MEMORANDUM

TO: Samuel A. Thumma, Chair
Drafting Committee to Revise the Uniform Determination of Death Act

COPY: Members of the Drafting Committee
Professor Nita A. Farahany, JD, Ph.D., Reporter

FROM: Alexander M. Capron

DATE: May 1, 2023

As an Observer of the work of this committee, I was glad to receive a copy of the draft revised Uniform Determination of Death Act that was sent April 20th to the Committee on Style. Your description of the current status of the debate and conversation within the drafting committee was very deft and, I'm sure, conveyed to the Committee on Style that a substantial amount of work remains to be done within the drafting committee. As one of the two people involved in the current process who took part in the drafting of the UDDA—the other being Peter Langrock—I am very aware that what is happening now is more complex and will require added effort.

Reading over the working draft submitted to the Committee on Style, I noticed several points, large and small, that I believe will need attention before the draft is more widely discussed in the ULC or at least before the drafting committee's next meeting. Some may have already been dealt with by the Style Committee, but if not, I hope you will find the following worth considering.

A. Beginning in Section 2 of the draft act, the first definition, which is in brackets, now reads:

> [(1) "Clinical evaluation for the determination of death" means the formal process of establishing that a person is dead, in accordance with accepted medical standards, by circulatory and respiratory criteria under Section (3)(1), or by neurologic criteria under Section (3)(2).]

Given the significance of the determination being made, I believe it would be desirable not to suggest that physicians in all (or, for that matter, any) cases are merely confirming a conclusion they have already reached. Such an implication would be avoided if "whether" replaced "that," so the clause reads, "means the formal process of establishing whether an individual is dead." This revision also replaces "person" with "individual," which is used throughout the draft act.

B. Further along in Section 2, the fifth definition has a small typographical error. It now reads:

> (5) "Physician" means an individual authorized to practice medicine under [cite to state law authorizing the practice of medicine][or osteopathy under [cite to state law authorizing the practice of osteopathy].

Another close bracket is needed at the end of the sentence (" . . . practice of osteopathy]].")

C. The first sentence in the "POSSIBLE ALTERNATIVE" under **Section 3. Determination of Death** now reads:

> An individual who has sustained either (1) permanent cessation of circulatory and respiratory functions, or (2) permanent coma, cessation of spontaneous respiratory functions, and loss of brainstem reflexes, is dead.

The meaning of clause (1) is clear because the adjective "permanent" modifies a single noun, "cessation," which is restricted by the two objects of the preposition "of," namely "circulatory and respiratory functions." The same is not true, however, for clause (2). There, the adjective "permanent" is used only once, to modify "coma," leaving it unclear whether "cessation" and "loss," the other two nouns in the clause, must also be "permanent" conditions for an individual to be declared dead. The standards accepted by medical experts (such as the AAN) indicate that "permanent cessation" and "permanent loss" are needed to overcome the ambiguity.

D. The next section in the draft act consists of the following bracketed text:

> **[Section 4. Notification**
>
> Before a health-care professional begins the clinical evaluation for the determination of death of an individual under Section 3(2), a health-care institution shall make reasonable efforts to notify the individual's surrogate that the evaluation will soon begin.]

Since the evaluation in question has not been specified in a previous operative clause, it should be modified by the indefinite, rather than the definite, article (i.e., "a clinical evaluation"). Given the possible policy noted in Section 6, below, an additional, bracketed sentence should be added to Section 4:

> [When notifying the surrogate, the institution shall also inform the surrogate that all objections to death being determined pursuant to Section 3(2) must be communicated to the institution before the health-care professional begins the impending evaluation.]

E. The definite article is misused in the next, bracketed section of the draft act:

> **[Section 5. Time to Gather**
>
> After the individual is determined to be dead under Section 3(2) but before discontinuation of circulatory and respiratory support of the individual, the health-care institution shall allow a reasonable amount of time for those designated by the individual's surrogate to gather at the individual's bedside.]

The first time "individual" appears in this sentence, it should be preceded by the indefinite article "an," as it was in Section 4. Further, it would be preferable to avoid the passive voice in the first

clause, by revising it to read "but before a health-care professional discontinues the individual's circulatory and respiratory support." Next, I suggest that the committee include in Section 2 a definition of "the persons designated by the individual's surrogate," which definition should make clear how and when (*i.e.,* before or after death is declared?) the surrogate is to designate the members of this group. Finally, I suggest that the committee also either include in Section 2 a definition of "a reasonable amount of time" or spell out the parameters in this section, since "reasonable" could refer to the normal practices of the institution itself or those of other comparable institutions, the effects of delay on the hospital, the amount of time needed for those gathering to travel, taking into account the circumstances of each person, etc., etc.

F. The last section in the draft act raises issues of substance as well as of wording. It now reads:

> **[Section 6. Accommodation**
>
> A health-care institution shall adopt a policy in a record that sets forth the reasonable efforts it will make to accommodate [the personal] objections by the individual to a determination of death pursuant to Section 3(2). Any such objections must be expressed in the individual's medical records or through information provided to the health-care institution by an individual's surrogate.
>
> (1) The policy shall allow the individual to choose that a determination of death of the individual be made solely pursuant to Section 3(1).
>
> (2) The policy shall provide that any objections be made before beginning the clinical evaluation for the determination of death pursuant to Section 3(2) must be made before beginning that determination.]

The first substantive question concerns how the committee envisions such objections arising and being expressed. One way would be for someone (the individual?) to place the objections "in the individual's medical record." That raises the further question: Does this mean only those records held by the health-care institution where the individual is currently being treated or any "medical records," including ones held by health-care professionals who have discussed this matter with the individual previously? Is the alternative means listed—"or through information provided to the health-care institution by an individual's surrogate"—actually an alternative to the medical record or simply a source for what will be entered into the medical record? A related—and more basic—issue is why the second sentence in the introductory paragraph appears there rather than as one of the enumerated aspects of the policy.

A problem with wording is that subsection (2) does not scan; it may be that what is meant is that "an objection to death being determined pursuant to Section 3(2) must be made before the health-care professional begins that determination." Further, the committee will need to decide whether the implication of subsection (2) is that a clinical evaluation should not be carried out if an objection to a Section 3(2) determination has been raised. Finally, the word "Accommodation" is well suited to express a hospital's response to a request to delay withdrawal of life support so that relatives can gather, but it doesn't express what's at issue here, which is a

policy about what happens when an individual rejects determination of death pursuant to the neurological standard.

Given the number of changes that seem desirable, I suggest revising the section as follows:

[Section 6. Institutional Policy on Objections to the Use of Section 3(2)

A health-care institution shall adopt a policy in a record that sets forth the procedures it will follow when an individual personally objects to their death being determined pursuant to Section 3(2). The policy shall provide that:

(1) Such an objection may be expressed orally or in writing by the individual while still competent or by the individual's surrogate;

(2) An objection to death being determined pursuant to Section 3(2) must be communicated to the health-care institution before the health-care professional begins the clinical evaluation for the determination of death;

(3) The health-care institution shall note the individual's objection in the individual's medical record; and

[(4) When an individual's medical record notes that the individual objects to their death being determined pursuant to Section 3(2), the health-care institution will delay the clinical evaluation for [up to 24 hours][a reasonable period of time] to allow the individual's surrogate to arrange the individual's transfer to another institution or to withdraw the objection.]]

OR

[(4) When an individual's medical record notes that the individual objects to their death being determined pursuant to Section 3(2), any determination of the individual's death shall be made solely pursuant to Section 3(1).]]

OR

[(4) When an individual's medical record notes that the individual objects to their death being determined pursuant to Section 3(2), any health-care professional performing a clinical evaluation to determine whether the individual has died may only use tests relevant to determining death according to circulatory and respiratory criteria under Section (3)(1).]]