

GIFTS OF THE FUTURE: THE LEGAL AND MORAL IMPLICATIONS OF A TESTATOR DEVISING A CRYOPRESERVED ANATOMICAL GIFT TO A BENEFICIARY WHO DOES NOT YET NEED THE GIFT

Comment

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In the impossible, there is possible. In 1954, doctors successfully transplanted the first human organ.¹ Over fifty years later, more than 28,000 Americans are alive because they received a successful organ transplant.² In an age where science quickly catches up to currently perceived science fiction, many states have implemented laws to deal with anatomical gifts.³ But, what happens when science exceeds the expectations of those laws? What happens when cryogenic centers are able to preserve anatomical gifts, and thereafter, successfully rejuvenate them for organ transplantations? What happens when a beneficiary receives a cryopreserved anatomical gift, but does not yet need it?

This comment addresses some of the legal and moral implications that arise when a testator devises a cryopreserved anatomical gift to a beneficiary who does not yet need the gift. In Part I, the institutions that handle anatomical gifts are presented to lay the foundation for this article for three main reasons: first, to look into the process of how individuals may donate their organs; second, to discuss the current methods surgeons use to harvest an organ; and, third, explore the feasibility of cryopreserving an organ.⁴ Part II explores the future outlook and moral implications that arise if cryopreserved anatomical gifts can be devised to a beneficiary.⁵ Part III addresses the current laws that make anatomical gifts possible.⁶ Lastly, Part IV proposes some limitations to a testator's ability to devise a cryopreserved anatomical gift to a beneficiary who does not yet need the gift.⁷

With modern technology, the future quickly approaches and brings reality upon us. The research and assertions within this comment investigate whether or not the legal world is ready to deal with the ramifications this may entail.

1. See UNITED NETWORK FOR ORGAN SHARING, TALKING ABOUT TRANSPLANTATION: WHAT EVERY PATIENT NEEDS TO KNOW 4 (2013) [hereinafter UNOS, TALKING ABOUT TRANSPLANTATION], available at <http://www.unos.org/docs/WEPNTK.pdf>.

2. See *id.*

3. See *infra* Part III.

4. See *infra* Part I.

5. See *infra* Part II.

6. See *infra* Part III.

7. See *infra* Part IV.

Specifically, this comment will explore what the legal world must do to be fully prepared for when science collides with reality.

I. TRACING BACK TO WHERE IT ALL ENDED AND YET BEGAN

There are three main reasons why exploring the institutions that handle anatomical gifts lays a foundation for the organ donation process.⁸ First, the process of donating an organ helps explain why an individual might choose, alternatively, to devise a cryopreserved anatomical gift to a beneficiary if such an option was available.⁹ Second, the current methods that surgeons use to harvest organs are complicated, which highlights the dire need for organ donors and emphasizes why cryopreserved organs may be the answer to the present day shortage of organs our nation is experiencing.¹⁰ Third, the feasibility of cryopreserving an organ illustrates how quickly science is changing, even today.¹¹

A. *The Humane Origin of Anatomical Gifts*

To fully understand why a testator would give a cryopreserved anatomical gift, if such an option was available, it is first necessary to understand what normally occurs when a donor initially donates an organ.¹² “The National Organ Transplant Act (NOTA) of 1984 (as amended in 1988 and in 1990), the Uniform Anatomical Gift Act (UAGA), and the Sixth Omnibus Budget Reconciliation Act (SOBRA) provide the legal framework for organ donation in the United States.”¹³ However, organ procurement organizations (OPO) are ultimately responsible for tracking and distributing donated organs.¹⁴ Specifically, OPOs are the line of communication between hospitals, where the organs are procured, and potential recipients.¹⁵ Currently, there are fifty-eight OPOs within the United States, each of which received its assigned, designated region from the federal government.¹⁶

8. See text accompanying notes 9–11.

9. See *infra* Part I.A.

10. See *infra* Part I.B.

11. See *infra* Part I.C.

12. Thomas J. Cossé & Terry M. Weisenberger, *Words Versus Actions About Organ Donation: A Four-Year Tracking Study of Attitudes and Self-Reported Behavior*, 50 J. BUS. RES. 297, 301 (2000).

13. *Id.* (“NOTA specifically outlawed the buying or selling of human organs and tissue and established the National Organ Procurement and Transplantation Network (OPTN).”).

14. See *id.*

15. See *id.* (illustrating that each OPO remains in contact with, and subsequently retrieves organs from, all of the hospitals that are geographically located within the OPO’s designated region).

16. See Health Res. & Servs. Admin., U.S. Dep’t of Health & Human Servs., *Organ Procurement Organizations*, ORGANDONOR.GOV, <http://organdonor.gov/materialsresources/materialsopolist.html> (last visited Jan. 26, 2014).

When a transplantable organ becomes available, the organ is matched against a database of waiting transplant candidates.¹⁷ An OPO then receives an ordered list of potential recipients.¹⁸ In accordance with this list, the OPO notifies the corresponding transplant center where the potential recipient has been placed on a waitlist.¹⁹ The OPO also provides the organ donor's medical and social history to the transplant center.²⁰ Interestingly, the surgeon at the transplant center ultimately accepts or declines the organ on behalf of the patient.²¹

B. The Humans Who Deliver the Organs

The following section discusses the methods surgeons use to harvest organs; such discussion will help to draw an analogy between how surgeons must transfer organs to recipients and how cryogenics may not only be possible, but also preferable.²² Furthermore, this section explores why cryopreserved organs may be the long-awaited answer to the shortage of organ donors.²³

1. The Complicated Methods of Harvesting Organs

When a donor's organs are ready for harvest, physicians will classify the organ donor as either a non-heart-beating cadaver donor (NHBCD) or a brain-dead donor.²⁴ Specifically, when a physician certifies that the organ donor's death was caused by the donor's heart stopping, the physician will label that organ donor as a NHBCD.²⁵ On the other hand, a physician deems an organ donor brain-dead by applying one of two methods.²⁶ The first method is when the physician determines that the donor's entire brain is inactive.²⁷ Alternatively, a physician may deem a donor brain-dead if any one of the following can be found in the donor's "hospital chart: the absence of spontaneous respiration and two additional brain-stem reflexes; a physician's

17. See Cossé & Weisenberger, *supra* note 12.

18. See *id.*

19. See *id.*

20. See *id.*

21. See e.g., Howard M. Nathan et al., *Organ Donation in the United States*, 3 AM. J. TRANSPLANTATION 29, 29 (2003); Bruno Gridelli & Giuseppe Remuzzi, *Strategies for Making More Organs Available for Transplantation*, 343 NEW ENG. J. MED. 404, 404 (2000) (doctors take into account "the quality, size, or weight of the organ; the donor's age; and" whether the organ has tested positive for a variety of infections).

22. See discussion *infra* Part I.B.1–2.

23. See discussion *infra* Part I.B.3–5.

24. Kelly Ann Keller, Comment, *The Bed of Life: A Discussion of Organ Donation, Its Legal and Scientific History, and a Recommended "Opt-Out" Solution to Organ Scarcity*, 32 STETSON L. REV. 855, 875 (2003).

25. See *id.*

26. See *id.*

27. See *id.*

note declaring brain death; a flat electroencephalogram; or other brain studies indicating irreversible destruction of the brain.”²⁸

2. *The Bottom Line*

The classification of an organ donor as a NHBCD or a brain-dead donor determines how, and most importantly, when, a surgeon must harvest the donor’s organs.²⁹ If the donor is a NHBCD, the donor’s blood will inevitably cease to circulate necessarily after the heart stops, so surgeons must harvest organs from NHBCDs within forty-five minutes of the donor’s death.³⁰ Failure to do so causes the organs to die and effectively eliminates the recipient’s chances of receiving a transplant.³¹

Therefore, surgeons only have a short window of opportunity to retrieve the organs from the donor.³² To extend the brief time period in which an organ remains viable for transplantation, however, surgeons employ special measures.³³ In particular, surgeons utilize “‘rapid cooling’ techniques, and other protocols such as ‘reanimation’ of the organs with devices and medicines that circulate blood and perfuse or cleanse and cool the organs.”³⁴

On the other hand, if a donor is brain-dead, the donor can be artificially maintained through life support or through some other type of life-sustaining measure.³⁵ Therefore, the organs of a brain-dead donor can remain within the body much longer than the organs of a NHBCD.³⁶ Accordingly, because viability of the organs is not as pressing of a concern, the time frame is more flexible for surgeons who harvest organs from brain-dead donors than it is for surgeons who harvest organs from NHBCDs.³⁷

Because a donor’s classification determines how surgeons must harvest the organs, it is not unimaginable that the next step in scientific progression is cryopreserving the organs to sustain them for a longer period of time.³⁸ In fact, with NHBCDs, surgeons must cool the organs to an optimal, low temperature before transporting them and must reanimate them before transplanting them

28. Ellen Sheehy et al., *Estimating the Number of Potential Organ Donors in the United States*, 349 NEW ENG. J. MED. 667, 668 (2003).

29. See Keller, *supra* note 24, at 875–76.

30. See *id.* at 876–77 (requiring a doctor to cool the organs to an optimally low temperature to slow the degeneration process and to allow the organs to be transported to the recipient).

31. See *id.*

32. See *id.* at 877 (spanning from when the donor dies to when the donor’s individual organs begin to die).

33. See *id.*

34. *Id.*

35. See *id.* at 875–76.

36. See *id.* at 875–77.

37. See *id.*

38. See Megan Scudellari, *Icing Organs*, 27 THE SCIENTIST, no. 2, Feb. 1, 2013, available at <http://www.the-scientist.com/?articles.view/articleNo/34190/title/Icing-Organs>.

into any recipient.³⁹ This procedure parallels the process used when a beneficiary rejuvenates a testator's cryopreserved organ when a transplant is necessary.⁴⁰ The only difference is the amount of time the organ remains at the low, optimal temperature.⁴¹

3. *Who Wants to Be An Organ Donor?*

As the need for transplantable organs continues to grow at an unmanageable rate, studies are focusing on why patients are becoming organ donors in the first place.⁴² Specifically, an increasing number of studies not only attempt to pinpoint exactly what may influence someone to become an organ donor, but also what factors may encourage a deceased's next of kin to donate the decedent's organs.⁴³ These studies are in direct response to the needs of "[t]he organ-procurement community . . . to understand how and why a patient's age and ethnic background, as well as how [the patient] died, [may] influence the likelihood that families will consent to donate [the patient's] organs."⁴⁴ Notably, however, these studies do not advocate educating the American populace about the need for organ donation.⁴⁵

When it comes to organ donation, "[eighty-five percent] of Americans are already aware of the need for organ donors."⁴⁶ As a matter of fact, the American public views anatomical gifts with an overall air of positivity.⁴⁷ The problem, however, is that this view is not being matched by action.⁴⁸ As such, "[i]t is doubtful that the supply of cadaveric organs will ever fully meet the demand" with the current methods.⁴⁹ Even the courts have acknowledged "that the [alarming] demand for donor organs exceeds the supply[.]"⁵⁰

4. *The Intervention Led by the Legislature*

In response to the severe need for organ donors, the National Conference of Commissioners on Uniform State Laws (NCCUSL) passed and later amended the Uniform Anatomical Gift Act (UAGA).⁵¹ The original UAGA,

39. See Keller, *supra* note 24, at 876–77.

40. See generally Scudellari, *supra* note 38 (explaining the developing process of cryopreservation).

41. See *id.*

42. See Sheely et. al., *supra* note 28, at 673.

43. See *id.*

44. *Id.*

45. See *id.*

46. Susan E. Morgan & Jenny K. Miller, *Communicating About Gifts of Life: The Effect of Knowledge, Attitudes, and Altruism on Behavior and Behavioral Intentions Regarding Organ Donation*, 30 J. APPLIED COMM. RES. 163, 164 (2002).

47. See *id.*

48. See *id.*

49. Cossé & Weisenberger, *supra* note 12, at 297.

50. *Slaughter v. Life Connection of Ohio*, 907 F. Supp. 929, 934 (M.D.N.C. 1995).

51. See *Alcor Life Extension Found. v. Richardson*, 785 N.W.2d 717, 723 (Iowa Ct. App. 2010).

passed in 1968, “was intended to ‘encourage the making of anatomical gifts’ by eliminating uncertainty as to the legal liability of those authorizing and receiving anatomical gifts, while respecting dignified disposition of human remains.”⁵² By 1987, however, “it had become ‘apparent that the [UAGA of 1968] [was] not producing a sufficient supply of organs to meet the [then] current or projected demand for them.’”⁵³ The NCCUSL even “noted that although many Americans supported organ donation, very few actually participated in organ donation programs.”⁵⁴

After the 1987 amendment did not produce desired results, the NCCUSL again revised the UAGA in 2006, focusing on “strengthening . . . the respect due to a donor’s decision to make an anatomical gift.”⁵⁵ However, even with the adopted revisions, the shortage of donated, transplantable organs remains at a critical status.⁵⁶ This is another reason why the advancement of cryogenics is vitally important and why the legal world should begin to ensure cryopreserved anatomical gifts are protected within the various state statutes.⁵⁷

5. *The Medical Community’s Reaction: Lower the Standard to Increase the Donors*

To manage the drastic shortage of transplantable organs, the medical community lowered the criteria for acceptable donated organs to unimaginable proportions.⁵⁸ Specifically, due to the dire need for transplantable organs, organ donors who once were labeled as suboptimal are now being accepted wholeheartedly, and their organs are being harvested.⁵⁹ For example, organs are now harvested from donors who are above the age of fifty and donors who are below the age of five, as well as from those with worrisome medical histories.⁶⁰ Today, an acceptable organ donor may have a medical history that includes “hypertension, diabetes[,] . . . hepatitis C infection, and kidneys with prolonged cold-ischemia times or [general] anatomical abnormalities.”⁶¹ Thus, just as there is a severe need for organ donors, the need for scientific advancement to remedy this situation continues to grow as well.⁶²

52. *Id.* (quoting UNIF. ANATOMICAL GIFT ACT prefatory note, at 4 (1968)).

53. *Id.* (citing UNIF. ANATOMICAL GIFT ACT prefatory note, at 1 (1987) (quoting HASTINGS CTR., ETHICAL, LEGAL AND POLICY ISSUES PERTAINING TO SOLID ORGAN PROCUREMENT: A REPORT OF THE PROJECT ON ORGAN TRANSPLANTATION, at i (1985))).

54. *Id.* (citing REVISED UNIF. ANATOMICAL GIFT ACT prefatory note, at 4–5 (2006)).

55. *Id.*

56. *See* Cossé & Weisenberger, *supra* note 12, at 297.

57. *See id.*

58. *See* Gridelli & Remuzzi, *supra* note 21.

59. *Id.*

60. *See id.*

61. *Id.* (listing various medical conditions that once would have caused an individual to be deemed as an undesirable organ donor).

62. *See* discussion *supra* Part I.B.3–4.

C. How Cryopreservation May Impact the Future of Anatomical Gifts and Whether Any Limitations Currently Exist

Many once considered organ transplantation as the anti-aging medicine because of its ability to effectively extend human life.⁶³ However, as the need for transplantable organs increases at an alarming rate, while the number of willingly donors is unable to match such need, science must change to accommodate the times.⁶⁴

The need for self-preservation seems to drive organ recipients.⁶⁵ Similarly, the need for self-preservation drives people who choose cryogenic preservation.⁶⁶ However, has science, through cryobiology, advanced to the point that the motive to save one's life may be altruistically extended to save the life of another? Studies indicate it has.⁶⁷

1. A Blast from the Not-So Distant Past

"Adult humans have survived [being] cool[ed] to temperatures that stop the heart, brain, and all other organs from functioning for up to an hour."⁶⁸ Cryogenics, thus, merely takes this concept to another level; with cryogenics, someone may "be [cryogenically] preserved for decades or [even] centuries."⁶⁹ Essentially, the science behind cryogenics preserves the human body's cell structure and chemistry, so when the person is rejuvenated, total recovery, including memory and personality, occurs.⁷⁰

2. The Cell Was the Start, Cryogenics the Means, and Humans the End

There have been remarkable advances in human cryobiology.⁷¹ Cryobiology is not unheard of and is quickly gaining recognition for its capabilities.⁷² "Sperm banking, frozen blood, and frozen human embryos are [such] longstanding and well-known medical contributions of the field of cryobiology" that they are now regarded as discoveries of the past.⁷³ Successful

63. See, e.g., Gregory M. Fahy et al., *Physical and Biological Aspects of Renal Vitrification*, 5 ORGANOGENESIS 167, 167 (2009) [hereinafter Fahy et al., *Renal Vitrification*].

64. See *id.*

65. See *id.* at 167–68.

66. See *id.*

67. See discussion *infra* Part I.C.1–3.

68. *What is Cryonics?*, ALCOR LIFE EXTENSION FOUND., <http://www.alcor.org/AboutCryonics/index.html> (last visited Jan. 26, 2014).

69. *Id.*

70. See *id.*

71. See Gregory M. Fahy et al., *Cryopreservation of Complex Systems: The Missing Link in the Regenerative Medicine Supply Chain*, 9 REJUVENATION RES. 279, 280 (2006) [hereinafter Fahy et al., *Cryopreservation*].

72. See *id.*

73. *Id.*

cryopreservation of human embryonic stem cells is an example of how far cryobiology has advanced within human biology; such stem cells “are now available for attempts at rejuvenation.”⁷⁴

While the new possibilities involved with the cryogenic suspension of human cells and bodies show clear advancements in cryobiology, advancements in the suspension and rejuvenation of animal organs are perhaps the most telling indicators of cryobiology’s potential.⁷⁵ Scientists and researchers have gathered information regarding the cryogenic suspension of animal organs, which illustrates just how close science is to rejuvenating cryopreserved human organs.⁷⁶ In particular, “[a]nimal intestines and ovaries have been frozen, thawed, and [most importantly,] shown to function after transplantation[.]”⁷⁷

3. *No Longer Once Upon a Time*

In 2002, researchers were able to rejuvenate rat ovaries.⁷⁸ They further observed that one of the frozen ovaries “was [even] able to give rise to developing pups.”⁷⁹ Thus, not only did rejuvenation become reality, but also, these researchers were able to prove rejuvenation of an organ to its full and functioning capacities.⁸⁰ While “no vital organ[s] (particularly a heart, liver, or kidney) ha[ve] ever been frozen to a temperature low enough for long-term storage and subsequently thawed, transplanted, and found to support life,” it seems that the day where such capability becomes a reality is quickly approaching.⁸¹

4. *Why Cryogenics Is the Answer*

Today, cryobiology is known as “[the science of life] at low temperatures.”⁸² Due to the massive shortage of transplantable organs around the world, more and more researchers have turned to cryobiology as the true source of anti-aging medicine.⁸³ With the advancements in cryogenic suspension of human cells and the rejuvenation of animal organs, “long-term banking of human organs . . . for subsequent transplantation” is not an unconventional goal.⁸⁴ In fact, it is why scientists initially envisioned cryobiology.⁸⁵

74. *Id.*

75. *See id.* at 283–88.

76. *See id.*

77. *See id.* at 279.

78. *See generally id.* at 283 (noting recent research on cryogenic rejuvenation of rat ovaries).

79. *Id.*

80. *See id.*

81. *Id.*

82. *Id.* at 280.

83. *See id.* at 279–80.

84. Fahy et al., *Renal Vitrification*, *supra* note 63, at 167.

85. *See id.*

While cryopreserved human organs have not yet been successfully rejuvenated, science is quickly progressing toward the solution.⁸⁶ However, whether this solution will solve all the problems currently surrounding organ transplantation is yet to be seen; specifically, what cryogenics will come to mean, in terms of the critical shortage of transplantable organs, is waiting to be discovered.⁸⁷ More importantly, however, is the question of whether Congress is ready for such a day to come.⁸⁸

II. WHEN A TESTATOR DEVISES AN ANATOMICAL GIFT TO A BENEFICIARY

Because courts have even described death as unique, the moral implications and future outlook of anatomical gifts that arise if a testator is able to cryopreserve and devise an anatomical gift to a beneficiary will now be explored.⁸⁹ Specifically, a hypothetical will be presented and analyzed to delve further into why anatomical gifts devised to family members are desirable.⁹⁰ The advantages of allowing a testator to devise cryopreserved anatomical gifts to an unrelated beneficiary will be touched upon as well.⁹¹ Alongside these issues, the expense and process of cryopreserving anatomical gifts will be explored to emphasize that, while the outcome may be attractive, Congress must still deal with some remaining issues.⁹²

A. What Are the Moral Issues Involved?

People are driven to become organ donors for a variety of reasons: to save a loved one; to save another human being; or to save themselves, even if it is just one part of them.⁹³ The mortality of one may be the extension of life for another.⁹⁴ The situation is different, however, when it hits a little closer to home.⁹⁵ When, instead of being the one to donate the organ, you are on the receiving end.⁹⁶ It is your loved one who is giving you the organ.⁹⁷ Worse still,

86. See Fahy, et al., *Cryopreservation*, *supra* note 71, at 283–88.

87. See *id.*

88. See *id.*

89. See, e.g., *Colavito v. N.Y. Organ Donor Network, Inc.*, 356 F. Supp. 2d 237, 242 (E.D.N.Y. 2005), *aff'd*, 486 F.3d 78 (2d Cir. 2007) (describing death as unique).

90. See *infra* Part II.A.1.

91. See *infra* Part II.A.1–2.

92. See *infra* Part II.B.

93. See UNOS, TALKING ABOUT TRANSPLANTATION, *supra* note 1, at 40–41.

94. See David Muir et al., *Eight Is Enough for Four Kidney Recipients*, ABC NEWS (Apr. 8, 2008), <http://abcnews.go.com/GMA/OnCall/story?id=4611316&page=1#.UFndG42PU1N> (“We’re just trying to save our loved ones.”).

95. See Tatiana Morales, *Saved By His Daughter’s Heart*, CBS NEWS (Aug. 19, 2004, 2:35 PM), <http://www.cbsnews.com/stories/2004/08/19/earlyshow/living/main637069.shtml> (conveying the story of a father with a failing heart receiving news that he could become the donee of his daughter’s heart, after she was in a fatal accident). Some of the initial questions that ran through his mind were whether it would be ethical and if it was selfish of him to do accept his daughter’s heart. *Id.*

96. See *id.*

it is your loved one who is dying, but your loved one's organs, which are the type you are waitlisted for, are viable and transplantable.⁹⁸

1. It Was Almost Like Every Other Day

Suppose you are a parent who has had a heart condition since before your child was born.⁹⁹ By noon of each day, your day ends because your heart condition, making it impossible for you to do anything else.¹⁰⁰ Then, one day, your child goes on a trip with friends.¹⁰¹ That night, you get the call that all parents dread every time their children walk out of the front door.¹⁰²

The doctor on the other end of the line tells you that your child has been in a horrible car accident; his death is but moments away.¹⁰³ You are told not to even bother coming to the hospital where your child lays struggling; you would not make it in time.¹⁰⁴ Your child, however, became an organ donor months earlier.¹⁰⁵ Then, the doctor tells you of a proposition that literally takes your breath away.¹⁰⁶ You can have his heart.¹⁰⁷ Your dying child's heart is viable.¹⁰⁸ His heart would cure your heart condition.¹⁰⁹

Confronted with such a situation, it is not surprising that questions of ethics and selfishness arise.¹¹⁰ Is it ethical to donate to one's kin?¹¹¹ Is it selfish?¹¹² After all, if you do not accept the heart, the organ will almost certainly be transplanted into someone else.¹¹³ Perhaps, a virtual stranger, whom you may never meet, will be the recipient of the organ.¹¹⁴ And that stranger may be someone who has a higher number on the waitlist for the organ.¹¹⁵

97. *See id.*

98. *See id.*

99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.*

103. *See id.*

104. *See id.*

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.*

2. *There Is No "I" in Love*

When an organ donor and a recipient are related, the surviving family members may have concerns.¹¹⁶ These concerns may not be the same as those of the donor or the recipient.¹¹⁷ Instead, the concerns may revolve around whether the family members can sustain another loss or how long the family members are prepared to hold on to the current situation.¹¹⁸ Most of the time, however, they all come to the same conclusion.¹¹⁹

The donor is a loved one who can no longer live; the recipient, on the other hand, is a loved one who still can live. If there is a chance to live, why not take it? What better way to remember the one who has passed than having that person literally become a part of the one who is saved?

B. How Cryogenics Will Change Devised Anatomical Gifts

Cryobiology has not yet advanced to the point to allow vital individual organs, themselves, to be suspended separately and outside of the human body.¹²⁰ However, an entire human body can be cryopreserved.¹²¹ Thus, hypothetically, someone can devise his or her organs to be harvested and rejuvenated when a beneficiary needs the organs, while the testator remains in a state of cryogenic suspension.¹²²

1. *There Is No True End*

One major issue with this inference, however, is that cryogenic suspension does not kill the person.¹²³ In fact, someone cannot legally engage in pre-mortem cryogenic suspension because cryogenic suspension involves someone who is already legally dead but whose body is biologically viable.¹²⁴ Thus, the decedent is merely suspended in animation.¹²⁵ As such, harvesting organs from a cryopreserved individual could be analogous to harvesting organs from a live donor.¹²⁶

116. See, e.g., *id.*

117. See *id.* ("I just lost [my daughter]. And . . . I didn't want to lose [my husband], too. . . . I couldn't take another [loss].").

118. See *id.*

119. See *id.*

120. See *Frequently Asked Questions: Page 6 – Membership Questions*, ALCOR LIFE EXTENSION FOUND., <http://www.alcor.org/FAQs/faq06.html> (last visited Jan. 26, 2014) [hereinafter ALCOR, *Membership Questions*].

121. See *id.*

122. See *id.*

123. See *id.*

124. See, e.g., *Donaldson v. Lungren*, 4 Cal. Rptr. 2d 59, 62–65 (Ct. App. 1992); *Alcor Life Extension Found., Inc. v. Mitchell*, 9 Cal. Rptr. 2d 572, 573 (Ct. App. 1992).

125. See ALCOR, *Membership Questions*, *supra* note 120.

126. See *id.*

Currently, a live donor can donate both parts of their liver and a kidney.¹²⁷ Theoretically, people who choose to be cryopreserved already have the potential to devise their liver or kidney to a beneficiary and have their intent carried out while they remain in cryogenic suspension.¹²⁸ Today, the only thing stopping this hypothetical situation from happening is that the rejuvenation process does not create this possibility.¹²⁹ Because it is a scientific hindrance preventing rejuvenation from realization, the law should ensure that it is ready to deal with realization when reality meets this future possibility.¹³⁰

However, the advancements in cryogenics are making rapid progression.¹³¹ Therefore, the day may be upon us that the law will not only have to deal with cryopreserved suspended anatomical gifts, but it will also have to deal with devised anatomical gifts that are still within a cryopreserved person.¹³² The first way to do so is to look to what the current law allows and provides for.¹³³

2. The Beginning of Possible

Unlike the other organs in the human body, the brain has the ability to be both isolated and preserved with a process known as neuropreservation.¹³⁴ To remain viable, however, the brain must be kept within the human skull.¹³⁵ The rationale for choosing neuropreservation over cryopreservation of one's entire body is that brains are compact and are therefore inexpensive to store.¹³⁶ The rapid advancements in cryogenics can easily create a future in which the brain is not the only organ to be isolated and cryopreserved.¹³⁷

Neuropreservation indicates that soon, organs, by themselves, may be cryopreserved within a protective shell as well and stored for long-term, future transplantation.¹³⁸ The methods now being used to transport a transplantable organ from a donor to a recipient serve as an underlying foundation of such a belief.¹³⁹ In particular, the methods that surgeons utilize mirror the processes of cryopreserving organs.¹⁴⁰ For example, in both procedures, the doctors cool the

127. *See id.*

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.*

132. *See id.*

133. *See infra* Part III.

134. *See* ALCOR, *Membership Questions*, *supra* note 120; *see also* *Frequently Asked Questions: Page 2 – Technical Questions*, ALCOR LIFE EXTENSION FOUND., <http://www.alcor.org/FAQs/faq02.html> (last visited Jan. 26, 2014) [hereinafter ALCOR, *Technical Questions*] (illustrating that neuropreservation is a branch of cryopreservation that solely focuses on preserving the human brain).

135. *See* ALCOR, *Technical Questions*, *supra* note 134.

136. *See id.*

137. *See id.*

138. *See id.*; *see also* ALCOR, *Membership Questions*, *supra* note 120.

139. *See* ALCOR, *Membership Questions*, *supra* note 120; ALCOR, *Technical Questions*, *supra* note 134.

140. *See* ALCOR, *Membership Questions*, *supra* note 120; ALCOR, *Technical Questions*, *supra* note 134.

organs to an ideal temperature to keep them viable.¹⁴¹ Thus, while cryogenics may suspend organs indefinitely in time, this procedure may cause the law to rapidly advance to deal with the ramifications of a testator devising cryopreserved organs to a beneficiary.¹⁴²

3. *When Shocking May Not be Enough*

Neuropreservation, as well as the idea that organs themselves may one day be cryopreserved within a protective shell, begs the question of whether the law will allow such an activity when it may shock the conscious of lay individuals.¹⁴³ A recent decision by a California appellate court addresses how the law would likely answer this question.¹⁴⁴

In *Regents of University of California v. Superior Court*, the testator donated her body to a university program to advance teaching, medical, and scientific purposes.¹⁴⁵ Years later, the testator's children sued the university for its alleged mishandling of the testator's remains, in a manner that shocked their conscience.¹⁴⁶ The court recognized that, because the document the testator used to donate her body to the university did not contain any provision as to how the testator's body would be disposed of after the university utilized it, the university did not owe a duty to dispose of the testator's remains in a manner that would not shock her family members' conscience.¹⁴⁷ Specifically, the court explained that the university's "rights created by an anatomical gift are superior to the rights of others, and [as such,] family members . . . do not have the right to alter terms of the written donation agreement executed by the donor."¹⁴⁸

Analogously, when the day comes that organs, by themselves, can be cryopreserved within a protective shell, it would be legal for cryogenic centers to use whichever methods they prefer, even if such activities would shock the conscience of lay individuals.¹⁴⁹ This would probably require testators, who intend to donate an organ to a particular beneficiary, to specifically state in their will that the anatomical gift is to be cryopreserved until the beneficiary needs the organ.¹⁵⁰ Thus, even though the suspension of an organ by isolating it within a protective shell may shock the conscious of the testator's family

141. See ALCOR, *Membership Questions*, *supra* note 120; ALCOR, *Technical Questions*, *supra* note 134.

142. See ALCOR, *Membership Questions*, *supra* note 120; ALCOR, *Technical Questions*, *supra* note 134.

143. See ALCOR, *Membership Questions*, *supra* note 120; ALCOR, *Technical Questions*, *supra* note 134.

144. See *Regents of Univ. of Cal. v. Superior Court*, 107 Cal. Rptr. 3d 637 (Ct. App. 2010).

145. See *id.* at 639.

146. See *id.* at 639, 646.

147. See *id.* at 648–49.

148. *Id.* at 639–40.

149. See *supra* text accompanying notes 147–48.

150. Cf. *Regents of Univ. of Cal.*, 107 Cal. Rptr. 3d at 648–49.

members, the right of the cryogenic center in determining how it cryopreserves a testator's organ would be superior to the rights of others.¹⁵¹

4. *When the New is Not Truly Unique*

Legislators have specifically constructed laws involving the decedent's next of kin and the decedent's organs.¹⁵² Because "property does not refer to a thing but rather to the rights between a person and a thing[.]" courts have never required individuals to possess all of the sticks in the bundle of rights before acknowledging their property interest in a thing.¹⁵³ However, "the bodies of deceased persons (and necessarily the [organs] they contain) have held a unique status in the law."¹⁵⁴ Since the 1930s, courts have classified deceased individuals' bodies as quasi-property of the decedent's next of kin.¹⁵⁵

Many state legislatures, "in prescient recognition of the rapid progress of medical science, expanded the common-law quasi-property rights of [a decedent's] next of kin with the [adoption of the] Revised Uniform Anatomical Gift Act" (RUAGA).¹⁵⁶ Specifically, the adoption of RUAGA granted a decedent's next of kin a quasi-property right to the decedent's organs.¹⁵⁷ As such, the decedent's next of kin have the option of donating the decedent's organs, if the decedent did not decide to do so before death.¹⁵⁸ By being able to devise cryopreserved anatomical gifts to a beneficiary, testators can ultimately decide whether they want to donate their organs.¹⁵⁹

5. *What Money Can Buy*

Cryogenic centers routinely advertise cryopreservation as a medical procedure and an advancement that is not only for the wealthy.¹⁶⁰ However, cryopreservation may not be as affordable as cryogenic centers make it out to be.¹⁶¹ To be eligible to participate in cryogenics, adults generally pay around \$800 annually.¹⁶² Adults must also have either life insurance or another secure means of providing "the minimum amount of \$80,000 for neuropreservation, or

151. *See id.*

152. *See* Dina Mishra, Comment, *'Tis Better to Receive: The Case for an Organ Donee's Cause of Action*, 25 YALE L. & POL'Y REV. 403, 405 (2007).

153. *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 382–83 (Tex. 2012).

154. *Id.* at 383.

155. *See id.* at 384.

156. *Id.*

157. *See id.*

158. *See id.*

159. *See, e.g.,* Mishra, *supra* note 152, at 406.

160. *See Frequently Asked Questions: Page 5 – Financial Questions*, ALCOR LIFE EXTENSION FOUND., <http://www.alcor.org/FAQs/faq05.html> (last visited Jan. 26, 2014) [hereinafter ALCOR, *Financial Questions*].

161. *See id.*

162. *See* ALCOR, *Membership Questions*, *supra* note 120.

\$200,000 for whole body preservation.”¹⁶³ Calculated over a lifetime, the price may be equivalent to “that of smoking, cable TV, regular eating out, or even a daily cup of coffee.”¹⁶⁴ However, as a lump sum, the price would consist of six, possibly seven, figures.¹⁶⁵

Interestingly, courts have recognized the following:

[A] transaction where the . . . donor compensates a qualified donee[,] [like a cryogenic center,] for preserving all or part of the donated body does not take the transaction outside the scope of the RUAGA, even if in a strict common-law sense it may not qualify as a “gift.”¹⁶⁶

Courts have anticipated the transactions that would necessarily occur between testators and cryogenic centers when testators choose to cryopreserve their anatomical gifts for their respective beneficiaries.¹⁶⁷ Consequently, testators’ payments to cryogenic centers do not take their future anatomical gifts to their respective beneficiaries outside of the scope of the RUAGA, and therefore, the RUAGA would protect the anatomical gifts accordingly.¹⁶⁸

While some aspects of the financial cost of cryopreserving are unascertainable due to limitations in scientific advancements, currently, there are only two different schemes of cryogenic self-preservation.¹⁶⁹ Patients may choose to cryopreserve their entire body, or patients may choose to only cryopreserve their brain.¹⁷⁰ Cryopreserving an organ is analogous to solely cryopreserving the brain because the sizes of the organs are comparable.¹⁷¹ Therefore, hypothetically, the cost of cryopreserving the brain and the cost of cryopreserving other organs in the body would be approximately equivalent.¹⁷²

6. *Out of Whose Pocket Would the Organ be Sustained?*

The beneficiary of an organ will not likely be financially responsible for the cryopreserved organ.¹⁷³ In particular, when testators devise an organ, they

163. *Id.*

164. *Frequently Asked Questions: Page 3 – Moral and Ethical Questions*, ALCOR LIFE EXTENSION FOUND., <http://www.alcor.org/FAQs/faq03.html> (last visited Jan. 26, 2014) [hereinafter ALCOR, *Moral and Ethical Questions*].

165. See ALCOR, *Membership Questions*, *supra* note 120 (estimating that minimum costs may increase due to inflation and future advances in technology).

166. *Alcor Life Extension Found. v. Richardson*, 785 N.W.2d 717, 726 (Iowa Ct. App. 2010) (considering the documents executed by a donor to be cryopreserved as an arrangement for an anatomical donation).

167. See *id.*

168. See *id.*

169. See ALCOR, *Membership Questions*, *supra* note 120 (recommending insurance policies higher than stated minimum costs to allow for future technological advances).

170. See *id.*

171. See ALCOR, *Technical Questions*, *supra* note 134.

172. See *id.*

173. See ALCOR, *Financial Questions*, *supra* note 160.

must set up an initial trust before the cryogenic process even begins; such trust sustains the cryopreserved organ and keeps it viable.¹⁷⁴ Thus, the beneficiary of the organ would not be responsible for the initial cost of cryopreserving the organ or the cost to sustain the organ while it remains cryopreserved.¹⁷⁵ As such, the beneficiary will likely receive the organ as an exonerated devise, free and clear of any debts.¹⁷⁶

This self-sustaining scheme is viable because cryogenic institutions have financial and internal safety mechanisms to ensure the continuation of cryogenics for years to come.¹⁷⁷ For example, one cryogenic institution in the United States has created an irrevocable Patient Care Trust.¹⁷⁸ The primary goal of the trust is “providing care for individuals . . . who have been placed into cryonic suspension.”¹⁷⁹ In fact, “funding will continue indefinitely into the future.”¹⁸⁰ Furthermore, the amount of money generated by the trust in excess of the cost of patient storage has been earmarked to fund potential research for cryopatient repair and resuscitation.¹⁸¹

Because the Patient Care Trust is irrevocable, it cannot be destroyed or removed “until the [stated] purposes of the Trust are fulfilled.”¹⁸² And “[s]ince the purposes of the Trust can be summarized as ‘keep[ing] [and maintaining] all the patients in cryopreservation until [such time that] they can all be repaired and revived,’ this Trust” will likely exist indefinitely.¹⁸³ With such knowledge, many individuals who choose cryopreservation may be relieved of their fears related to the mismanagement of the trust and how the trust may be sustained.¹⁸⁴

III. THE LAWS OF THE LAND

While current statutes do not specifically address whether a testator can devise a cryopreserved anatomical gift to a beneficiary who does not yet need the anatomical gift, statutes do generally address anatomical gifts, and they provide a glimpse into how different legislatures will likely handle

174. *See id.* (deferring long-term care costs to a Patient Care Trust).

175. *See id.*

176. *See id.*

177. *See* Mike Darwin, *The Cost of Cryonics*, ALCOR LIFE EXTENSION FOUND. (Aug. 1990), <http://www.alcor.org/Library/html/CostOfCryonics.html>.

178. *The Alcor Patient Care Trust*, ALCOR LIFE EXTENSION FOUND., <http://www.alcor.org/AboutAlcor/patientcaretrustfund.html> (last visited Jan. 26, 2014) [hereinafter ALCOR, *Patient Care Trust Background Information*].

179. *Alcor Patient Care Trust*, ALCOR LIFE EXTENSION FOUND., <http://www.alcor.org/Library/html/patientcaretrust.htm> (last modified May 2, 1999).

180. ALCOR, *Patient Care Trust Background Information*, *supra* note 178.

181. *See id.*

182. *Id.*

183. *Id.*

184. *See id.*; *see also* Darwin, *supra* note 177.

cryopreserved anatomical gifts in the future; specifically, the legislation of California, Colorado, and Texas will be explored below.¹⁸⁵

A. California

In California, individuals may determine how their remains will be disposed of.¹⁸⁶ Individuals may choose to be a donor and give an anatomical gift to a beneficiary because one of California's "[p]ertinent state interests include[s] preserving human life."¹⁸⁷ Interestingly, the California legislature anticipated the complication of a recipient of an anatomical gift not being a match with the donor's organ either because the blood types of the donor and the recipient are incompatible or because of other problems.¹⁸⁸ Under such circumstances, if the anatomical gift "is an organ[,] . . . the gift passes [from the beneficiary] to the appropriate organ procurement organization[,] unless the donor specifies otherwise."¹⁸⁹ In these instances, it can be inferred that the statutory use of the word "cannot" is not necessarily the equivalent of "does not yet need."¹⁹⁰ Thus, if the designated beneficiary does not yet need the organ, it is possible for either the testator or the beneficiary to cryopreserve the organ for the beneficiary's future use, given the testator specifically documents such an alternative.¹⁹¹

While donors are prohibited from selling their organs, "[a] person may charge a reasonable amount for the removal, . . . preservation, . . . [and] storage" of an organ.¹⁹² Thus, it appears that the California legislature is anticipating the rise of cryogenic centers that will handle anatomical gifts.¹⁹³ However, the California legislature has not gone so far as to proclaim cryogenic centers as the equivalent of OPOs.¹⁹⁴ In fact, even though cryogenic centers may handle certain body parts, such as human heads and hands, under statute, they are not required to become OPOs.¹⁹⁵

Under California law, an organ procurement organization is defined as "a person designated by the Secretary of the United States Department of Health and Human Services as an organ procurement organization."¹⁹⁶ In *Alcor Life*

185. See discussion *infra* Part III.A–C.

186. See CAL. HEALTH & SAFETY CODE § 7100.1(a) (West 2010).

187. *Donaldson v. Lungren*, 4 Cal. Rptr. 2d 59, 62 (Ct. App. 1992); see also CAL. HEALTH & SAFETY CODE § 7150.50(a)(2).

188. CAL. HEALTH & SAFETY CODE § 7150.50(b), (g)(3).

189. *Id.* (looking to both subsections, concurrently, indicates where the anatomical gift will pass under such circumstances).

190. *Id.* (inferring that subsection (b) allows for the individual making the anatomical gift to provide instructions in the case where a donee is not yet able to have the transplant performed).

191. See *id.*

192. *Id.* § 7150.75.

193. See *id.* (inferring the ways in which such centers may handle these transactions).

194. See *Alcor Life Extension Found., Inc. v. Mitchell*, 9 Cal. Rptr. 2d 572, 575 (Ct. App. 1992).

195. See *id.* at 575–76.

196. CAL. HEALTH & SAFETY CODE § 7150.10(a)(16).

Extension Foundation, Inc. v. Mitchell, the court acknowledged that a cryogenic center might possibly fall under the donee category of a procurement organization, despite the California Department of Health Services' (DHS) rejection of such view.¹⁹⁷ Specifically, the DHS argued that, to be recognized as a procurement organization, a cryogenic center must be licensed, accredited, or approved.¹⁹⁸ However, the court pointed out that, because DHS had not yet established a mechanism for cryogenic centers to even apply to become procurement centers, cryogenic centers were unable to become licensed altogether.¹⁹⁹

Although there has not been a proposal to grant licenses to cryogenic centers so they may become procurement centers in California, or in any other state for that matter, cryogenic centers should be leery of the possibility of such licenses.²⁰⁰ In particular, by becoming a licensed procurement center, a cryogenic center will be subject to lawsuits in foreign jurisdictions, even if the center only consists of one establishment.²⁰¹ Because a state has a very strong interest "in protecting the life and health of its citizens[.]" courts have "allow[ed] a recipient injured by the negligence of an organ procurer to sue in his home state."²⁰² Therefore, if cryogenic centers become licensed as procurement centers, beneficiaries who are injured by a cryogenic center's negligence may sue the cryogenic center in their home state, regardless of where the cryogenic center is domiciled.²⁰³ Such result would cause cryogenic centers to expend numerous resources, including time and money, to defend these lawsuits, thereby diverting resources that could otherwise further potential cryogenic research and development.²⁰⁴

While there are no existing proposals to introduce cryogenics legislation into the California legislature, the contemplation that cryogenic centers may qualify as OPOs indicates that there may be changes in the future.²⁰⁵ Currently, however, under California law, donors could choose to cryopreserve their organs for the future use of a beneficiary.²⁰⁶

197. *See Mitchell*, 9 Cal. Rptr. 2d at 575.

198. *See id.*

199. *See id.* (acknowledging that the DHS had not created such licensing mechanisms for cryogenic centers); *see also* Alcor Life Extension Found. v. Richardson, 785 N.W.2d 717, 725 (Iowa Ct. App. 2010) (noting that the federal government is now responsible for designating qualified OPOs).

200. *See Slaughter v. Life Connection of Ohio*, 907 F. Supp. 929, 934 (M.D.N.C. 1995).

201. *See id.*

202. *Id.*

203. *See id.*

204. *See id.*

205. *See supra* note 197 and accompanying text.

206. *See supra* notes 186–91 and accompanying text.

B. Colorado

The statutes in Colorado consist of the exact same language as California's statutes.²⁰⁷ Specifically, individuals may choose to become donors and may give an anatomical gift to someone of their choosing.²⁰⁸ Regarding the prohibition of selling or purchasing organs from a donor, the same safeguard that is in place in California is also in place in Colorado.²⁰⁹ However, Colorado goes one step further to protect anatomical gifts; specifically, a person who "intentionally falsifies, forges, conceals, defaces, or obliterates a document of [an anatomical] gift" can be charged with a misdemeanor.²¹⁰ Thus, given the protection Colorado affords to anatomical gifts, under Colorado's current law, it may be possible for a donor to devise an anatomical gift to a beneficiary, with the aid of cryogenics, to preserve the organ until such time the beneficiary needs the organ.²¹¹

C. Texas

Like California and Colorado, Texas also allows a donor to name a specific individual as the recipient of an anatomical gift.²¹² Theoretically, under Texas law, if both of the following conditions are satisfied, then an organ may be cryopreserved until a beneficiary needs the organ: (1) when the donor dies, the beneficiary does not yet need the organ and (2) the donor has specified such a protocol in a document.²¹³ However, if a donor fails to specifically mention cryopreserving an organ that is not transplantable or that is not a match for the beneficiary, then such organ will subsequently pass to the appropriate OPO.²¹⁴ Much like Colorado, Texas also provides for the double safeguards against an individual improperly acquiring a donor's organs.²¹⁵ Interestingly, Texas has taken additional steps to protect the process of organ donation.²¹⁶ For example, "[i]nvalidation of [a] will after the donor's death does not invalidate the [anatomical] gift."²¹⁷

Texas's visionary attitude towards anatomical gifts is not surprising; in fact, the Supreme Court of Texas recently reflected upon the Texas legislature's

207. Compare COLO. REV. STAT. ANN. §§ 12-34-101 to -125 (West 2012), with CAL. HEALTH & SAFETY CODE §§ 7150-7151.40 (West 2010).

208. COLO. REV. STAT. ANN. § 12-34-111(a)(2), (b), (g)(3).

209. See *id.* § 12-34-116; see also discussion *supra* Part III.A.

210. COLO. REV. STAT. ANN. § 12-34-117.

211. See *id.*

212. See TEX. HEALTH & SAFETY CODE ANN. § 692A.011(a)(3) (West 2009); see also discussion *supra* Part III.A-B.

213. See TEX. HEALTH & SAFETY CODE ANN. § 692A.011(a)(3), (d).

214. See *id.* § 692A.011(d), (i)(3).

215. See *id.* § 692A.016-.017; see also discussion *supra* Part III.B.

216. See TEX. HEALTH & SAFETY CODE ANN. § 692A.005.

217. *Id.* § 692A.005(d).

“prescient recognition of the rapid progress of medical science.”²¹⁸ The court cautioned that “[t]he Anatomical Gift Act does not give the estate the right to designate a recipient once the individual dies.”²¹⁹ Rather, “[t]he . . . Act gives . . . individual[s] the right to designate a recipient of their [organs] while they are alive and gives their agent at the time of death the right to designate a recipient immediately before” they die.²²⁰ This expands the concept that testators may lawfully choose to have their anatomical gifts cryopreserved for a beneficiary.²²¹ Specifically, immediately before death, testators may grant upon their agent the power to also have the anatomical gift cryopreserved for a beneficiary as well.²²²

IV. CONCLUSION

As discussed throughout this article, a balancing test must be used to determine whether an individual should be allowed to use cryogenics to give an organ, as an anatomical gift, to a beneficiary who does not yet need the organ.²²³ On one hand, there is the emotional need and the want to take care of one’s family and friends.²²⁴ On the other hand, there is a critical shortage of transplantable organs in the United States.²²⁵

A. The Semi-Good

By allowing individuals to use cryogenics to devise anatomical gifts to family members and friends, it is not hard to imagine an age where multiple cryogenic organ storage facilities will be erected to safeguard organs that may never be used by anyone.²²⁶ Rather, the organs will be handed down from generation to generation, with a fear that someday, someone down the line may need the organ.²²⁷ Meanwhile, there are thousands of transplant patients who are in desperate need of the organ, and these patients are just suffering on the waitlist.²²⁸

218. *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 384 (Tex. 2012).

219. *Id.* at 386.

220. *Id.* (citing TEX. HEALTH & SAFETY CODE ANN. § 692A.005, .009(a)(1)).

221. *See* TEX. HEALTH & SAFETY CODE ANN. § 692A.011.

222. *See id.* § 692A.009(a)(1).

223. *See supra* Parts I–III.

224. *See supra* Part II.A.

225. *See supra* Part I.B–C.

226. *See supra* Part II.B.

227. *See supra* Part II.B.

228. *See supra* Parts I.A, II.A.

B. The Semi-Bad

Alternatively, by prohibiting individuals from using cryogenics to devise anatomical gifts to family members and friends, the community's general neutrality regarding becoming an organ donor may continue to prevail.²²⁹ As the age of digital interfacing progressively becomes the primary mode of communication, it is easy for people to become isolated and forget the codependency of the human species.²³⁰ Meanwhile, again, the thousands of waitlisted transplant patients continue to suffer.²³¹

C. The Proposal

To encourage individuals to become organ donors, states should allow individuals to designate recipients of their anatomical gifts, which various states already allow, and should allow individuals to decide whether to use cryogenics to preserve an organ until a beneficiary needs it, which various state laws still need to address.²³² However, state legislators should limit the length of time an organ is kept cryopreserved.²³³

A proposed time limitation is the lifespan of the beneficiary who is to receive the anatomical gift. When a donor designates a specific beneficiary to be the recipient, it is reasonable to limit the use of the cryopreserved anatomical gift, or rather the organ, to the beneficiary, only within the lifespan of that beneficiary. It is also proposed that the beneficiary be able to choose to pass the anatomical gift to a third party, but only if that third party is currently in need of, and is a match for, the transplantable organ. To aid with the current shortage of transplantable organs, however, after the beneficiary dies, the cryogenic center where the organ is suspended or stored should then make the organ available to an appropriate OPO.²³⁴

Under this proposed scheme, a donor is still able to give an anatomical gift to a specific recipient, knowing that the beneficiary may need the organ in the future, and through the use of cryogenics, the donor's intent will still be carried out.²³⁵ However, once the beneficiary can no longer use the organ, instead of the cryogenic centers continuously retaining the organ and passing it down from one generation to the next, the organ will go to someone who is in desperate need of a transplant.²³⁶

229. See *supra* Part I.B.3.

230. See *supra* Parts I.C, II.A.

231. See *supra* Parts I.A, II.A.

232. See discussion *supra* Part III.

233. See generally ALCOR, *Membership Questions*, *supra* note 120 (discussing the "time limit[s] beyond which cryonics will not work").

234. See TEX. HEALTH & SAFETY CODE ANN. § 692A.011 (West 2009).

235. See discussion *supra* Part II.B.

236. See *supra* Parts I.A, II.A.

D. The Chance of Success

A concern that could arise from the proposed scheme is the potential influx of negligent infliction of emotional distress lawsuits; particularly, these lawsuits might arise if a beneficiary promised an organ to a third party, but upon the beneficiary's death, the cryogenic center holding that transplantable organ makes it available to an appropriate OPO, rather than the third party.²³⁷ In *Witt v. Yale-New Haven Hospital*, "the plaintiffs allege[d] that the Yale Fertility Center at the defendant hospital discarded [the wife's] ovarian tissue, which had been cryogenically frozen and stored for the purpos[e] of using the tissue to allow [them] to conceive a child in the future" and such conduct caused the plaintiffs to experience negligent infliction of emotional distress.²³⁸ When analyzing if the husband was capable of maintaining his claim, the court focused on "whether the defendant [even] owed a duty of care to [the husband]."²³⁹ The court then looked to the state's highest court for guidance:

[O]ur Supreme Court has stated that "the test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case."²⁴⁰

Under the public policy analysis, courts consider four factors: "(1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging continued vigorous participation in the activity, while protecting the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions."²⁴¹

When this analysis is applied to the above-mentioned concern, the public policy analysis seems to shield the cryogenic center from liability.²⁴² In particular, the second factor in the public policy analysis is the most persuasive in favor of finding the cryogenic center not liable.²⁴³ Even courts have recognized the dire need of transplantable organs and the shortage the nation is presently facing.²⁴⁴ Furthermore, some state legislatures already protect persons

237. See e.g., *Witt v. Yale-New Haven Hosp.*, 977 A.2d 779, 786 (Conn. Super. Ct. 2008) (pertaining to jurisdictions that do "not require physical injury as an element for negligent infliction of emotional distress").

238. *Id.* at 781–82.

239. *Id.* at 789.

240. *Id.* (quoting *Zamstein v. Marvasti*, 692 A.2d 781, 786 (Conn. 1997)).

241. *Id.* (quoting *Perodeau v. City of Hartford*, 792 A.2d 752, 768 (Conn. 2002)).

242. See *id.* at 788–90; see also text accompanying note 237.

243. See *Witt*, 977 A.2d at 789–90.

244. See *Slaughter v. Life Connection of Ohio*, 907 F. Supp. 929, 934 (M.D.N.C. 1995).

that act either in accordance, or act in good faith, with the laws of anatomical gifts, regardless of whether the laws are of the specific state or other states, from civil actions or from criminal prosecutions.²⁴⁵ Therefore, the proposed scheme is not only favorable, but also, there is a good chance it will succeed.²⁴⁶

245. See e.g., COLO. REV. STAT. ANN. § 12-34-118(a) (West 2012) (“A person that acts in accordance with this part 1 or with the applicable anatomical gift law of another state, or attempts in good faith to do so, is not liable for the act in a civil action, criminal prosecution, or administrative proceeding.”).

246. See *supra* Part IV.C.