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**POSITION STATEMENT:
KIDNEY PAIRED DONATIONS,¹ KIDNEY LIST DONATIONS² AND NOTA § 301
JUNE 19, 2007**

As Associate General Counsel to United Network for Organ Sharing (UNOS), Malcolm E. Ritsch, Jr. of our law firm has been asked to provide information and legal analysis regarding Section 301 of the National Organ Transplant Act (NOTA), 42 U.S.C. 274e. This analysis updates prior analyses dated May 5, 2005 September 18, 2006 and is provided as a general resource for the organ transplant community and for counsel advising organ transplant programs and organ procurement organizations.

The impetus for this latest Position Statement update is a favorable memorandum from the U.S. Department of Justice (“DOJ”) in March 2007, which is described on page 2 and in footnotes 5 and 8. Whereas the analysis in this Position Statement is grounded on the common law of gifts as a guide to interpretation of the term “valuable consideration” in NOTA Section 301, the DOJ Memorandum reaches the same legal conclusion by looking primarily to the wording and interpretation of federal and state statutes. Since these two approaches reinforce one another, the transplant community is urged to follow both approaches when considering the meaning of “valuable consideration” in NOTA Section 301 and in state statutes that contain identical or similar wording.

Section 301 of the NOTA, copied verbatim below at Page 7, is a federal criminal statute. It applies only to the fields of organ and tissue transplantation and must be interpreted in that specific context. In recent years, donations of kidneys by living donors have begun to involve multiple donors and/or recipients. Transplant physicians have been approached by individuals who wish to donate to a spouse or other family member, but are unable to do so because of blood type incompatibility or other immunological barriers. Thus, living donation arrangements have been initiated that permit either a simultaneous kidney paired donation or a kidney list donation.

Kidney paired donations³ involve two living donors and two recipients—the intended recipient of each donor is incompatible with the intended donor but compatible with the other

¹ “Kidney paired donations” and “kidney paired exchanges” are synonymous terms.

² “Kidney list donations,” “list paired donations” and “living donor/deceased donor exchanges” are synonymous terms.

³ See *supra* note 1. The Concept for a National Live Paired Kidney Donation (LPKD) Program through OPTN/UNOS was endorsed by the OPTN/UNOS Board of Directors on November 18-19, 2004, with the understanding that details of the program will be developed over time. On August 28, 2006, a Proposal for National

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donor in the arrangement. Every kidney paired donation transplant avoids burdening the waiting list and increases access to organs for all kidney transplant candidates.

Kidney list donations⁴ involve three individuals: a living donor; the recipient of the living donor's kidney, who is allocated an organ through the waiting list; and the donor's intended recipient who receives an allocation priority on the kidney waiting list. The kidney list donation program yields additional donor sources for patients on the kidney waiting list.

The Office of Legal Counsel at the DOJ issued a memorandum to the U.S. Department of Health and Human Services on March 28, 2007, which concluded that kidney paired donations and kidney list donations do not violate NOTA § 301.⁵ Section 301 of NOTA prohibits the exchange of valuable consideration for a human organ. The DOJ determined that in these types of donations there is no valuable consideration exchanged and therefore no violation of NOTA § 301.

Transplant professionals involved in these and other innovative living kidney donation arrangements have proceeded in the reasonable belief that these arrangements do not violate NOTA § 301. This position statement explains why NOTA § 301 is legally and historically inapplicable to today's living donation arrangements.⁶

HISTORY OF LIVING DONATION

When NOTA was enacted in 1984, "living-related kidney transplants" had been performed for thirty years. Living donors were usually related by blood to transplant recipients. That was not always the case, since the essential element of HLA compatibility can exist between related or unrelated individuals. In fact, unrelated living donation of kidneys in this country began more than ten years before NOTA was enacted, although unrelated living donation was often imprecisely lumped into the "living-related" category. Today, the terminology has evolved to become simply "living donation" because immunosuppressive drugs have broadened the range of donor/recipient compatibility, and the severe shortage of available kidneys has brought forth living donors motivated by the desire to make a gift to someone in

Kidney Paired Donation Program was circulated for public comments and is available at unos.org. Since kidney paired donations are not implemented through the OPTN/UNOS kidney waiting list, they currently operate under guidelines developed within and among transplant centers and organ procurement organizations.

⁴ See *supra* note 2. OPTN/UNOS currently makes available a Local Voluntary Alternative System for Assigning Priority in Kidney Allocation to Original Intended Candidates for Living Donor Kidneys, for adoption by participating transplant centers and organ procurement organizations.

⁵ U.S. Department of Justice, Office of Legal Counsel, *Memorandum for Daniel Meron, General Counsel, Department of Health and Human Services* (Mar. 28, 2007). The opinion stated that because NOTA § 301 is a criminal statute, it must be interpreted narrowly under the rule of lenity. As such, "valuable consideration" under NOTA § 301 must be understood "as referring to the buying and selling of organs for monetary gain or to organ exchanges that are otherwise commercial." Kidney paired donations and kidney list donations are gifts and therefore do not involve any pecuniary exchange in violation of NOTA § 301.

⁶ This analysis provides an interpretation of federal law under NOTA § 301. However, statutes similar to NOTA § 301 have been adopted by most state legislatures. As such, this analysis and the DOJ interpretation of NOTA § 301 are also relevant to interpretation of state laws.



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need. Innovative multi-party approaches to living donation such as kidney paired donations and kidney list donations are today's edition of "living-related kidney transplants."

In 1984 and today, the basic attributes of the living donation arrangement remain the same. The donor intends to make a gift, is not financially benefited and assumes the lifetime health risk of having only one kidney. The donor's increased risk is acknowledged today by the award of a kidney allocation preference should the donor later need a transplant.⁷ The recipient receives a kidney and pays nothing to the donor. And the national pool of organs is one kidney better off due to the donor's generosity, because the gift removes the recipient from the waiting list.

In 2006, there were 6,434 living donor kidney transplants from 6,435 living donors; and 10,659 nonliving donor kidney transplants from 7,181 nonliving donors.

NOTA § 301 DOES NOT APPLY

There is no suggestion whatsoever in § 301 of NOTA (see page 7 below) that either the "living-related kidney transplants" of yesterday or the living donation arrangements of today are illegal. To the contrary, the payment of "the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ" is expressly permitted by § 301 of NOTA. Such expenses are incurred by living donors and not by nonliving donors. What NOTA's one-sentence criminal provision (§ 301(a) below) outlaws is the purchase and sale of organs. That was clearly Congress' intent from the legislative history excerpted below. Congress would not have endorsed a payment to the living donor for expenses and lost wages in subsection 301(c)(2) of NOTA, yet intended to render the living donation arrangement itself criminal in subsection 301(a).

"Valuable consideration" under NOTA § 301 is a monetary transfer or a transfer of valuable property between donor, recipient and/or organ broker in a sale transaction.⁸ It is not familial, emotional, psychological or physical benefit to the organ donor or recipient, all of which attach equally to the "living-related kidney transplants" in yesterday's terminology and to the multi-party kidney paired donations, kidney list donations and similar innovative and highly beneficial living donation arrangements of today and tomorrow. There is no "valuable consideration" under NOTA § 301 in any of these living donation arrangements. The donor receives none, the recipient gives none and none is transferred to a broker. In fact, there is no "consideration" at all in a living organ donation arrangement because the donation is a "gift" as will be explained below.

⁷ Under OPTN/UNOS Policy 3.5.11.6, an individual is assigned four (4) additional kidney allocation points on the waiting list if he or she has previously donated, for transplantation within the United States, his or her vital organ or a segment of a vital organ (i.e., kidney, liver segment, lung segment, partial pancreas, small bowel segment).

⁸ The DOJ concludes that NOTA, NOTA's legislative history, references in other U.S. Code provisions, similar state laws, and the common law indicate that "valuable consideration" refers to consideration that is measured in monetary terms. *See supra* note 5.



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GIFTS DO NOT INVOLVE “CONSIDERATION”

A gift is a voluntary transfer of something beneficial from a donor to a beneficiary who receives it without paying the donor for it.⁹ The essential elements of a gift are (1) donative intent, meaning the intent to transfer voluntarily – the living donor gives up something (a kidney, and knowingly assumes additional health risk); (2) the actual delivery of the gift to a beneficiary; and (3) acceptance by the beneficiary of the gift (a kidney and potential health benefits) without paying the donor for it (that is, the beneficiary pays no “consideration” to the donor).¹⁰ The living donor suffers a detriment, the beneficiary receives a benefit and the beneficiary pays no “consideration” – no payment of money or transfer of property – to the donor. The beneficiary’s expression of appreciation to the donor is not “consideration.”¹¹

The living donor’s intent to make a gift of a kidney can arise from the desire to benefit a family member, a friend or someone else for whom the donor feels a personal bond. Donative intent can also arise from the donor’s desire to benefit an unidentified fellow human being who is in need of a kidney. Some degree of emotional or psychological benefit is always present in the mind of a donor – the living kidney donor will feel satisfaction having made the gift, even though the donor will suffer additional health risk. This incidental emotional or psychological benefit to the donor is an inherent component of donative intent in any type of gift – it is not to be confused with “consideration.” Motive alone cannot serve as “consideration.”¹²

A gift is different from a contract. A contract does not involve donative intent. “Consideration” and the mutual agreement of the parties are required to make the contract legally

⁹ Black’s Law Dictionary defines “donation” as “A gift. . . . The act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person, **without any consideration.**” (emphasis added).

¹⁰ *Bolles v. Toledo Trust Co.*, 4 N.E.2d 917, 919-920 (Ohio 1936); *Thomas v. The First National Bank of Danville*, 186 S.E. 77, 80 (Va. 1936). In *Colavito v. New York Organ Donor Network, Inc.*, the New York Court of Appeals considered certified questions from the Second Circuit regarding the rights of an intended organ donation beneficiary under the New York Public Health Law (which is adopted from the Uniform Anatomical Gift Act). The New York Court of Appeals found that “**gifts** of a deceased [organ] donor are conditioned upon medical benefit to the intended recipient. . . . [I]ndeed medical compatibility tests are specifically authorized [under the New York Public Health Law] ‘to assure medial **acceptability** of [the] gift’ for transplantation.” No. 106, slip op. at 12 (Dec. 14, 2006) (quoting New York Public Health Law § 4301) (emphasis added). The U.S. Court of Appeals for the Second Circuit adopted this holding in its confirming opinion, *Colavito v. New York Organ Donor Network, Inc.*, 2007 WL 1462399.

¹¹ The fundamental and generally accepted idea of “consideration” is the exchange or price requested and received by the promisor for his or her promise. *Restatement (Second) of Contracts* §§ 17, 71 and 72. Furthermore, consideration either requires a benefit to the party promising or a detriment to the party to whom the promise is made. *Brewer v. The First National Bank of Danville*, 120 S.E.2d 273, 279-280 (Va. 1961).

¹² If there is no legal consideration (a promise to make a gift is **not** legal consideration) then mere motive, such as love and affection, a close friendship, a desire to do justice or a desire to avoid trouble, will not support a mere promise. See *Williston on Contracts* at § 7:17.



binding.¹³ A gift, on the other hand, involves a gratuitous transfer by the donor and no transfer of money, property or services or agreement not to exercise rights or to suffer material detriment (“consideration”) by the beneficiary. For that reason, no “consideration” is present in a gift.¹⁴ A mere promise alone to make a gift of an organ is not intended to be legally binding.

The donation of an organ is properly considered to be a gift, rather than a contractual undertaking. As gifts, living donations may be made conditionally for a specific purpose.¹⁵ The condition can be construed as “consideration” only if the happening of the condition will be a benefit to the person who promises to give an organ. If, on the other hand, the happening of the condition will not benefit the promisor and is merely for the purpose of enabling the promisee to receive a gift, the condition is not “consideration.”¹⁶

BASIC GIFT FRAMEWORK FOR ALL LIVING DONATIONS

Every living donation involves the same basic gift framework, regardless of how a beneficiary receives a donated organ. Each of the three forms of living donation: (1) direct donation, (2) kidney paired donation, and (3) kidney list donation, fits the above analysis of a legal gift.

A **direct donation** involves a donor and a single specific beneficiary who is histocompatible. The donor with donative intent donates an organ that is delivered to the specified beneficiary, typically a family member or friend, and the beneficiary accepts the gift. The donor suffers the detriment of increased health risk and the beneficiary receives the potential for increased health benefit but pays the donor no “consideration.”

A **kidney paired donation** involves two living donors and two beneficiaries – the original intended recipient of each donor is incompatible with the intended donor but compatible with the other donor. The conditional gift framework is applicable here as you have two donors

¹³ The parties must actually bargain for consideration as the exchange for the promise. *See Restatement (Second) of Contracts* §§ 71, 75 and 81, comment a.

¹⁴ Numerous court cases have found that gifts cannot contain consideration. *See Rusk v. Rusk*, 5 S.W.3d 299, 303-05 (Tex. App. 1999) (holding that absence of consideration is key to finding a legal gift); *Deli v. Hasselmo*, 542 N.W.2d 649, 656 (Minn. Ct. App. 1996) (holding that “consideration is what distinguishes a contract from a gift”); *Pankhurst v. Weitingner & Tucker*, 850 S.W.2d 726, 730-731 (Tex. App. 1993) (lack of consideration is an essential characteristic of a gift); *Bolles*, 4 N.E.2d at 919 (there is no consideration in a gratuitous transfer).

¹⁵ *See Wilkin v. Wilkin*, 688 N.E.2d 27, 29-30 (Ohio Ct. App. 1996) (holding that the failure of the purpose attached to a gift causes the gift to fail as well); *Grossman v. Greenstein*, 155 A. 190, 190-191 (Md. 1931) (a gift may yet fail because it was made upon a condition or limited to a purpose).

¹⁶ If a benevolent man promises to give a coat to a tramp on the condition that the tramp walk down the street to the store and buy a coat on the man’s credit, no reasonable person would consider the walk to be consideration for that promise. The walk is not requested as the price for the promise but is merely a condition of a gratuitous promise (gift). *Williston on Contracts* at § 7:18. *See Restatement (Second) of Contracts* § 71, comment b and c; *Stelmack v. Glen Alden Coal Co.*, 14 A.2d 127, 128-129 (Pa. 1940) (stating that “If the promisor merely intends to make a gift to the promisee upon the performance of a condition, the promise is gratuitous and the satisfaction of the condition is not consideration for a contract.”); *Dorman v. Publix-Saenger-Sparks Theatres, Inc.*, 184 So. 886, 888-889 (Fla. 1938) (finding benefit to the promisor constituting consideration, under the facts). *See also Fedun v. Mike’s Café Inc.*, 204 A.2d 776, 782-783 (Pa. Super. Ct. 1964).



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with the donative intent to donate organs to their original intended beneficiaries. Again, the donative intent of both donors is for each intended beneficiary to receive a compatible organ. That intent is carried out in the kidney paired donation when each donor gives an organ to the compatible beneficiary. Both donors suffer potential health detriment, both beneficiaries receive a potential health benefit and neither pays a donor any “consideration.” The condition to each donor’s gift benefits the beneficiaries and not a donor.

Finally, a **kidney list donation** involves three individuals: a living donor with donative intent; the recipient of the living donor’s organ, chosen from the kidney waiting list; and the donor’s intended recipient who receives an allocation priority on the kidney waiting list. This donation fits within the conditional gift framework. There is a donor with donative intent and there are actually two beneficiaries. Although the organ is actually delivered to another beneficiary, the donor’s donative intent in donating the organ is conditioned on the original intended beneficiary receiving a compatible organ from the nonliving donor pool. This occurs indirectly, since donating the organ to the actual recipient improves the likelihood that the beneficiary will receive a compatible organ from the pool. The donor suffers potential health detriment, both beneficiaries receive a potential health benefit and neither pays the donor any “consideration.” The condition to the donor’s gift benefits the intended recipient, not the donor.

In all three forms of living donation, the living donor simply donates an organ gratuitously in order to either directly or indirectly benefit the intended beneficiary. There is a second beneficiary – the actual recipient of the donor’s kidney – in the kidney paired donation and in the kidney list donation.

CARRYING OUT THE INTENT OF THE DONOR

It has been contemplated that circumstances may arise with the paired donation of organs, where the first donation has already occurred and the expected paired donor either cannot or will not, for some reason, donate the second organ. In such circumstances, the donative intent of the donor can still be fulfilled. The donor’s intent to benefit the original intended beneficiary can be carried out, as nearly as possible, by giving the original intended beneficiary additional priority on the kidney waiting list, as with the kidney list donation.

Thus, the kidney list donation serves as an equitable alternative arrangement if the need arises. The donor’s gift of a kidney would be treated as a donation to the general nonliving donor pool, and the original intended recipient would receive allocation priority on the kidney waiting list.¹⁷ Although the original intended recipient was not able to immediately receive a compatible kidney, the donor’s intent is now indirectly fulfilled since the original recipient has an improved likelihood of receiving a compatible organ from the nonliving donor organ pool.¹⁸

¹⁷ See *supra* note 4.

¹⁸ The fulfillment of the donor’s intent through the alternative arrangement of a kidney list donation is analogous to a court operating under the doctrine of *cy pres* or *equitable distribution* – the construction of a charitable gift in equity in order to carry out, as nearly as possible, the charitable intent of the donor. *Thatcher v. Lewis*, 76 S.W.2d 677, 682 (Mo. 1934). See also *In re Wilkey’s Estate*, 10 A.2d 425, 427-428 (Pa. 1940).



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The language of NOTA § 301, quoted verbatim below, in no way refers to the donation (gift) of an organ. It refers to the transfers for “valuable consideration,” which is the language of contract not the language of gifts.

STATUTE AND LEGISLATIVE HISTORY

Section 301 of NOTA (42 U.S.C. § 274e)

§ 301. Prohibition of organ purchases

(a) **Prohibition.** It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.

(b) **Penalties.** Any person who violates subsection (a) of this section shall be fined not more than \$50,000 or imprisoned not more than five years, or both.

(c) **Definitions.** For purposes of subsection (a) of this section:

(1) The term “human organ” means the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation.

(2) The term “valuable consideration” does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.

(3) The term “interstate commerce” has the meaning prescribed for it by section 321(b) of Title 21.

Note that the title of Section 301 is “Prohibition of organ **purchases.**” Congress, in enacting NOTA, intended to criminalize the buying and selling of organs for profit, and not the voluntary donation of organs:

The Organ Procurement and Transplantation Act, S. 2048, amends the Public Health Service Act (PHSA) and makes additional provisions, as follows:

* * *

(5) Prohibits the **interstate buying and selling of human organs** for transplantation.

* * *

Finally, the **prohibition on the buying and selling of human organs** is directed



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at **preventing the for-profit marketing** of kidneys and other organs.

S. Rep. No. 382, 98th Cong., 2nd Sess. 1984, 1984 WL 37470 (Leg. Hist.). The House of Representatives agreed with the Senate's characterization of the purpose of Section 301:

The Senate bill and the House amendment contained provisions prohibiting the sale for valuable consideration of human organs for use in human transplantation if the transfer effects [sic] interstate commerce. The Conference Agreement reflects the House provision with language clarifying this prohibition. **This title intends to make the buying and selling of human organs unlawful** with maximum penalties not to exceed \$50,000 and/or imprisonment of up to five years for such violation. 'Human organ' is defined as the kidney, liver, heart, lung, pancreas, bone marrow, corneas, eyes, bone, and skin, and any other human organ included by the Secretary of Health and Human Services by regulation. The term 'human organ' is not intended to include replenishable tissues such as blood or sperm.

The term 'valuable consideration' does not include the reasonable payment associated with removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ in connection with the donation of that organ. Reasonable payments to organizations processing human tissues, such as corneas, should not be included in the terms 'valuable consideration.'

H.R. Conf. Rep. No. 1127, 98th Cong., 2nd Sess. 1984, 1984 WL 37471 (Leg. Hist.). The Senate continued to refer to "valuable consideration" as relating to the purchase and sale of organs in the legislative history of the 1988 Amendments to NOTA:

In addition to **prohibiting the purchase of organs**, the act provided for the establishment of grants to organ procurement agencies and a national organ-sharing system.

S. Rep. No. 310, 100th Cong., 2nd Sess. 1988, 1988 WL 169911 (Leg. Hist.)

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