Uniform Law Commission

M E M O R A N D U M

TO: **Committee to Amend or Revise the Uniform Health-Care Decisions Act**

FROM: **Nina Kohn, Reporter**
Nora Winkelman, Chair

DATE: **June 14, 2021**

RE: **Summary of June 3, 2021 Meeting**

The Drafting Committee met on June 3rd by videoconference. A list of attendees is attached as Appendix A. The Chair introduced the meeting by explaining the nature and scope of the revision project. She also advised those in attendance that a Fall 2-day meeting of the Committee was contemplated during which the Committee members would begin to review, discuss and debate a proposed draft that will be prepared by the Reporter and circulated to all Committee members in advance. The Chair also advised the attendees that the Fall meeting would again be held by videoconference but that it was very likely that all future meetings would be held in-person, as was the norm for ULC drafting projects pre-pandemic. Finally, the Chair explained that the ULC drafting process usually occurs over the course of 2 years, with an initial draft being read during the ULC's 2022 Annual Meeting and the final draft being read during the ULC's 2023 Annual Meeting, at which time it would be proposed for approval by the full ULC membership. If approved, the draft would then be offered to the States for enactment.

The Reporter then reviewed and lead a discussion of the issues memo prepared in advance of the meeting with those in attendance. Consistent with the goal of the meeting, the group did not come to conclusions about all of the specific provisions or approaches outlined in the memo. Rather, participants provided ideas and feedback to guide the Reporter's work creating a first draft of the revised Act for the Committee's consideration at the Fall meeting.

This memo briefly lays out the key issues discussed at the June 3 meeting.

Capacity Trigger. Participants shared views as to whether the new Act should include procedures for determining whether an individual lacks capacity to make their own decisions, and, if so, what those procedures should be. A number of participants voiced support for providing more guidance to healthcare providers regarding capacity assessment. One participant suggested that greater guidance might help avoid unnecessary guardianship proceedings. A concern was raised, however, that the requirement that a physician certify the lack of capacity may be a barrier to effectuating patient wishes. Participants also raised the issue of whether capacity should be required to revoke a health care directive.

Several participants spoke about the importance of recognizing that people may make decisions in different ways, and that people may use technological assistance or support to make decisions. Several participants also suggested that the Act should recognize that capacity varies, including by the type of medical decision to be made, and that incapacity must be short-lived and thus capacity determinations should be revisited.

Discussion was also had as to potential existing state models, and it was noted that two states (Vermont and Utah) define the capacity to execute a power of attorney for healthcare.

Execution requirements, including provisions for electronic documents. Participants discussed best practices for the use, execution, and revocation of advance directives—especially when those advance directives are electronic in nature—and how the revised Act might facilitate the use of these practices. Among other things, participants discussed the importance of tying execution requirements to the underlying purpose of those requirements and suggested that it would be valuable to allow signing witnessed by videoconference to count as signing "in the presence." Participants also noted that providers' concerns about fraud may be a barrier to the use of electronic advance directives, and commented on the potential equity implications of using technology that is selectively available to patients. In addition, participants raised concern about requiring or implying that all advance directives be in writing, and some noted value in embracing video or oral directives.

Participants suggested looking to other Uniform Acts for guidance. The E-Wills Act was repeatedly mentioned as a key resource to consider in drafting provisions. The Unform Electronic Transfers Act was also noted as a resource when considering e-signatures. Likewise, participants discussed the potential for e-notarization to the extent that notarization is required or encouraged, and noted that the Notarial Acts Act could be a resource on that issue.

Default surrogates: priority for appointment. Participants discussed how the default surrogate priority list, and provisions for selecting default surrogates, might be improved. A number of participants expressed support for revisiting the current list to recognize more diverse family and support structures. Several participants noted that kin are sometimes poor choices as surrogates due to conflict within families. It was suggested that clinicians may have undue difficulty challenging surrogates who deviate from known patient wishes or best interest.

Participants flagged potential concerns about, and benefits of, providers having flexibility in selecting default surrogates. Relatedly, some discussion was had of the value of any priority list; as part of that discussion, concern was raised that a lack of a list might encourage guardianship as well as burden providers.

On the issue of disagreements among surrogates, one participant suggested that it can be helpful to create systems that give priority to those who would be at a person's bedside in a crisis.

Utah's statute (Utah Code Section 75-2a-108) was suggested as an informative model. Another suggested model was the waterfall list included in the Uniform Anatomical Gift Act.

Relationship between advance directives and Physician Orders for Life-Sustaining Treatment (POLST). Participants discussed how the Act might clarify the relationship between and among designations and instructions included in a power of attorney for health care or other advance directive and those found in a POLST. Participants voiced concerns about a clinician's statement taking precedence over an advance directive executed by a patient.

Participants suggested a need to distinguish between true inconsistencies in advance directives and POLST forms, and more "evolved" or "refined" instructions. Participants also suggested that perceived conflicts might be avoided by recognizing that neither an advance directive nor POLST control when individuals can make and communicate their own wishes. A distinction was made by some participants between inconsistent statements as to surrogate appointment and inconsistent statements as to treatment preferences, with a suggestion made that an advance directive should always trump as to surrogate appointment even if not as to treatment preferences. Participants suggested a variety of ways to address true inconsistencies, including to look to the most recent expression of preferences.

It was also noted that inconsistency can arise between written and oral statements, and that such inconsistencies present a parallel and related concern.

Psychiatric Advance Directives. Participants discussed expanding the Act to include specific provisions related to psychiatric advance directives. Concern was voiced by some participants that instructions included in psychiatric advance directives – especially those related to treatment refusals – may not be honored to the same extent as instructions in traditional advance directives. It was suggested that it might be helpful to—consistent with Illinois' approach—call psychiatric advance directives by the term "mental health treatment declaration" to help distinguish them from other advance directives.

Authority to apply for health benefits. Participants discussed whether an agent or surrogate named under a health-care power of attorney should be permitted to apply for government health-care benefits for the principal if the participant lacks a power of attorney for finances and, if so, whether this power should only arise when explicitly granted by the principal. Participants shared a variety of opinions pro and con. Some expressed concern about the scope of such

power. Questions were raised as it would be possible to cabin the authority to mere applications for benefits.

Grounds for disqualification. Participants discussed whether a new Act should include additional grounds for disqualifying agents and default surrogates. No comments were offered directly to this point. However, in the context of this question, one participant suggested that the Committee should discuss the relationship between a legally authorized representative (LAR) appointed for the purpose of consenting to participation in research and an agent under advance directive. Another participant encouraged the committee to consider whether clinicians who decline to take direction from a "bad surrogate" should have some form of legal protection.

Mental health decisions. The Reporter asked for thoughts on whether additional qualifications should be placed on an agent's or surrogate's ability to consent to mental health treatment for individuals who may not be in the category of patients who have or need a psychiatric advance directive. No comments were offered by participants.

Statutory form. Participants discussed the benefits and costs of statutory forms. It was suggested that any form should be readily usable both to the patient and to the clinical team. One participant expressed concern that a form, if included, will be wrongly treated as mandatory. Others countered that forms are important so that attorneys and others don't write bad advance directives, so that advance directives are understandable to clinicians, and so that patients know what they must include in their advance directive in order for their wishes to be respected. Participants also discussed the value and importance of making any form optional, including because patients have a right to express preferences without a form.

Oral designations. Participants discussed whether oral designations of surrogates should be honored. One participant observed that the Cruzan case indicates that oral designations must be observed. Others noted that oral designations are working in states which explicitly permit them. Concern was raised about how to avoid fraud with purported oral designations.

Appendix A

IN ATTENDANCE
(for all or part of the meeting)

Molly Ackerly
Beth Anderson
Stephanie Anderson
Shea Backus
Gerald Brew
Jamie Buller
Kathleen Buchli
Sam Crane
Elliott Crigger
Arthur Derse
Max Elliott
Ann Elmore
David English
Marty Ford
Norman Greene
Loren Greene
Marian Grant
Jess Hale
Allan Hikoyeda
Seiko Izumi
Mary Gay Taylor Jones
Kara Jovag
Maren Klawiter
Nina Kohn
Jacqueline Lenmark
Ariane Lewis
Jennifer Mathis
Esson Miller Jr
Maria Moen
Frances Nedjat-Haiem
David Orentlicher
Ben Orzeske
Brendan Parent
Thaddeus Pope
Charlie Sabatino
Robyn Shapiro
Rebecca Sudore
Lois Synder Sulmasy
Tim Schnabel
Christina Strong
Deb Tedford
Susan Tolles
Suzanne Walsh
Chris Wilson
Nora Winkelman
Susan Wolf
Stuart Zimring