



## **INTRODUCTION**

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THIS IS A SUMMARY AND INTERPRETATION OF THE UNIFORM ANATOMICAL GIFT ACTS OF VIRGINIA AND WEST VIRGINIA AS APPLIED TO FACTUAL PATTERNS THAT ARE FREQUENTLY ENCOUNTERED IN HOSPITALS AND OTHER CLINICAL SETTINGS.

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LIFENET HEALTH AND K&L GATES, LLP  
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**FREQUENTLY ASKED QUESTIONS**  
**ON**  
**ORGAN AND TISSUE DONATION**

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## **INTRODUCTION**

The Uniform Anatomical Gift Act of 2006 (“UAGA”) was adopted in 2007 in Virginia and 2009 in West Virginia. The UAGA was developed to address issues commonly encountered in the donation, consent, and recovery of organs and tissues. It was designed as a uniform statute to provide essentially the same process and procedure in every state.

Although uniformity is the goal of the UAGA, each state has made minor changes to its version of the Act. For the most part, these changes are minor and do not reflect substantial differences. The Virginia and West Virginia versions are almost identical; we have noted critical differences.

Each state’s UAGA divides the consent process into two principle components: (1) ways an individual can consent *before* his death and (2) if the individual didn’t make a designation before his death, ways others can make the donation decision *after* the individual’s death.

This document is designed to answer questions that frequently arise in the donation and consent process.

## **FIRST PERSON DESIGNATION**

### 1. What is a “First Person” designation?

“First Person” designation is the designation created by an individual who makes his or her own decision to donate *before his death*. The term is also used to describe the designation provided by a person *who legally stands in the place* of the donor, for example, a guardian or someone who is empowered *by the donor* pursuant to a medical power of attorney or advance directive.

First Person designation is given great deference by the UAGA and the law provides that no one, *not even family members*, can change a First Person designation. (There are some exceptions, discussed below, for example if the person making the First Person designation is an unemancipated minor.)

Under both Virginia’s and West Virginia’s Anatomical Gift Act, an agent named in a medical power of attorney or advance directive is regarded as the legal equivalent of the individual. The agent is the highest ranking individual who can provide authorization for donation before or after the individual’s death. Because the agent is considered to “stand-in-the-shoes” of the individual, an agent has a higher ‘ranking’ than family members on the priority list of individuals who may authorize a gift after death.

Family members are only asked to consider making a donation if the potential donor has died (or is about to die) and he/she *did not* make a First Person designation during his/her life.

2. Who can designate an organ/tissue/eye gift prior to the death of the donor (in other words, who can execute a First Person designation)?

VIRGINIA [§ 32.1-291.4]; WEST VIRGINIA [§ 16-19-4]

- An adult individual
- An individual's guardian
- An individual's agent (unless the document says otherwise)
- An individual's parents (if the individual is an unemancipated minor)
- A minor if the minor is:
  - Emancipated or
  - Virginia - 15 ½ years old or older; West Virginia – 16 years old or older

3. What is the age of majority?

VIRGINIA [§ 1-204]; WEST VIRGINIA [§ 16-19-3(1)]

18.

4. What documents legitimately evidence a First Person designation?

VIRGINIA [§ 54.1-2986; 37.2-1020; 46.2-342; 32.1-291.4; 32.1-291.5; 32.1-291.19]; WEST VIRGINIA [§ 16-19-3(7); 16-19-5; 16-19-18; 16-30-6(f)]

The following non-exhaustive list can evidence First Person designation:

- Driver's License
- Identification Card
- Donor Card
- Will
- Any form of communication to two or more adults, if made during a terminal illness or injury (West Virginia – at least one of the adults must be a “disinterested witness”)
- Donor Registry
- Advance Directive
- Power of Attorney
- Any other document that is valid under the state/country where it was executed
- West Virginia – Any document/item that is valid under the state/country where the person making the gift was domiciled, has a place of residence or was a national at the time the document/item was executed

Any other written document

5. What if the driver's license or identification card is suspended, revoked or expires; is the First Person designation on it still valid?

VIRGINIA [§32.1-291.5(c), 46.2-342(D)-(H)]; WEST VIRGINIA [§16-19-5(c)]

Yes. If a donor has First Person designation on his driver's license or identification card but the license or card has been suspended, the First Person designation remains valid.

6. Can a First Person designation be countermanded by someone other than the donor?

VIRGINIA [§ 32.1-291.8; 54.1-2986; 54.1-2986.1; 46.2-342(F)]; WEST VIRGINIA [§ 16-19-8(a) and (f); 16-19-14(f)]

No, unless the donor expressly provides otherwise or unless the donor is an unemancipated minor, someone other than the donor may not revoke or countermand a First Person designation. If the donor is an unemancipated minor, a parent who is readily available may amend or revoke an anatomical gift.

7. Who qualifies as a "parent"?

VIRGINIA [§32.1-291.2]; WEST VIRGINIA [§16-19-3(20)]; [NCCUSL Comment re: "parent"]

The Virginia statute defines "parent" as a parent whose parental rights have not been terminated. The West Virginia statute defines "parent" as a natural or adoptive parent whose parental rights have not been terminated.

A parent must have parental rights related to the donor or individual. A parent who has adopted the donor or individual qualifies as a "parent." A step-parent does not qualify as a "parent."

Divorced parents are still parents unless full custody has been awarded to one parent and not the other. If there is joint custody, then both parents have parental rights.

8. Is a Medical Power of Attorney, Advance Directive, or other similar document sufficient to authorize a First Person Designation?

VIRGINIA [§ 37.2-1020(B); 32.1-291.4(2); 32.1-291.9(1); 32.291.21(B); 54.1-2983]; WEST VIRGINIA [§ 16-30-6(f); 16-19-4(3); 16-19-9(a)(1); 16-19-20]

Yes. The UAGA recognizes a number of different documents as authoritative evidence of the donor's intention to donate or not to donate. A document falling into this category may have a variety of names: medical power of attorney, health care power of attorney, durable power of attorney, living will, or advance directive.

These documents generally take two forms. In the first, the document evidences the individual's intention to permit donation and directs the agent to sign all consents or forms necessary to achieve donation. In the second, the document may not contain explicit instructions but instead delegates the decision of whether or not to be a donor to the agent.

The most difficult situation is when the document is silent. This includes instances where the document contains pre-printed form language regarding donation but the questions are not answered or the blanks are not completed. The issue in these instances is whether the individual has elected not to empower the individual to make a decision on donation (deciding instead, for instance, to allow this decision to fall to family members after death) or whether the individual is making a conscious and affirmative decision to refuse donation (in other words, it is tantamount to a Refusal document). For this to be considered a Refusal document, the document must conform to the UAGA provisions for refusal documents (see discussion below in Section 22).

The more likely interpretation for the individual not completing the information is that the principal did not intend to provide the power to make any donation decision to his agent. The result is that the document is not a First Person designation. The decision to make a gift will default to the statutory list of individuals who can make this decision after the individual's death.

Likewise, if the information is crossed out, the most logical interpretation is that the donor did not intend to give this authority to his agent.

Under both Virginia's and West Virginia's Anatomical Gift Act, an agent designated pursuant to a medical power of attorney or Advance Directive is the First Person identified in the statutory hierarchy of individuals who can authorize a gift of the individual's organ or tissues.

## 9. What happens if there is a conflict between a First Person designation and an Advance Directive?

An individual's First Person designation could conflict with the express or implied terms of an advance directive because medical regimens needed to ensure the medical suitability of a part for donation could be inconsistent with instructions not to start or maintain "extraordinary measures". In this instance, Virginia's and West Virginia's statute directs the prospective donor and attending physician to confer to resolve the



conflict. If the prospective donor is incapable of resolving the conflict because he may be incapacitated, then the agent acting under the donor's medical power of attorney, or, if none, another person authorized to make health care decisions on behalf of the donor, is designated to act on behalf of the donor to attempt to resolve the conflict.

*While this consultation occurs, the statutes require that measures necessary to ensure the medical suitability of a part for donation shall continue unless such administration would be contraindicated by appropriate end of life care.*

The OPO should be involved in assisting with the resolution of the conflict by providing necessary medical information relating to: (1) the necessity of the continued administration of measures to ensure the medical suitability of the part(s) for donation, (2) the length of time the measures would need to continue to ensure suitability and (3) any other relevant information related to the prospective donor and the suitability of the part(s) for donation.

The Official Comments to the UAGA provide that in the absence of specific instructions, necessary measures to ensure the medical suitability of a part for donation may not be withheld or withdrawn from the prospective donor.

This is an area that is not clearly and decisively controlled by the respective statutes; the statutes do not identify which document is to control and instead defaults to the results of a colloquy among the care givers and those responsible for approving an individual's treatment. The fact that the withdrawal of organ-sustaining procedurals and regimens is not permitted during the resolution of the dilemma is, however, compelling evidence of the Legislatures' intent to be certain that a donation opportunity is not foreclosed prematurely and that *all* parties involved in this process have an opportunity to be provided relevant and important information (i.e., which means that the OPO has to be involved).

**AUTHORIZATION IN THE ABSENCE OF A  
FIRST PERSON DESIGNATION**

10. In the absence of a First Person designation, who can authorize organ/tissue/eye donation after the death of the donor?

VIRGINIA [§ 32.1-291.9]

The statute identifies the following person(s), in the order listed, may authorize or refuse donation after the donor's death if they are reasonably available:

- Agent of donor, unless prohibited from making decisions by healthcare POA or other record\*
- Guardian at time of death\*;
- Spouse;
- Adult children;
- Parents;
- Adult siblings;
- Adult grandchildren
- Grandparents;
- Adult who exhibited special care/concern for decedent;
- Any person having authority to dispose of body

\* As noted previously, these individuals are deemed to stand-in-the-shoes of the donor and are effectively treated as if it were the donor himself making a First Person designation.

WEST VIRGINIA [§ 16-19-9; 16-30-8]

The following person(s), in the order listed, may authorize or refuse donation after the donor's death if they are reasonably available:

- Agent of donor, unless prohibited from making decisions by healthcare POA or other record\*;
- Spouse;
- Adult children;
- Guardian at time of death\*\*;
- Health care surrogate appointed by attending physician or an advanced nurse practitioner;
- Parents;
- Adult siblings;
- Adult grandchildren
- Grandparents;
- An Adult who exhibited special care/concern for decedent

\* As noted previously, the agent is deemed to stand-in-the-shoes of the donor and are effectively treated as if it were the donor himself making a First Person designation.

\*\* Note that here, unlike in Virginia, the guardian is lower than the spouse. Also note that a healthcare surrogate, appointed by the attending physician is in a higher class than parents, siblings, grandchildren, grandparents, and adults who have demonstrated a special care or concern for the decedent.

11. Is common-law marriage recognized as valid?

VIRGINIA [§ 20-13]; West Virginia [§ 48-2-101]

No, neither Virginia nor West Virginia recognizes common-law marriage for residents of their own state.

However, if the person claims to have a common-law marriage from one of the following states, (and that marriage is not against the public policy of Virginia or West Virginia (see further below)), the marriage may be recognized. *(This information is valid as of July 1, 2010. However, please check with legal counsel if someone claims to be in a common-law marriage as state laws can change at any time and to help determine whether the requirements for common-law marriage have been met.)*

Alabama	Kansas	Pennsylvania (if marriage formed before 2005)
Colorado	Maryland	Rhode Island
D.C.	Montana	South Carolina
Florida (if marriage formed before 1968)	Nebraska (if marriage formed before 1987)	Texas
Georgia (if marriage formed before 1997)	New Hampshire (as long as the potential donor has been declared to be dead)	Utah
Idaho (if marriage formed before 1996)	Ohio (if marriage formed before Oct. 10, 1991)	
Iowa	Oklahoma	

Even if the common-law marriage is from one of the above states, it will **not** be recognized in Virginia if the marriage is (i) bigamous, (ii) incestual, or (iii) between couples of the same sex.

Even if the common-law marriage is from one of the above states, it will **not** be recognized in West Virginia if the marriage is against public policy. While this has not been definitively defined, it likely includes (and prohibits) marriages that are (i) polygamous, (ii) incestual, or (iii) between couples of the same sex.

12. Are there other limits on marriage?

VIRGINIA [§ 20-45.2; § 20-45.3; § 20-38.1]; west Virginia [§ 48-2-603]

Neither Virginia nor West Virginia recognizes marriage or civil union between members of the same sex, *regardless* of whether that marriage or civil union would be valid in another state or Commonwealth.

Additionally, Virginia and West Virginia do not recognize marriages:

- entered prior to dissolution of prior marriage of either party;
- between ancestor and decedent or brother and sister, even if only by half-blood or adoption;
- between uncle and niece or aunt and nephew, even if only by half-blood or adoption; and
- between first cousins or double cousins (West Virginia only).

13. In Virginia, the last category of person able to authorize a donation after death is “any other person having authority to dispose of the decedent’s body.” Who falls into this category?

VIRGINIA [§ 32.1-288(A)]

The following people fall into the last category of people who may authorize a donation:

- relatives who are not in the prior categories,
- friends,
- sheriff of the county or city where death occurred.

14. Who is an individual who exhibited special care or concern for the individual?

This could be a friend, neighbor, pastor or member of a church congregation, or domestic partner. The individual has to be able to demonstrate a fairly strong connection to and familiarity with the individual,

as evidenced by visits to the hospital, residence, frequency of contact, and duration of the special relationship (e.g., months, years)

15. What does “reasonably available” mean?

VIRGINIA [§ 32.1-291.2]; WEST VIRGINIA [§ 16-19-3(27)]

Reasonably available is defined by each of Virginia and West Virginia to mean that an individual is able to be contacted by a procurement organization without undue effort and *is willing* and able to act in a timely manner consistent with existing medical criteria necessary for the making of an anatomical gift.

If someone is contacted, but won't make a decision, this person is not considered “reasonably available” because he is not willing to act in a timely manner.

16. Can authorization for donation be obtained by telephone?

VIRGINIA [§ 32.1-291.10]; WEST VIRGINIA [§ 16-19-10(a)(2)]

Yes, authorization for donation after a donor's death can be obtained from the individuals listed on #10 above by telephone as long as the conversation is electronically recorded or contemporaneously reduced to a record and signed by the person receiving the oral communication.

The authorization form should be read to the authorizing party and the authorizing party's responses should be reflected on the form.

17. Are there limits on the authority of those who are authorized to approve a donation on behalf of the donor after the death of the donor?

VIRGINIA [§ 32.1-291.8(A), (G), and (H); 46.2-342 (F); 54.1-2983; 54.1-2986(B); 54.1-2986.1(A); 37.2-1020(B)]; WEST VIRGINIA [ § 16-19-4(3) and (4); 16-19-7(c); 16-19-8(a), (b) and (f); 16-19-14(f)]

Yes. If the gift is via a First Person designation, the most likely place to find limits (if any) will be in the text of the gift document itself, for example, does it enumerate the organs to be donated, does it include tissue or eyes, does it mention research or education? A document of gift that only specifies a general intent to make a gift (for example, by using the term “donor”, “organ donor”, or a symbol or icon) means the organs, tissues or corneas may be used for transplantation, therapy, research, and education.

If this is a First Person designation, this designation cannot be changed or countermanded unless the donor is an unemancipated minor in which case a parent may do so.

If the donor refused consent (not to be confused with refusing to make a decision one way or the other) for any part during his lifetime and did not change this refusal, this Refusal cannot be changed or countermanded after his death unless the individual was an unemancipated minor. (A Refusal is not the same as refusing to make a decision one way or the other, see discussion in #20.)

If the person providing consent is a guardian or an agent acting pursuant to an advance directive and the advance directive provides instruction with respect to donation, the agent or guardian cannot act contrary to these instructions – whether the instructions are to permit or refuse donation or do not give the agent the authority to make that decision. If the instructions are to leave the decision up to the agent or guardian, the decision regarding donation then is his or hers to make.

If this is not a First Person designation, then the individuals whose authorization is sought after death (i.e. the individual in the respective classes) can limit the gift as they deem appropriate.

18. What if there is opposition to donation by someone within the same class as the person providing the consent?

VIRGINIA [§ 32.1-291.9(B)]

The statute does not require unanimity within a class. If there is objection to donation within a class of persons, the gift may nonetheless proceed if 50% or more of the persons in the class who are reasonably available authorize the gift. Ties go in favor of donation.

Example: If there are 4 adult children and 2 are in favor of donation and 2 are opposed, donation can proceed.

Example: If there are 3 adult siblings and only 2 are reasonably available and 1 is in favor and 1 is opposed, donation can proceed.

If more than 50% of those reasonably available in a class refuse donation, the gift fails and the OPO may not proceed to a lower class. However, the OPO may continue efforts to locate additional people within the first class.

Example: If there are 2 parents and only 1 is reasonably available and opposes, donation cannot proceed.

- Example: However, if the second parent is located and authorizes the gift, donation can proceed because the class is tied.

WEST VIRGINIA [§ 16-19-9(b); 16-30-8]

If there is an objection to donation within a class of persons, the gift may proceed if a majority of the members of the same class consent to do so. Unlike Virginia, ties do not go in favor of making the gift. In the event of a tie, the attending physician or advanced nurse practitioner shall appoint a health care surrogate to decide whether to make the anatomical gift. Presumably, the designated surrogate should not be an individual who is a member of the class that is deadlocked.

- Example: If there are 4 adult children and 2 are in favor of donation and 2 are opposed, donation can only proceed in the event the health care surrogate appointed by the attending physician or advanced nurse practitioner decides to make the anatomical gift.

A note of caution is in order: because the surrogate may be selected from the same or different class of individual, this can result in a very sensitive interplay among the surrogate and the members of the deadlocked class.

19. Does a gift of or refusal of one or more parts preclude the gifting of other parts?

VIRGINIA [§32.1-291.8(E) and (F)]; WEST VIRGINIA [§ 16-19-8 (d) and (e)]

No. Unless expressly indicated otherwise, if a donor or individual acting on behalf of a donor has authorized or refused to authorize a gift of a specific part (*i.e.*, liver), this does not preclude authorization for the donation of other parts (*i.e.*, kidneys, pancreas, lungs, *etc.*).

Likewise, unless otherwise expressly provided, authorization for one or more parts to be used for a specific purpose (*i.e.*, transplant, research, therapy, or education) is not a limit on the purpose for which other parts may be donated.

20. What is the difference between Revocation and Refusal?

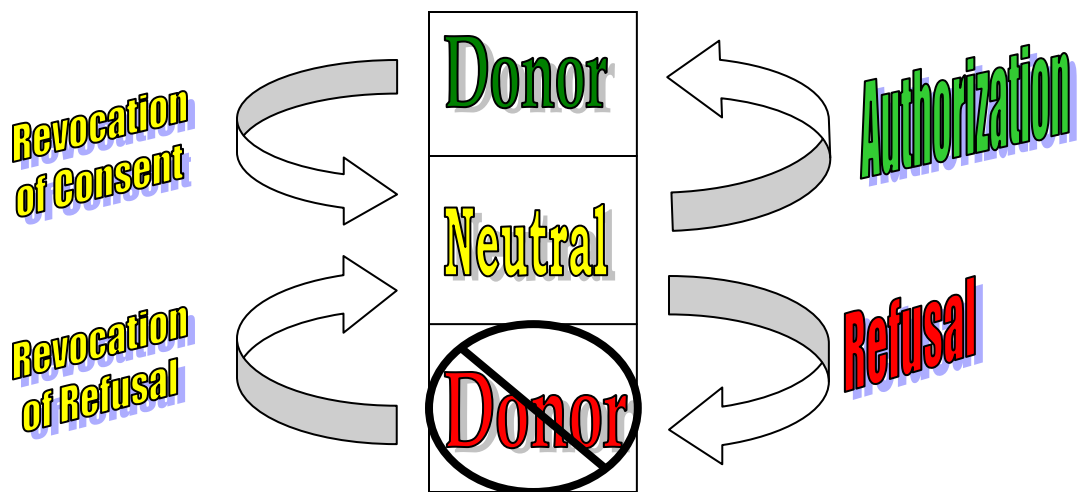
VIRGINIA [§ 32.1-291.6, 32.1-291.7, 32.1-291.8, 32.1-291.10, 32.1-291.14(F)]; WEST VIRGINIA [§ 16-19-6; 16-19-7; 16-19-8(c)]

There is an important difference between revocation and refusal. Under both Virginia and West Virginia law, an individual is in one of three statuses relative to donation: (1) approval for donation, (2) neutral/no decision, and (3) refusal for donation.

Initially, everyone starts in the neutral position. During his/her life, a person can move out of the neutral position one of two ways, by either: (1) authorizing donation or (2) refusing donation. Either of these choices can be *revoked* or *changed* by the individual during his life. In either case, if the person changes (or revokes), he is moved back to the neutral position.

An easy way to think of “revocation” is to substitute the word “change” for the word “revoke”. “Revocation” is the “change” that moves an individual donor to the neutral position (from either the authorization or refusal positions). “Refusal” is the “no” position. Some people confuse “revocation” with “refusal”, but they are not the same. See the diagram and the Examples below.

Potential Donation Categories.  
Everyone Starts at the **Neutral Position**



If an individual has authorized a gift (for example, via a donor, a First Person designation), this person moves to the authorization position. If this person revokes (or changes) his authorization, the revocation moves him to the neutral position; it does not move him to the refusal position. Likewise, if a person has executed a Refusal, he is in the refusal position. If he revokes (or changes) this Refusal, he moves back to the neutral position, he does not move to the authorization position (unless the document *also* indicates an intention to make a gift in which case, he moves to the authorization position).



Once a person is in (or returns to) the neutral position, this individual or another authorized person (such as a family member) may make a subsequent donation decision. This distinction is important in the instance of a donor who has executed a First Person designation, but who subsequently *revokes* his gift. This revocation has moved the individual from the “yes” to the neutral position. Family members may still authorize donation on his behalf.

## 21. What is the effect of a Refusal?

VIRGINIA [§ 32.1-291.7(D); 32.1-291.8(H)]; WEST VIRGINIA [§16-19-7(c); 16-19-14(f)]

Unless the individual is an unemancipated minor, a First Person refusal to donate bars/prohibits any other person from making an anatomical gift of the individual’s body or parts.

If the individual is an unemancipated minor, a parent who is reasonably available may revoke (or change) the refusal and ultimately decide whether or not to donate the minor’s organs, tissue, or corneas.

## 22. What form must a Refusal take to be valid?

VIRGINIA [§ 32.1-291.2(2), 32.1-291.7(A), 32.1-291.9]  
WEST VIRGINIA [§ 16-19-7(a); 16-19-9; 16-19-10]

### 1. Before the Donor’s Death.

An individual, while he is alive, may make a First Person refusal himself by executing a Refusal document or by a verbal designation. Alternatively, he may delegate this power to be exercised by another person who may exercise this power while the grantor is alive (by executing a refusal document on behalf of the individual) or after his death. This Refusal by the individual has to be in:

- (a) a record signed by the individual (or by someone acting at the individual’s direction if the individual is physically unable to sign) that is witnessed and signed by at least two adults, at least one of whom is a disinterested witness, and contains a statement that the record has been signed and witnessed as such,
- (b) a will, or
- (c) any communication (this could be a verbal statement) by the individual, during a terminal illness or injury, to two or more adults, at least one of whom must be a disinterested witness.

In Virginia, for purposes of this section a disinterested witness is someone *other than* any of the following: spouse, child, parent, sibling, grandchild, grandparent, guardian, adult who exhibited special care/concern for individual, and the person or entity to whom the gift could pass (which includes the OPO).

2. After the Donor's Death.

After the death of an individual who has not made a decision regarding donation, the majority of persons reasonably available in a class can refuse to donate if no class prior to them authorizes donation.

23. What form must a Revocation take to be valid?

VIRGINIA [§ 32.1-291-6; 32.1-291.6-10]

1. Before the Donor's Death.

Only a donor (or someone authorized to act for or who stands-in-the-shoes of the donor) may revoke a gift before the donor dies. A revocation may take several forms: (1) in writing, (2) by action, (3) verbally.

- (a) The revocation may be in writing. This document would have to indicate that the gift is being revoked and must be signed by at least two adult witnesses, one of whom is a disinterested witness.
- (b) If the gift was made in a will, it must be amended in the same manner that wills are amended.
- (c) If the gift is contained in a document that is not a will, the gift will be revoked by the destruction or cancellation of the document *with the specific intent to revoke the gift*. (This can be a difficult determination to make, i.e. was the document destroyed because the individual wanted to revoke the gift?)
- (d) A gift can also be revoked by a later-executed document that amends or revokes a previous gift, either expressly or by inconsistency. For example, an earlier gift document indicates that the donor does not want to donate his eyes, but a subsequent document authorizes the donation of his corneas. The second gift prevails over the first because it is the most recent document and the two documents are inconsistent, therefore the later document prevails.

- (e) Finally, the gift can be amended or revoked by a statement, but the statement has to be during a terminal illness or injury and has to be made before two witnesses, at least one of whom is a disinterested witness.

2. After the Donor's Death.

- (a) First-Person Designation – After the donor's death, a gift made pursuant to a First Person designation cannot be changed, overruled, or revoked by family members or anyone else (except the parents of an unemancipated minor).
- (b) Non First-Person Designation – After the donor's death, a gift made by an individual or group in the class of survivors may only be revoked by:
  - (i) an individual or group in a higher class; or
  - (ii) a majority of reasonably available members of the highest class.
- (c) A revocation is only available up to the point that the OPO, transplant hospital, or physician/technician is aware of the revocation before:
  - (i) an incision has been made to remove a part from the donor's body or
  - (ii) invasive procedures have commenced on the recipient.

**Example 1:** *An individual previously had a First Person designation through his state DMV. At his most recent drivers license renewal, he opted not to continue the First Person designation so his name was removed from the DMV registry and his license no longer contained the donor icon. Does this mean that his family may not authorize donation?*

Answer. *The family (or other individuals in the classes described in the statute) may authorize donation. By not renewing the First Person designation, the individual has revoked his First Person designation. The legal effect of this action is that he is letting others make the decision on his behalf. The decision not to renew his First Person designation is not the legal equivalent of a refusal because a refusal is an express, affirmative statement that the individual does not wish to make a gift at all. A non-continuation is not, in and of itself, an affirmative statement. To be*

a qualifying affirmative statement, the expression must either be (1) in writing or (2) an oral communication made during a terminal illness or injury in the presence of 2 witnesses, one of whom is disinterested. In this example, the act of not continuing a designation is neither a writing nor an express, affirmative statement.

**Example 2:** Same facts as above, except that a family member indicates that the potential donor made several verbal statements at the time of his license renewal that he did not want to be a donor; the individual was in good health at the time these statements were made.

Answer. As discussed above, the non-renewal of the First Person designation is a revocation (which puts the individual in the neutral position). The alleged oral statements are being asserted to move the individual to the Refusal position. These statements may or may not qualify as a Refusal, depending upon additional facts. Because there is no document involved, the rule for verbal authentication applies. To qualify as a verbal Refusal, the individual would have had to be suffering from a terminal illness or injury and the statements would have to be witnessed by (or verified by) two witnesses, at least one of whom is a disinterested witness. Since the individual made these statements while he was in good health, then they do not, by law, satisfy the definition of a “refusal”. Nonetheless, the family members could consider these statements as they decide whether to authorize a gift.

**Example 3:** Same facts as above, except that the individual did renew his First Person designation at the time his license was renewed. However, a family member indicates that the individual had subsequently changed his mind and no longer wanted to be a donor, although no document is offered to support this contention.

Answer. In the absence of a written revocation or refusal document, the only way that a legitimate First Person designation can be set aside is by establishing that the gift has been revoked by the donor during his lifetime and that the donor then issued (by writing or orally) a Refusal. In this example, because there is no writing, the only way a revocation can be established is by proving the alleged oral statements. The family member asserting this statement must produce two witnesses to the statement (one of whom must be ‘disinterested’) AND these statements have to have been made when the individual was suffering from a terminal illness or injury. A disinterested witness cannot be a spouse, child, parent, sibling, grandchild, grandparent, or guardian.

**Example 4.** *When is an individual suffering from a “terminal” illness or injury?*

*Answer. The statute does not define at what point in the progression of a terminal illness a person has to be in order to permit a verbal refusal or revocation of a First Person designation. Presumably, a properly witnessed statement made after a person’s awareness of the diagnosis of a terminal disease or “illness” would be sufficient. Note that there seems to be a greater sense of having to be closer to death in the case of “terminal injury”, (i.e., a person sustaining a terminal injury usually does not live for another year). It is uncertain whether the word “terminal” has the same sense of imminence with respect to illness that it has for injury.*

**Example 5.** *An individual with a valid First Person designation has a family member who produces a document that he claims is a Refusal document. The actual text of the donor document that purports to be a “refusal” only says that the donor has “changed” his mind and revokes his First Person designation. Is this a revocation of the First Person designation or a refusal to make any gift whatsoever?*

*Answer. The actual language of the document is critical, and the text would have to clarify whether the donor sought merely to revoke his First Person designation (thereby allowing family members or others to act on his behalf after his death) or to affirmatively refuse to authorize any form of gift. If the document says nothing more than the donor no longer wants to have a First Person designation, then this would be a revocation document and the First Person designation ends (consequently, the individuals in the hierarchy of family members would have to authorize the gift). To qualify as a refusal document, the text of the document would also have to say that the individual does not want to make any gift.*

24. Who must check for a First Person designation or in the absence thereof, search for persons who can authorize a gift?

VIRGINIA [§ 32.1-291.8(G) - (H); 32.1-291.12(A); 32.1-291.14(F) - (G)];  
WEST VIRGINIA [§ 16-19-12; 16-19-14(a) and (f)]

The following individuals must make a reasonable search of the individual for information about donation status if he/she is believed to be dead or if death is imminent: law enforcement officer, firefighter, paramedic, other emergency rescuer, or a hospital.

In West Virginia, the medical examiner also must conduct a reasonable search of an individual whose body is placed in his custody for information about the donation status of the individual.

If the donor/decedent is an unemancipated minor who authorized (or refused) a gift, the OPO must conduct a reasonable search for the parents to allow them an opportunity to revoke or amend the authorization (or refusal).

Upon referral from a hospital, the OPO must make a reasonable search for persons who are authorized to make a gift if the individual has not executed a First Person designation.

25. If the donor, individual, or person providing authorization is from a state other than Virginia/West Virginia and death is declared in Virginia/West Virginia, which state's law governs the recovery of the gift?

VIRGINIA [§ 32.1-291.19]

WEST VIRGINIA [§ 16-19-18]

The answer is both states, depending upon whether the gift is based upon a document of gift, i.e. a First Person designation or is a gift made by others, e.g. survivors in the classes described earlier. In a First Person designation, the validity of the designation will be governed by the laws of the state where the individual making the gift was (i) domiciled, (ii) has a residence, or (iii) was a national at the time the document of gift was executed. For example, assume a potential donor has made an anatomical gift via his drivers license in State X (i.e., a First Person designation) and a symbol is placed on his license. Assume also that State X (i.e., the state of the drivers license) provides that symbols on drivers licenses are only valid for organs, not tissue.

In this instance, both Virginia and West Virginia law provide that the gift is valid at least with respect to organs because it was made in accordance with the laws of the state where it was executed (i.e., State X, the state of the drivers license). Had the gift been made in Virginia or West Virginia (instead of State X), the gift would also include tissue.

Virginia and West Virginia both provide that a gift, once validly made, may be interpreted under the laws of either Virginia or West Virginia respectively. Does this mean that the recovery could be governed by Virginia or West Virginia law, which would allow the recovery of tissue because neither Virginia nor West Virginia has an "organ-only" limitation in its UAGA?

Although there may be an argument for this interpretation, the better rule is tissue cannot be recovered on the basis of the State X drivers license icon. The reason is that the extent of the gift is defined in the first instance by the laws of the state where the gift is made and the document of gift executed. Under the laws of State X, no gift has been made with respect to tissue. Because there is not a First Person designation with respect to tissue, the individuals described in the hierarchy of classes will have to make an authorization for a gift of tissue.

If this is not a First Person designation situation and the authorization decision passes to the family or others authorized to make donation decisions after a person's death, then the priority of those who may authorize the gift is controlled by the state of the recovery (e.g. Virginia or West Virginia), even if there is a different sequence in the law of the potential donor's home state, State X.

## **OTHER PROCEDURAL QUESTIONS**

26. **What constitutes death?**

VIRGINIA [§ 54.1-2972; 32.1-296]; WEST VIRGINIA [16-30-3(g); 16-10-1]

Virginia and West Virginia recognize both brain death and cardiac death.

27. **Who can declare death?**

VIRGINIA [§ 54.1-2972]

Cardiac death can be declared by any physician authorized to practice in Virginia.

Brain death must be declared and attested by two physicians authorized to practice in Virginia and who are licensed in the fields of neurology, neurosurgery, electroencephalography, or critical care medicine. Alternatively, one of the required two physicians may be the treating physician as long as the other is a specialist in one of the four listed fields.

A nurse or physician assistant may declare death in an extremely limited situations, e.g. if the nurse or PA works for a home health agency, hospice, nursing home, or prison and certain other conditions are satisfied.

WEST VIRGINIA [§ 16-5-19; 16-19-14; 30-3-16; Title 11, Series 1B of the West Virginia Board of Medicine Legislative Rules]

Cardiac and brain death can be declared by a physician authorized to practice in West Virginia. Certain authorized physician assistants may pronounce death in accordance with the West Virginia Board of Medicine Legislative Rules, which provides that a physician assistant may pronounce death provided that (i) it is contained in his job description, (ii) he has a need to do so within his scope of practice; and (iii) that the pronouncement is in accordance with applicable West Virginia law and rules.

28. **Can physician(s) who declare death be part of recovery process?**

VIRGINIA [§ 32.1-291.14(I)]; WEST VIRGINIA [§ 16-19-14(i)]

No, neither the attending physician (nor physician assistant-West Virginia) nor the physician who declares death may participate in recovery or transplant proceedings.

29. Is the Medical Examiner's consent required for recovery to take place?

VIRGINIA [§ 32.1-291.23(D) and (E)]; West Virginia [§ 16-19-21; 16-19-22]

Yes, if the body is under the jurisdiction of the Medical Examiner. If the Medical Examiner believes the recovery of a part may interfere with the postmortem investigation, the Medical Examiner and LifeNet Health are to follow agreed-upon protocols and procedures.

In Virginia, if the Medical Examiner denies recovery, LifeNet Health may take the matter to the Chief Medical Examiner.

In West Virginia, if the Medical Examiner denies recovery, he is required to provide the OPO with a written explanation of the reasons for not allowing recovery.

30. Is there immunity for mistakes made by individuals in the process of obtaining authorization or pursuing the recovery?

VIRGINIA [§ 32.1-291.18]; WEST VIRGINIA [§ 16-19-17(a)]

Yes. Both states provide that an individual who is involved in the recovery of organs and tissues, and who acts in good faith in doing so, is not liable in any "civil action, criminal prosecution, or administrative proceeding." This applies to OPO personnel, hospital personnel, physicians, and anyone involved in the recovery process. Statutory immunity is unusual and reflects the state's judgment that the recovery of organs and tissue is something that is to be encouraged.

31. Can the OPO engage in pre-donation testing of the body or part(s), even prior to declaration of death?

VIRGINIA [§ 32.1-291.14(C) - (E)] WEST VIRGINIA [§ 16-19-11(a)(1); 16-19-14(c) and (e)]

Yes. The OPO is allowed to conduct reasonable examinations necessary to ensure medical suitability of any part that is or could be the subject of an anatomical gift.

During this interval, unless the hospital or OPO knows the individual has executed a refusal or until a majority of persons in a class refuse donation, measures necessary to ensure the medical suitability of the part may not be withdrawn.



The examinations may continue after there has been a declaration of death unless prohibited by another law (other than UAGA).

The “examination” permitted includes review of all medical and dental records.