted from the 2006 Revised Uniform Anatomical Gift Act prepared by the National Conference of Commissioners on Uniform State Laws. One *advantage* of NCCUSL uniform laws is: they are prepared by a committee consisting of many law professors. But, one *disadvantage* of NCCUSL uniform laws is: they are prepared by a committee consisting of many law professors.

Representative Folwell and the General Assembly staff worked very hard on House Bill 1372, and cleaned up many issues to make it gibe with North Carolina law, including House Bill 634 on health care powers of attorney and living wills. To achieve the main goal of having "the heart prevail" in 2007, Representative Folwell moved forward with a bill that needs some clean-up. That is why the bill explicitly requires further study by the General Statutes Commission.

House Bill 1372 explicitly notes that the General Statutes Commission should review the statutes on corneal tissue removal<sup>56</sup> and routine searches for donor identification,<sup>57</sup> but also authorizes review of other organ donation statutes.<sup>58</sup>

Other revisions the General Statutes Commission should consider include:

- Revising the motor vehicle statutes to provide that duplicate driver's licenses and special identification cards may be issued for the purpose of adding or removing organ donor symbols
- Clarifying that the Division of Motor Vehicle donor registry is not exclusive (see discussion above under "Advance Planning for Anatomical Gifts — *Donor Registry*");
- Making North Carolina's donor registries available for refusals to make anatomical gifts;
- Defining "organ," so that the definition of "tissue" as a body part other than an organ is clear, and clarifying whether an "eye" is an organ;
- Clearing up general definitional issues, such as the failure to use a defined term once it has been defined;<sup>59</sup>
- Revising the statutory order of persons authorized to make anatomical gifts, using an order similar to that in N.C.G.S. § 90-322 (discussed in the paper titled "Overview of House Bill 634"), especially as it is anomalous that guardians come next to last in the order of priority;
- Clearing up issues about revocation by parents and guardians of minors (see discussion above under "Minors");
- Clearing up substantial problems with the "disinterested witness" definition, which include:

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<sup>56</sup> N.C.G.S. § 130-391.

<sup>57</sup> N.C.G.S. § 90-602.

<sup>58</sup> Section 13 of Session Law 2007-538, effective October 1, 2007.

<sup>59</sup> E.g., N.C.G.S. § 130A-412.4(7) defines "document of gift" to include a donor card or other record, and as an organ donation symbol on the driver's license or card or on a registry. N.C.G.S. § 130A-412.7(b), however, does not use that defined term, but explains all over again how one may make an anatomical gift, using the same definition but also adding further requirements.

- the fact that, read literally, all human beings are excluded by the statutory definition of a "disinterested witness" as any person to whom an anatomical gift could pass;
- the vagueness of determining whether a person "has exhibited special care and concern" for the donor (meant to mirror this definition in the context of a person who can make an anatomical gift); and
- reconsidering whether a person should have to be a disinterested witness at all, i.e., why should family members be excluded as witnesses to an anatomical gift made in the last illness, or to a refusal, or to a revocation? Does the logic of will execution apply to these determinations? Perhaps the concern is to keep family members opposed to organ donations from "faking" a refusal or revocation, but if family members can authorize and revoke anatomical gifts after death, why they may not be witnesses; and
- Clarifying the ambiguities about revocations after death by persons who made gifts on behalf of the donor (see discussion above under "What if Someone Else Wants to Revoke a Donor's Gift? — *Revocation After Death*").

### **Funeral Decisions**

Some people wish for the person they designate as their health care agent to have authority to make related decisions, such as decisions about the disposition of remains. So, a secondary goal of the drafting group that prepared House Bill 634 on health care powers of attorney and living wills was to harmonize the statutes on post-mortem decisions to clarify the health care agent's authority for these decisions.

House Bill 634 amends the law that allows a principal to authorize his or health care agent "to exercise any and all rights the principal may have with respect to . . . the authorization of any autopsy, and the disposition of remains," by adding the limitation that "this authority is limited to incurring reasonable costs related to exercising these powers, and a health care power of attorney does not give the health care agent general authority over a principal's property or financial affairs."<sup>60</sup> Current North Carolina law also allows a person named an executor in a purported will to make such arrangements. House Bill 634 clarifies that the health care agent with this authority has precedence over the person named executor in a will "to make body, funeral, and burial arrangements," subject to these financial limitations.<sup>61</sup>

Obviously, any decision about funeral arrangements can involve finances, and no legislation can determine what costs are "reasonable." Similarly, decisions about end-of-life care can involve finances, and a health care agent may encounter conflicts if someone else has authority over the principal's business matters. That is why the health care power of attorney statute distinguishes between authority over property and financial affairs "necessary" to exercise health care powers and general authority over property and financial affairs.<sup>62</sup>

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<sup>60</sup> N.C.G.S. § 32A-19(b)(as amended by Section 3 of Session Law 2007-502, effective October 1, 2007);

<sup>61</sup> N.C.G.S. § 28A-13-1(as amended by Section 3 of Session Law 2007-502, effective October 1, 2007).

<sup>62</sup> N.C.G.S. § 32A-19(d).

House Bill 634 also gives a designated health care agent, to the extent authorized in a health care power of attorney, a general first priority over a guardian of the person or general guardian in making arrangements for disposition of remains and funerals, *unless* the Clerk of Court has authorized that guardian to suspend the authority of the health care agent.

The House Bill 634 drafting group worked with the North Carolina Board of Funeral Service to make changes in various statutes that establish orders of priority for funeral and burial decisions. Due to a last-minute glitch, the changes were not included in Senate Bill 1435, which made extensive revisions in various funeral statutes. It is hoped these can be made as technical corrections in the short session. The main change needed is to conform the statutory orders in the newly-revised statutes on disposition of remains<sup>63</sup> and cremations<sup>64</sup> to conform them to the order of priority in House Bill 634, giving health care agents priority, to the extent given in the health care power of attorney, over the executor named in a will.<sup>65</sup>

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<sup>63</sup> N.C.G.S. § 130A-420(a)(as amended by Section 26 of Session Law 2007-531, effective August 31, 2007).

<sup>64</sup> N.C.G.S. § 90-210.124(a)(as amended by Section 22 of Session Law 2007-531, effective August 31, 2007).

<sup>65</sup> Also, the newly revised statute on order of priority in preneed funeral contracts has a typographical error. It should have defined a person's "legal representative" with reference to N.C.G.S. § 130A-420, but used the phrase "legal representation" instead. N.C.G.S. § 90-210.60(3a)(added by Section 7.1 of Session Law 2007-531, effective August 31, 2007).