

1-1-2014

Zombie Powers of Attorney: The Uniform Anatomical Gift Act of 2006 and the Durable (Undead) Power of Attorney for Health Care

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Smith, Sutton James (2014) "Zombie Powers of Attorney: The Uniform Anatomical Gift Act of 2006 and the Durable (Undead) Power of Attorney for Health Care," *University of Dayton Law Review*. Vol. 39: No. 2, Article 5.

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Cover Page Footnote

Special thanks are in order for my beautiful and talented wife Emi, my parents and grandparents, and all those whose willingness to help and patience have pushed me to improve.

ZOMBIE POWERS OF ATTORNEY: THE UNIFORM ANATOMICAL GIFT ACT OF 2006 AND THE DURABLE UNDEAD POWER OF ATTORNEY FOR HEALTH CARE

*Sutton James Smith**

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I. INTRODUCTION

You're hunkered down in the corner of what used to be a hospital. The windows are shattered. The remains of the place are everywhere—crushed vials and charts litter the floor. You've been sitting motionless in the eerie glow of the emergency lighting since the power went out two hours ago, and you're clutching a shotgun to your chest. It has been days since you have seen anyone else alive.

And that's when you hear them—the sound is still soft and distant, but you know that *they know* you're there. Slowly, the noise grows. Utter terror is overcome by raw curiosity, and you turn to look over your shoulder, peering out the window. And then you see them—"the zombie powers of attorney"—thousands of documents limping and scraping toward you. They're caught somewhere between termination and non-existence, and they're here for your body.

Alright, that might be a *bit* dramatic, but Ohio law does allow a durable "healthcare power of attorney" (HPOA) to live on after it should have died, for a single purpose: tissue donation.¹

Allowing an HPOA to remain in effect after the principal dies may not seem like a bad idea. If you trust someone with your life, you probably trust him in death, right? But by the time a posthumous donation can be made, an HPOA is already legally dead—both under common law and under Ohio statute.² Nonetheless, by adopting the Revised Uniform Anatomical Gift Act of 2006 (UAGA), the Ohio General Assembly gave an "attorney in fact" under an HPOA priority to consent to a posthumous donation of the principal's anatomy even though *the HPOA has terminated* due to the death of the principal.³

But it really shouldn't have.

Section II of this comment traces the creation and evolution of two legal creatures: the agency relationship and the UAGA, both central players in the discussion that follows. Section III introduces and discusses the conflicts created by the UAGA's posthumous donation system, and the unintended consequences they can create. Section IV offers two potential cures that address, to varying degrees, the issues that arise from Ohio's adoption of the UAGA system, and discusses the benefits and drawbacks of each. Finally, Section V provides a concise recapitulation of the issues and

¹ See OHIO REV. CODE ANN. § 2108.09 (West 2013). Note that throughout this comment, "power of attorney," "durable power of attorney for health care," and "HPOA" will be used to refer to the legal document creating the relationship or the relationship itself. The words "attorney in fact" and "agent" will be used to describe the individual authorized to act under the document.

² See *infra* Part II.D.

³ § 2108.09(A)(1). Note that while the term is alternately spelled "attorney-in-fact" and "attorney in fact," the Ohio Revised Code uses the term sans hyphen, so the author will, too. *Id.* § 2108.01(B)(1).

solutions presented throughout the comment.

II. BACKGROUND

A. Agency Basics

Generally speaking, HPOAs are legal documents that create an arrangement (called agency) between two people: the one creating the relationship (known as the principal), and the one chosen by the principal (called the agent, or sometimes the attorney in fact).

Agency is fundamentally a transfer of autonomy or power from the principal to the agent, whom the principal then authorizes to act.⁴ As the Restatement of Agency (Restatement) puts it: “[a]n agent . . . holds power as a result of a voluntary conferral by the principal and is privileged, in relation to the principal, to exercise that power.”⁵ In practice, this means the agent acts on the principal’s behalf; he acts, in a legal capacity, as if he were the principal.

Powers of attorney often take the form of a financial relationship. Indeed, in Ohio, the original power of attorney law empowered an agent to approve “the conveyance, mortgage, or lease of any interest in real property . . .” on behalf of the principal.⁶ As such, powers of attorney are frequently used in estate planning to empower agents to create, amend, or revoke trusts, dispose of property specifically bequeathed in the principal’s will, and even change the language of the will itself.⁷ Likewise, a principal could grant her agent the power to make monetary gifts on her behalf, disclaim inheritances, elect or take under or against a will, and handle tax matters for her.⁸

The HPOA, on the other hand, is an agency relationship connected to a non-financial interest: the principal’s health. At its simplest, an HPOA is a “designation of an agent to make health-care decisions for the individual granting the power.”⁹ HPOAs exist to ensure the principal has a voice when she is incapacitated—whether because of trauma or mental illness or simply because the principal is under anesthesia for a routine procedure.¹⁰ HPOAs are nothing more than an agency relationship confined to the narrow arena of the principal’s health care, and they rely on the same fundamental principles that any other agency relationship would.

⁴ RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

⁵ *Id.* § 1.01 cmt. c.

⁶ OHIO REV. CODE ANN. § 1337.01 (West 2013).

⁷ GREGORY S. FRENCH ET AL., ANDERSON’S OHIO ELDER LAW PRACTICE MANUAL § 2.5 (2011 ed.) [hereinafter *ELDER LAW MANUAL*].

⁸ *Id.* §§ 2.6–9.

⁹ A. KIMBERLY DAYTON ET AL., 3 ADVISING THE ELDERLY CLIENT § 33:15 (2013) (quoting UNIF. HEALTH-CARE DECISIONS ACT § 1(12) (1994)).

¹⁰ *See id.*

Another common form of agency is a living will. A living will “is a written document that describes the circumstances in which the person who executes [the] document would want life-sustaining treatment to be continued, withheld, or withdrawn.”¹¹ It is not uncommon for a layperson to associate living wills with terminating life-sustaining treatment (i.e., “pulling the plug”), but in fact, “such a declaration is equally capable of directing that all possible measures be taken to sustain life.”¹² Unlike HPOAs, living wills typically operate only as instructions and do not appoint decision makers.¹³ Living wills are entirely creatures of statute.¹⁴ Ohio offers a form outlining the nature and operation of living wills specific to the state.¹⁵

A “do not resuscitate order” (DNR) “is an order written by a patient’s attending physician directing that the patient should not be resuscitated should her heart and lungs stop functioning.”¹⁶ In a typical DNR setting, the principal is a “terminally ill or critically injured person,” who wants to make clear to her agent that she wishes to avoid lifesaving procedures if she is “admitted to a hospital, in circumstances in which [she is] almost certainly likely to die soon and resuscitation would accomplish nothing more than to prolong inevitable death.”¹⁷

In Ohio, DNRs are noted on standardized identification cards, forms, necklaces, or bracelets.¹⁸ The item signifies either:

- (1) [t]hat the person . . . authorizes the withholding or withdrawal of CPR and that [the authorization] has not been revoked . . . [or]
- (2) [t]hat the attending physician of the person . . . has issued a current do-not-resuscitate order . . . for that person and has documented the grounds for the order in that person’s medical record.¹⁹

In short, a DNR is an instruction from the principal to her agents to forego CPR or similar treatment because the person’s terminal condition makes prolonged life unfruitful.

Finally, an “advance care directive” is “a planning document that combines a declaration relating to a person’s preferences regarding health care treatment with language appointing a health care proxy”²⁰ “The literature usually uses this term to describe a document that combines the

¹¹ *Id.* § 33:14.

¹² *Id.* (footnote omitted).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ OHIO FORMS & TRANSACTIONS § 30:23 (2013).

¹⁶ DAYTON ET AL., *supra* note 9, § 33:16.

¹⁷ *Id.*

¹⁸ OHIO REV. CODE ANN. § 2133.21(C) (West 2013).

¹⁹ *Id.*

²⁰ DAYTON ET AL., *supra* note 9, § 33:11.

features of a ‘living will’ with a durable power of attorney [for healthcare.]”²¹ Instructions given in an advance care directive can apply to any healthcare situation the creator lists: “[a]n adult or emancipated minor may give an individual instruction[,] . . . oral or written[, which] may be limited to take effect only if a specified condition arises.”²² Because it can refer to any document “concerning a health-care decision,”²³ the use of “advance care directive” is a little like saying “property right;” it communicates the general area of discussion, but does not specify the exact nature or source of the fact at issue. Lawyers should be careful using the term, since nearly all of the documents discussed could be called an “advance care directive.”

In Ohio, “[a]dvance health-care directive’ means a durable power of attorney for health care or a record signed by a prospective donor containing the prospective donor’s direction concerning a health-care decision.”²⁴ Think of it as a super-HPOA: it simultaneously appoints an agent and gives decision-making instructions.

B. The Agent’s Authority to Act

The genius of the agency relationship is that it allows one person to act on behalf of another. It enables two individuals to work towards the same end, in concert but independently, in a more effective and efficient manner. Not surprisingly, this is only possible when the principal authorizes the agent to act. There are three kinds of authority: actual authority, implied authority, and apparent authority.²⁵

1. Actual Authority

The transfer or “conferral” of some portion of the principal’s autonomy to the agent is most obvious in examples of actual authority.²⁶ “An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent so to act.”²⁷ For actual authority to exist, “[t]he agent’s belief must be grounded in a manifestation of the principal, including but not limited to the principal’s written or spoken words”²⁸ that, “as reasonably understood by the agent, expresses the principal’s assent that the agent take

²¹ *Id.* § 33.13.

²² UNIF. HEALTH-CARE DECISIONS ACT § 2(A) (1994).

²³ *Id.*

²⁴ OHIO REV. CODE ANN. § 2108.24(A)(1) (West 2013).

²⁵ RESTATEMENT (THIRD) OF AGENCY §§ 2.01, 2.03 (2006).

²⁶ *Id.* § 1.01 cmt. c.

²⁷ *Id.* § 2.01.

²⁸ *Id.* § 2.02 cmt. c.

action on the principal's behalf."²⁹ In short, an agent acts with actual authority when he does something the principal says he can do.

2. Implied Authority

Implied authority is a corollary to actual authority. To quote the Restatement, implied authority refers to:

[the] authority either (1) to do what is necessary, usual, and proper to accomplish or perform an agent's express responsibilities or (2) to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent.³⁰

So, if actual authority is the agent's power to do what the principal says the agent can do, implied authority is the agent's power to do what the agent thinks the principal would want the agent to do to assert his actual authority. Note, however, that implied authority still relies on "the principal's manifestation."³¹

3. Apparent Authority

While agency is most commonly thought of as a relationship between a principal and an agent, agency law also governs the relationship between the principal and third parties. This is where apparent authority fits in. Apparent authority is "the power . . . to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to [bind] the principal"³² When a third party reasonably believes someone has the authority to act on the principal's behalf (whether or not that person actually does), apparent authority exists and that person can interact with the third party on behalf of the principal.

But apparent authority still relies on some act by the principal. It only exists when the context makes it "reasonable for a third party to believe that an agent has authority," and "the belief is traceable to manifestations of the principal."³³ Indeed, apparent authority is created "by a person's manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the

²⁹ *Id.* § 3.01.

³⁰ *Id.* § 2.01 cmt. b.

³¹ *Id.*

³² *Id.* § 2.03.

³³ *Id.* § 2.03 cmt. c.

manifestation.”³⁴ In other words, when the third party sees the principal do something that leads the third party to believe another person is the principal’s agent, the third party can transact with the other person and bind the principal.

C. *The Duties Inherent in Agency*

When an agent accepts the authority to act on behalf of his principal, he also incurs duties to do or to avoid doing certain things. The agent “has a fiduciary duty to act . . . for the principal’s benefit in all matters connected with the agency relationship.”³⁵ Agents owe their principals two kinds of duties: duties of loyalty and duties of performance.

1. Duties of Loyalty—The Soul

Duties of loyalty create a sort of moral obligation for agents. These duties closely circumscribe an agent’s ability to derive material benefit from his position,³⁶ act “as or on behalf of an adverse party,”³⁷ compete with the principal,³⁸ use the principal’s property,³⁹ or use confidential information learned in his capacity as an agent.⁴⁰ These duties stem from “the ordinary expectation that a person who acts as an agent does so to further the interests of the principal and that it is the principal who should benefit from . . . transactions that the agent undertakes on the principal’s behalf,” not the agent.⁴¹

If the agent is acting with actual or implied authority, the agent is authorized to exercise only those powers the principal has conferred. Remember: an agent only has actual authority to “take action designated or implied in the principal’s manifestations to the agent and acts necessary or incidental to achieving the principal’s objectives”⁴² It is difficult to see how deriving material benefit from the position, acting as or on behalf of an adverse party, or competing with the principal, would be necessary or incidental to the agent achieving the principal’s objectives.

Because apparent authority turns on what the third party reasonably believed, rather than what the agent is authorized to do, duties of loyalty apply, but are not implicated as centrally as in situations surrounding actual authority. Still, the general “fiduciary duty to act loyally for the principal’s benefit” would seem to prohibit any knowing act by the agent that gives a

³⁴ *Id.* § 3.03.

³⁵ *Id.* § 8.01.

³⁶ *Id.* § 8.02.

³⁷ *Id.* § 8.03.

³⁸ *Id.* § 8.04.

³⁹ *Id.* § 8.05.

⁴⁰ *Id.*

⁴¹ *Id.* § 8.02 cmt. b.

⁴² *Id.* § 2.02(1).

third party reason to believe the agent is authorized to act—thereby creating apparent authority—when he is not.⁴³

2. Duties of Performance—The Body

The agent is also bound by duties of performance: what the agent can and cannot do. The agent must act with “the care, competence, and diligence normally exercised by agents in similar circumstances[.]”⁴⁴ act only within the scope of the authority granted by the principal,⁴⁵ and act reasonably to avoid harming the principal.⁴⁶

This is true for all three kinds of authority. An agent exercising actual authority owes a duty to always act as is “necessary or incidental to achieving the principal’s objectives”⁴⁷ Achieving the principal’s objectives would obviously require care, competence, and diligence, and would preclude acting outside the scope of the authority or in a manner that harms the principal. Duties of performance also prohibit the agent from encouraging apparent authority by acting in a manner that leads a third party to believe the agent is authorized to do something when he is not, because such action would not be within the scope of his authority and may harm the principal.

3. Duties under HPOAs

Ohio law codifies similar duties for attorneys in fact under Ohio Revised Code section 1337.34. That section states: “[A]n agent that has accepted appointment shall . . . [a]ct loyally for the principal’s benefit . . . [and a]ct with the care, competence, and diligence ordinarily exercised by agents in similar circumstances”⁴⁸ In addition, agents must act only “in the principal’s best interest . . . in good faith . . . [and] within the scope of authority granted in the power of attorney”⁴⁹

In the context of HPOAs, these duties bind the attorney in fact to further the health care interests of the principal, to use care, competence, and diligence when making decisions concerning the principal’s health, and to always act reasonably to avoid harming the principal. Likewise, an attorney in fact’s authority is limited to decisions about the principal’s health care. Thus, when an attorney in fact is working under an effective HPOA, his freedom in decision-making is strictly defined.

⁴³ *Id.* § 8.01.

⁴⁴ *Id.* § 8.08.

⁴⁵ *Id.* § 8.09.

⁴⁶ *Id.* § 8.10.

⁴⁷ *Id.* § 2.02(1).

⁴⁸ OHIO REV. CODE ANN. §§ 1337.34(A), (B)(1), (B)(3) (West 2013).

⁴⁹ *Id.* § 1337.34(A).

D. The Death of an HPOA—Termination Under Ohio Law

The most obvious way to terminate any agency relationship is to simply revoke the agent's authority.⁵⁰ Voluntary termination comports with the basic premise that authority is derived from the principal's intentional conferral of power—when that grant is revoked, the agent's power to act is revoked too.⁵¹

A principal's incapacity will also terminate an agency relationship.⁵² A principal can prevent this by making her relationship with her agent "durable." Durability protects the agent's power to act on behalf of the principal when the principal is legally or physically unable to act for herself; it means that "the disability or incapacity of a principal who has previously executed a power of attorney . . . does not terminate the agency"⁵³

Any power of attorney can be made durable, often by simply including words to that effect.⁵⁴ But HPOAs are unique with respect to durability: because HPOAs are effective *only* when the principal lacks the capacity to make her own medical decisions, they are by definition durable.⁵⁵ Indeed, if an attorney in fact's authority ended the moment the principal is unable to act for herself, it would have no value at all.⁵⁶

Take note that durability deals with loss of capacity, not loss of life. Durability does not mean that the agency relationship continues forever; it simply trumps the default rule that the agency relationship terminates upon the principal's incapacity.⁵⁷ This is a key distinction because in Ohio, well-settled case law holds that "[t]he death of a party revokes a power of attorney given by [that party]"⁵⁸ Like voluntary termination, the principal's death ends her ability to authorize her agent to act.

At common law, because a grant of actual authority requires some intentional manifestation by the principal, and because implied authority is derived from a grant of actual authority, a principal cannot confer either if the principal is dead. As Justice Scalia once put it, *nemo dat qui non habet*: no one gives what he does not have.⁵⁹ The Restatement echoes this point: "[t]he death of an individual principal terminates the agent's actual

⁵⁰ *See id.*

⁵¹ *See supra* Part II.B.

⁵² OHIO REV. CODE ANN. § 1337.30(A)(2) (West 2013).

⁵³ RESTATEMENT (THIRD) OF AGENCY § 3.08 cmt. b (2006).

⁵⁴ *ELDER LAW MANUAL*, *supra* note 7, § 2.2.

⁵⁵ OHIO REV. CODE ANN. § 1337.13(A)(1) (West 2013) (stating that an attorney in fact under an HPOA shall make healthcare decisions for the principal "only if the attending physician of the principal determines that the principal has lost the capacity to make informed health care decisions for the principal.").

⁵⁶ *Id.*

⁵⁷ *See id.* § 1337.30(A)(2).

⁵⁸ *McDonald v. Adm'r of Black*, 20 Ohio 185, at syllabus (Ohio 1851); *see also Santa v. Ohio Dep't of Human Servs.*, 736 N.E.2d 86, 88 (Ohio Ct. App. 2000).

⁵⁹ *Chicago v. Morales*, 527 U.S. 41, 91 n.9 (1999) (Scalia, J., dissenting).

authority.”⁶⁰

In 2012, Ohio codified much of the Restatement when it adopted the Uniform Power of Attorney Act.⁶¹ Ohio Revised Code section 1337.30 states that “[a]n agent’s authority terminates when . . . [t]he power of attorney terminates . . . ,”⁶² and “[a] power of attorney terminates when . . . [t]he principal dies”⁶³ So like at common law, the death of the principal terminates the agent’s authority.

However, termination may not be instantaneous in practice. For agents, “termination is effective only when [he] has notice of the principal’s death.”⁶⁴ The same applies to third parties: “[t]he termination is also effective as against a third party with whom the agent deals when the third party has notice of the principal’s death.”⁶⁵ Thus, actual and implied authority can continue after the death of the principal only when neither the agent nor the third party knows the principal is dead; neither an agent nor a third party can bind the principal if they know she is dead.

Likewise, “[a]n agent’s apparent authority may survive or linger after the termination of actual authority”⁶⁶ “Apparent authority ends when it is no longer reasonable for the third party with whom an agent deals to believe that the agent continues to act with actual authority.”⁶⁷ Apparent authority thus survives the principal only “[w]hen third parties do not have notice that the principal has died or lost capacity”⁶⁸ Until they know the principal is dead, third parties “may reasonably believe the agent to be authorized” and may therefore rely on the agent’s apparent authority.⁶⁹

Like at common law, agency authority can survive under Ohio law if either the agent or the third party is unaware that the principal died: “[t]ermination of an agent’s authority or [termination] of a power of attorney is not effective as to the agent or another person that, without actual knowledge of the termination, acts in good faith under the power of attorney.”⁷⁰

Termination of the agency relationship also affects the agent’s duties. Because the principal’s death terminates the agency relationship, it also releases the attorney in fact from the responsibilities and restrictions of

⁶⁰ RESTATEMENT (THIRD) OF AGENCY § 3.07(2) (2006).

⁶¹ UNIF. POWER OF ATTORNEY ACT (2012); OHIO REV. CODE ANN. §§ 1337.21–.64 (West 2013).

⁶² OHIO REV. CODE ANN. § 1337.30(B)(4) (West 2013).

⁶³ *Id.* § 1337.30(A)(1).

⁶⁴ RESTATEMENT (THIRD) OF AGENCY § 3.07(2) (2006).

⁶⁵ *Id.*

⁶⁶ *Id.* § 3.11 cmt. c.

⁶⁷ *Id.* § 3.11(2).

⁶⁸ *Id.* § 3.11 cmt. b.

⁶⁹ *Id.*

⁷⁰ OHIO REV. CODE ANN. § 1337.30(D) (West 2013).

the position.⁷¹ So when the HPOA terminates, the former agent no longer owes any fiduciary duties to the principal.⁷²

These fairly straightforward rules concerning the death of agency were apparently ignored when the National Conference of Commissioners on Uniform State Laws (NCCUS) drafted the UAGA.⁷³

E. The Birth of the Uniform Anatomical Gift Act

The '06 UAGA was the NCCUS's third version of the Act.⁷⁴ The original Act, authored in 1968, was born in the wake of the first successful heart transplant, and actually invented a donor's legal right to donate her eyes, organs, and tissues.⁷⁵ That Act was uniformly adopted by every state.⁷⁶

The development of immunosuppressive drugs increased the efficacy and prevalence of organ and tissue transplants, and spurred the NCCUS to draft an updated 1987 version of the UAGA to address these changes in practice and volume.⁷⁷ However, the '87 UAGA failed to reach the wide acceptance enjoyed by the '68 UAGA and subsequently fell out of harmony with federal law.⁷⁸

The '06 UAGA was designed to remedy the '87 Act's discontinuity with federal law, and placed particular emphasis on an increasingly critical shortage of donated organs and tissues across the United States.⁷⁹ To that end, NCCUS sought the "substantial and active participation of . . . donors, recipients, doctors, procurement organizations, regulators, and others . . ." in updating the text of the Act.⁸⁰ To date, forty-seven states have adopted the '06 UAGA.⁸¹ Ohio implemented the '06 UAGA in 2009, enacting it as Ohio Revised Code sections 2108.01 through 2108.35.⁸²

Of note, the '06 UAGA deals only with posthumous tissue donations, avoiding the "distinct and difficult legal issues" associated with organ donations made by living persons.⁸³ As will become clear, however,

⁷¹ See *id.* §§ 1337.30(A)(1), (3).

⁷² See *id.* §§ 1337.30(A)(1), (3).

⁷³ See generally REVISED UNIF. ANATOMICAL GIFT ACT (2006) (amended 2008).

⁷⁴ *Id.* at Prefatory Note.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Anatomical Gift Act (2006): Enactment Status Map*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Anatomical%20Gift%20Act%20%282006%29> (last visited May 19, 2014). New York, Delaware, and Florida have not adopted the '06 UAGA, and neither has Puerto Rico.

Id.

⁸² OHIO REV. CODE ANN. §§ 2108.01–.35 (West 2013).

⁸³ REVISED UNIF. ANATOMICAL GIFT ACT at Prefatory Note (2006) (amended 2008).

those “distinct and difficult” issues are not unique to living donations.

Section 9 of the '06 UAGA outlines the process for determining who can consent to a tissue donation.⁸⁴ Under section 9, classes of individuals are authorized to consent to a posthumous donation of a decedent's anatomy.⁸⁵ Those classes are listed by priority.⁸⁶ A member of any class can make a gift, but he cannot consent if any member of a higher class is willing to decide.⁸⁷ Any member of the class with the highest priority may consent to a gift, unless another member of the same class objects.⁸⁸ If such an objection is known, a gift can only be made if a majority of the members of a class agree.⁸⁹

In the '87 UAGA, priority to consent to anatomical gifts (then section 3) mimicked another area of law: intestate succession.⁹⁰ As such, the '87 list relied on the next-of-kin model.⁹¹ Therefore, under the '87 Act, a principal's spouse would be given first priority in deciding whether to consent to a gift, then an adult son or daughter, a parent, sibling, grandparent, and finally the decedent's legal guardian.⁹² The '06 UAGA list (section 9) retains the general next-of-kin model, but inserts a new person at the top and pushes every class down one notch.⁹³

Top priority in the '06 Act is given to “[a]n agent of the decedent at the time of death who could have made an anatomical gift under division (B) of section 2108.04 of the Revised Code immediately before the decedent's death”⁹⁴ The agent referenced in section 2108.04(B) is the donor's attorney in fact acting pursuant to a durable power of attorney for health care.⁹⁵ That means an individual authorized by an HPOA to consent to *pre-death* donations is also given the first priority to consent to *posthumous* donations.

Section 9 did not appear out of thin air. When it gathered to update the '87 UAGA, NCCUS's study committee began by “solicit[ing] input from a wide variety of interested groups[,]” and in return “received substantial specific proposals for amendments” from, among others, a group called the American Organ Procurement Organization (AOPO).⁹⁶ The

⁸⁴ *Id.* § 9.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* § 9 cmt.

⁸⁹ *Id.*

⁹⁰ UNIF. ANATOMICAL GIFT ACT § 3 (1987).

⁹¹ *Id.* § 3(a) (listing, in order, the decedent's surviving spouse, adult children, parents, brothers or sisters, grandparents, and guardians).

⁹² *Id.*

⁹³ REVISED UNIF. ANATOMICAL GIFT ACT § 9 (2006) (amended 2008).

⁹⁴ OHIO REV. CODE ANN. § 2108.09(A)(1) (West 2013).

⁹⁵ *Id.* § 2108.04(B).

⁹⁶ NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAW STUDY COMM. FOR UAGA, REPORT OF UAGA STUDY COMMITTEE (April 2004).

AOPO proposed an amendment that placed former agents under HPOAs atop the list of individuals authorized to consent to a posthumous anatomical gift.⁹⁷ The substance of the AOPO amendment appeared in every subsequent draft the NCCUS considered, and ultimately became part of the promulgated text of the '06 UAGA itself.⁹⁸

Fortunately, AOPO included a comment explaining its rationale for the section 9 amendment.⁹⁹ Citing the '87 UAGA's failure to authorize healthcare proxies to make anatomical gifts, AOPO claimed "[m]any people believe that when they designate an individual to make health care decisions, particularly those at the end of life, that the designated individual is also empowered to determine whether or not an anatomical gift is made."¹⁰⁰ AOPO believed that by giving a former agent priority, "the autonomy of the [donor] is preserved by allowing them to designate an individual to exercise the right [to donate]"¹⁰¹

Unfortunately, AOPO provided no evidence or data to support its fundamental assumption.¹⁰² It is certainly reasonable to defer to AOPO's admittedly superior experience and grasp of anatomical donation, but when that fundamental assumption is at odds with established bodies of law, things can get scary.

III. ANALYSIS

The NCCUS claims to agree with common law and the Ohio statutes discussed above that agency terminates upon the death of the principal.¹⁰³ In its comment to section 9, NCCUS begins by making the conclusory statement that the Act "does not extend the agency relationship beyond a principal's death"¹⁰⁴ because "[u]nder other law, an agent's power under a power of attorney for health care or any other power terminates when the principal dies."¹⁰⁵ The comment continues, "[b]ut . . . the person who had been acting as an agent at the time of the principal's death (even though death terminated the agency relationship) has the first priority to make an anatomical gift on behalf of the deceased principal."¹⁰⁶

⁹⁷ AMERICAN ORGAN PROCUREMENT ORGANIZATION, PROPOSED AOPO AMENDMENTS TO THE UNIF. ANATOMICAL GIFT ACT (1987) [hereinafter AOPO AMENDMENTS].

⁹⁸ See REVISED UNIF. ANATOMICAL GIFT ACT § 9 (2006) (amended 2008); REVISED UNIF. ANATOMICAL GIFT ACT § 9 (Proposed Draft Apr. 2006); REVISED UNIF. ANATOMICAL GIFT ACT § 9 (Proposed Official Draft 2005); REVISED UNIF. ANATOMICAL GIFT ACT § 7 (Proposed Draft Apr. 2005); REVISED UNIF. ANATOMICAL GIFT ACT § 7 (Proposed Draft Feb. 2005).

⁹⁹ AOPO AMENDMENTS, *supra* note 97, at cmt. 3(a)(1).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See id.*

¹⁰³ REVISED UNIF. ANATOMICAL GIFT ACT § 9 cmt. (2006) (amended 2008).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

When you peel back the skin, this seemingly reasonable arrangement creates two alarming conflicts. First, section 9 of the '06 UAGA conflicts with common law and statutory law by creating a zombie power of attorney—a de facto agency relationship that continues after the principal's death.¹⁰⁷ And second, the '06 UAGA conflicts with Ohio's statutory right to nominate a person to dispose of your remains.¹⁰⁸

A. Section 9 of the 2006 UAGA Conflicts with Established Principles and Statutory Law Governing Agency

To the extent the '06 UAGA creates a zombie power of attorney that continues after the principal's death, it conflicts with the established termination rules discussed above.¹⁰⁹ The effect is a former agent acting without authorization and without fiduciary duties.

A zombie power of attorney represents a grant of actual authority that the principal can no longer make (because the principal is dead) and the presence of apparent authority that cannot be reasonable (because everyone involved knows the principal is dead).¹¹⁰ Because termination is effective as soon as “the agent has notice of the principal's death,”¹¹¹ and because it is inconceivable that the attorney in fact under an HPOA would be unaware of the principal's death after being asked to consent to a posthumous tissue donation, neither actual nor implied authority can continue in a donation scenario once the principal dies. The same is true for apparent authority, which requires the “third party's reasonable belief that the agent acts with actual authority.”¹¹² Any medical professional seeking to harvest the principal's tissues postmortem would be aware of the principal's death, and “[i]f a third party has notice of facts that call the agent's authority into question,” he cannot interact with a third party on behalf of the principal.¹¹³

Furthermore, the continued authorization under a zombie power of attorney as endorsed by section 9 is *directly contrary* to the language of Ohio's agency law.¹¹⁴ In fact, allowing a de facto agency relationship to continue beyond the death of the principal promotes a legal misunderstanding: that the grant of agency continues even though the source of the agency is terminated. It creates confusion, and actually puts educated principals at a disadvantage because their accurate knowledge of agency law is inaccurate in practical application. A zombie power of attorney is both illogical and illegal.

¹⁰⁷ See *supra* Part II.D.

¹⁰⁸ OHIO REV. CODE ANN. § 2108.24 (West 2013).

¹⁰⁹ See *supra* Part II.D.

¹¹⁰ See *supra* Part II.B.

¹¹¹ RESTATEMENT (THIRD) OF AGENCY § 3.07(2) (2006).

¹¹² *Id.* § 3.11 cmt. b.

¹¹³ *Id.* at cmt. e.

¹¹⁴ See *supra* Part II.D.

Even assuming the '06 UAGA was in line with agency law and assuming it does not create a zombie power of attorney that extends the agent/principal bond past death (because it is impossible under agency law), the absolute termination of the HPOA when the principal dies creates a bigger problem: a former agent with power but without duties.

As noted, an agent's duties terminate with the agency. Without the duties imposed by the agency relationship, the former agent can not only act in his own self-interest, but can intentionally act in bad faith and directly against the former principal's expressed wishes. Under section 9, the former agent is given priority in consenting to the former principal's anatomical gift *even though he has no duties of loyalty or duties of performance*. Certainly this is not what the principal intended in creating the agency.

B. The 2006 UAGA Conflicts with Ohio's Disposition of Remains Statute

Ohio Revised Code section 2108.70 allows adults to decide who will handle their remains.¹¹⁵ The default scheme in Ohio Revised Code section 2108.81 assigns the right of disposition of the decedent's remains, by a next-of-kin model, to the family of the decedent.¹¹⁶ However, "[a]n adult who is of sound mind may execute at any time a written declaration assigning to a representative one or more . . . rights[,]” including “[t]he right to direct the disposition, after death, of the declarant's body or any part of the declarant's body that becomes separated from the body before death. This right includes the right to determine the location, manner, and conditions of the disposition of the declarant's bodily remains.”¹¹⁷ This statute has special utility for same-sex couples because it allows them to assign the right of disposition to their partner—a person who is not currently listed in the default list for intestate succession.

Under the UAGA, a conflict arises anytime someone assigns a right of disposition to an individual other than their attorney in fact. For instance, if a gay decedent nominates her partner to dispose of her remains but names a different person to be her attorney in fact under and HPOA, who decides whether to make a tissue donation? This conflict is purportedly addressed by Ohio Revised Code section 2108.24:

If a prospective donor has a declaration . . . the terms of which are in conflict with the express or implied terms of a potential anatomical gift with regard to administration of measures necessary to ensure the medical suitability of a part for transplantation or therapy and the prospective donor is incapable of resolving the conflict, one of the following

¹¹⁵ OHIO REV. CODE ANN. § 2108.70 (West 2013).

¹¹⁶ *Id.* § 2108.81.

¹¹⁷ *Id.* § 2108.70(B).

shall apply depending on the circumstances:

(1) If the prospective donor has an agent, the agent shall . . . act for the prospective donor to resolve the conflict.

(2) If the prospective donor does not have an agent, the individual or class of individuals determined in the following descending order of priority . . . shall act for the prospective donor to resolve the conflict:

- (a) The prospective donor's surviving spouse;
- (b) The prospective donor's surviving adult children;
- (c) The prospective donor's surviving parent or parents; [etc.]¹¹⁸

As discussed, a dead principal has no agent.¹¹⁹ So subsection (1) either refers only to pre-death organ transplants, or is in direct conflict with section 9 (which gives priority to a *former* agent).¹²⁰ Subsection (2), therefore, must apply to posthumous tissue donations. That subsection is directly contrary to both the UAGA (which gives priority to the former attorney in fact) and Ohio Revised Code section 2106.24 (which allows the decedent to name an individual to dispose of her remains).

So even though the principal took the affirmative step of nominating someone to dispose of her remains, that person cannot prevent the principal's former agent under an HPOA from making a decision contrary to the disposition: either the UAGA applies and the former attorney in fact is given priority, or subsection (2) applies and the spouse, children, or other family member decides. This is perhaps even more egregious than the zombie power of attorney, because in these cases the agent has priority even though the principal specifically tried to give the right of disposition to someone else.

Would it surprise you to learn that the inclusion of the agent in Ohio Revised Code section 2108.24 also comes verbatim from the '06 UAGA?¹²¹ By ignoring agency law principles, the UAGA is in conflict with itself. And by adopting the UAGA, Ohio law is too.

IV. SOLUTIONS

As it stands, the UAGA's anatomical gift provisions create serious potential for problems. But two fairly straightforward solutions are

¹¹⁸ *Id.* §2108.24(C).

¹¹⁹ *See supra* Part II.D.

¹²⁰ Because section 9 authorizes former agents.

¹²¹ REVISED UNIF. ANATOMICAL GIFT ACT § 21 (2006) (amended 2008).

possible: change the law or change Ohio's statutorily required notice.

A. Change the Law

The first and most obvious solution is simply to rewrite the law. Recognizing the inherent danger of the current system, the UAGA list should be rewritten to exclude the attorney in fact outright. If removal is not possible, the best option is to put the former agent at the bottom, below "any other person having the authority to dispose of the decedent's body."¹²² This protects the integrity of a declaration under Ohio Revised Code section 2108.70 and decreases the likelihood that a former attorney in fact would be called on to make a decision regarding an anatomical gift.

Alternatively, the UAGA could be edited to extend the duties of agents despite the termination of the HPOA. But that simply resurrects the zombie power of attorney problem and runs counter to Ohio law.

Rewriting the UAGA would certainly lead to national awareness and prevention of this issue. But even without the NCCUS's support, the Ohio General Assembly should endeavor on its own to drive a stake through the heart of this problem. The obvious downside to this solution is the long, difficult, and partisan process of changing entire sections of statutory law. Luckily, Ohio has a much more convenient avenue to help remedy section 9's issues.

B. Change Ohio's HPOA Form and Notice

Since 2001, Ohio has mandated that any printed form distributed to create HPOAs must include a statutorily-prescribed notice, ostensibly to prevent principals from executing documents they do not understand.¹²³ That notice, section 1337.17 of the Ohio Revised Code, states specifically what HPOAs do and do not authorize the attorney in fact to do, when the document becomes effective, and when and how to create and execute it.¹²⁴ The notice also counsels principals on how to revoke the document.¹²⁵ Unfortunately, the document does not explain when and how the HPOA can terminate on its own.¹²⁶ Worse yet, the notice is utterly silent on anatomical gifts.¹²⁷ But these infirmities can be cured by the inclusion of a few vital phrases.

¹²² *Id.* § 9.

¹²³ OHIO REV. CODE ANN. § 1337.17 (West 2013).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *See id.*

1. Include Language Explaining the Termination of an HPOA

If the statutorily prescribed notice truly seeks to inform the principal, it should incorporate language that not only explains how and when an HPOA terminates, but also what the legal consequences of that termination are.

a. Time and Manner of Termination

The first step to improving Ohio's notice is to include language that explains, clearly and effectively, when and how HPOAs terminate. In its current form, the document tells the principal that "[t]his document has no expiration date under Ohio law, but you may choose to specify a date upon which your durable power of attorney for health care generally will expire."¹²⁸ This sentence is misleading.

As it stands, the notice suggests that the HPOA continues on *ad infinitum*, which is not true.¹²⁹ Instead, the notice should explain that the HPOA terminates automatically upon the principal's death, unless the principal notes an earlier date. That language could read:

This document expires automatically upon your death, but you may choose to specify an earlier date upon which your durable power of attorney for healthcare generally will expire.

This small change will clearly communicate to the principal that the HPOA is not infinite—a basic legal fact essential to a complete understanding of the document.

b. Consequences of Termination

It is important that the notice also clearly explains the legal and practical consequences of termination. Besides the previously mentioned expiration language, the only other reference to the end of the HPOA in the current notice is that the principal has "the right to revoke the designation of the attorney in fact and the right to revoke [the] entire document at any time and in any manner."¹³⁰

The current language fails to convey the legal significance of revocation or termination—especially with regard to the termination of the agent's duties. The notice should add language explaining that upon termination or revocation, the agent's powers cease, and he no longer has any duty to act in the principal's best interests. That language could read:

¹²⁸ *Id.*

¹²⁹ *See supra* Part II.D.

¹³⁰ § 1337.17.

Upon revocation or termination, the power of your agent to act on your behalf ceases, and the relationship ends. In addition, your former agent is no longer bound to act on your behalf or in your best interests.

This language would clearly communicate to the principal that the end of the relationship truly means the end of the relationship, and that at that point the agent is free to act as he so pleases.

2. Include Language Concerning a Former Attorney in Fact's Role in Consenting to Anatomical Gifts

a. "The HPOA has priority in consenting . . ."

As previously noted, Ohio's statutory notice fails to mention the words "anatomical gift" at all.¹³¹ Needless to say, the notice does not adequately explain the attorney in fact's power to consent to a donation.

Ohio's notice only provides a general outline of the agent's powers, saying, "[t]his document gives the person you designate (the attorney in fact) the power to make most health care decisions for you if you lose the capacity to make informed health care decisions for yourself."¹³² In addition, "the attorney in fact generally will be authorized by this document to make health care decisions for you to the same extent as you could make those decisions yourself, if you had the capacity to do so."¹³³ This includes "the authority to give informed consent, to refuse to give informed consent, or to withdraw informed consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition."¹³⁴ But the notice completely ignores an attorney in fact's priority when it comes to anatomical gifts.

To solve this defect, language should be added explaining that another specific power granted to an attorney in fact is priority—above all others—to consent to or refuse an anatomical gift. Coupled with the proposed language regarding the termination of the relationship, that language could read:

Although the power of attorney relationship terminates upon your death, Ohio law grants your former attorney in fact first priority in consenting to an anatomical gift.

This language would make clear to the principal that the attorney in fact has priority in consenting to an anatomical gift.

¹³¹ *See id.*

¹³² *Id.* (asterisk omitted).

¹³³ *Id.* (asterisk omitted).

¹³⁴ *Id.*

b. The Consequences of that Priority

While the proposed language above indicates that the attorney in fact has priority, it is equally important to explain the consequences of granting such power. As noted, not only does the '06 UAGA give the attorney in fact priority over spouses and family members, it also trumps other declarations concerning the principal's remains—a rather counterintuitive concept, especially for someone who intentionally executed a directive concerning disposition of her remains.¹³⁵

A better notice would include language outlining the effect nominating an attorney in fact has on the disposition of your remains. That language could read:

The priority granted to the attorney in fact to consent to anatomical gifts is superior to any other declaration or nomination concerning the disposition of your remains.

This language would clearly indicate to the principal that the attorney in fact has priority, even if the principal took steps to nominate a different person under Chapter 2108. As such, it provides a clear warning that a potential discrepancy should be swiftly addressed.

This is an imperfect solution, but it is a step forward. To be sure, the addition of language to a notice—no doubt skimmed over or ignored by the vast majority of principals—will not solve all of the problems created by the UAGA. But by making these changes, Ohio can take an affirmative step towards educating its citizens about the potentially unintended consequences of executing an HPOA. And any time someone—especially a layperson—executes a legal document, it is important that the individual understands, as far as is practical, the effect and consequences of doing so. In situations such as this, where the addition of a few short phrases is all that is needed, there is no excuse for not making the effort to improve the clarity and completeness of the notice.

V. CONCLUSION

Agency law has been used to create and define legal relationships for centuries. And for centuries, those relationships have been grounded in common law and statutory agency principles. The 2006 Uniform Anatomical Gift Act is a recent attempt to utilize the principles of agency law to benefit the many deserving people in need of and hoping for organ and tissue transplants. At its best, the UAGA could help countless individuals turn a tragic loss into a positive contribution. But as it stands, the UAGA is too susceptible to serious and awful conflict.

¹³⁵ See *supra* Part III.B. Although, as noted, it is not entirely clear what effect § 2108.24 has.

Zombie powers of attorney, living on after they should have died, are simply unacceptable. Internal conflicts in law and within families are worse. Both should be cured. Besides, a few of the suggested changes are so relatively minor that implementing them would be a no-brainer.¹³⁶

¹³⁶ Which is good when zombies are chasing you.

