

ULC in HI 7-26-23

To: The Honorable Samuel Thumma & All Members of the ULC; Determination of Death Act Committees & Style/Drafting Committees; Uniform Law Commission

PAB/CZ ULC Observer Comments:

Why must states only adopt one and only one of the options for BD?

Why couldn't the model statute be a third option?

Model Statute: "No one shall be declared dead unless respiratory, circulatory and nervous systems have been destroyed. Such destruction shall be determined in accord with universally accepted medical standards."

MINIMUM criteria to DETERMINE death.

Worded in the NEGATIVE (not "unless" ... to protect living from being treated as dead).

Three VITAL SYSTEMS (respiratory, circulatory and nervous which includes the entire brain)

Have been DESTROYED (anatomical structure), not SIMPLY a lack of FUNCTION(s)(ing).

Does not have to be all cells or all systems in the body.

Nita Farahany said that without brainstem reflexes that the heart will not beat spontaneously. This is not accurate in BD! The heart beats spontaneously in BD patients on a ventilator. That is the advantage of BD/DNC declarations for organ procurement as the patient is biologically alive with a spontaneously beating heart. The ventilator provides oxygen but does NOT make the heart beat, blood circulate, nor does it cause the cells, tissues, and organs to do respiration (gas exchange). Providing gasoline to the car engine does not make it run.

The apnea test does not rule out all respiratory brainstem function as hypoxic drive is not tested. The apnea test does not rule out all brainstem function and only risks harm, even causing destruction of brain tissue. The apnea test should not be done, and especially not without complete information to allow the surrogate to decline the test.

It was stated that the hypothalamus is in the "back" of the brain. The hypothalamus is part of the brain but we have never heard it referred to being in the "back" of the brain, i.e., posterior. It is described as deep within the brain, at the base of the brain.

It is not impossible to reconcile disparate views of death determinations, if there is a meaningful opt out for patients and providers for BD and/or model statute option.

It is imperative to provide a meaningful opt out. And, it is possible!

The opt out must not be limited to notifying the medical team only prior to start of a BD exam protocol or only if documented in the medical record. This is not respectful of the patient or their legal surrogate. Many will not have the medical facts and knowledge of the controversies on BD/DNC nor of the patient's condition.

We are grateful that Nita Farahany has taken note of the need of “destruction” but we have not said that “complete” destruction of the entire brain is called for. She did not distinguish the three main vital systems from “nests of cells” in the brain or body. The model statute does not say “complete destruction” but says not UNLESS the respiratory, circulatory and nervous systems, which includes the entire brain, have been destroyed.

The minimum criteria to fulfill must involve destruction to ensure “permanent” or “irreversible,” not simply a lack of *observation of function(s)(ing)*. A doctor can observe unresponsiveness and destruction but neither permanent nor irreversible is observable, nor can be tested for empirically.

Unresponsiveness is what is observed in the testing, which is not the same as unconsciousness or coma. Coma occurs in a biologically alive patient and is not synonymous with death.

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