



July 7, 2023

To: Members of the Uniform Law Commission

### **Statement of Texas Right to Life regarding Proposed Revisions to the UDDA**

Texas Right to Life is a Pro-Life organization that leads our state's efforts to apply Pro-Life principles and sound anthropology to medical ethics and public policy governing the practice of medicine. Accordingly, we have been closely observing the deliberations of the Uniform Law Commission with regard to the Uniform Determination of Death Act (UDDA). While we appreciate and fully support the proposed amendments in Sections 4-6, **Texas Right to Life strongly opposes the language in Section 3, Option 2 of the proposed revisions.** Our legislative team closely collaborates with state representatives and senators in the Texas State Legislature each session, and we work with attorneys statewide to defend the medically vulnerable in courtrooms across the country. The proposed revisions to Section 3 of the UDDA seem to create more problems than they resolve, and would face significant opposition in the Texas legislature and by Pro-Life activists across the nation.<sup>1</sup>

If the language in Section 3, Option 2 is adopted, the revised Uniform Determination of Death Act ("RUDDA") would read as follows:

*Section 3. Determination of Death*

*(a) An individual is dead if the individual has sustained: (1) permanent cessation of circulatory and respiratory functions; or (2) permanent (A) coma, (B) cessation of spontaneous respiratory functions, and (C) loss of brainstem reflexes.*

*(b) A determination of death under subsection (2) must be made in accordance with accepted medical standards.*

While we do believe the UDDA warrants significant revision, both our patient advocates and policy experts at Texas Right to Life have grave concerns with this proposed language. The new criteria is inexcusably subjective and liberalizes the definition of human death by straying from any basis in an objective, biological criteria. This change represents replacing the current robust "whole brain" criteria with a significantly more limited three-pronged subjective test. Thus, the revisions would allow an entirely new class of patients to be declared dead that otherwise are not considered biologically dead since they do have brain functioning which will no longer be tested

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<sup>1</sup> The Texas Legislature never adopted the exact wording of the UDDA. See Section 671.001, Texas Health and Safety Code.



for. The apparent underlying objective of these revisions seems ethically problematic. The rationale that the AAN stated for proposing these revisions was to modify the legal criteria to match current medical practice. It is problematic to mold state law to current medical practice, rather than vice versa.

Subsection (a)(2) of Option 2 is the locus of our concerns. With this new criteria, the UDDA would no longer require that “all functions of the entire brain” be tested prior to a diagnosis of brain death. Whole brain function encompasses far more than the combination of coma, spontaneous respiratory functions, and brainstem reflexes presented in the new criteria.

As one example, hypothalamic function has been found in patients who do not have brain stem reflexes.<sup>2</sup> In 2013, Jahi McMath was declared brain dead based on no intracranial blood flow. After this declaration, Jahi lived for over four years, during which she experienced pubertal development. This development was only possible because her hypothalamus was fully functioning. A neurologist later demonstrated that Jahi had remaining brain function in both cerebral hemispheres, rejecting that she was ever brain dead.<sup>3</sup> It is possible to have hypothalamic function without brain stem reflexes. Under the proposed revisions of the UDDA, Jahi would be considered dead due to the belief that she had permanent loss of her brain stem reflexes, despite other brain functions and her continued physical development. How could we claim a patient was deceased while she still demonstrated brain function and other significant signs of life for over four years?

Texas Right to Life’s Patient Advocacy team has personally assisted multiple families as they navigate brain death cases in Texas hospitals. In a few of those cases, a physician or neurologist retracted a brain death declaration after determining that the patient did in fact exhibit signs of life, such as continued brain functioning. Our team can attest to the importance of whole brain testing.

Further, subsection (b) of Option 2 would replace the term “irreversible” with “permanent.” These terms are not interchangeable, but are vastly different in theory and practice. Permanence assumes that death has already occurred, which would obviate the need for—and consequently discourage—any attempts by a physician to reverse the patient’s condition. In medical practice,

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<sup>2</sup> Nair-Collins, M., J. Northrup, and J. Olcese. 2016. Hypothalamic-pituitary function in brain death: A review. *Journal of Intensive Care Medicine* 31(1):41–50.

<sup>3</sup> Shewmon, D. Alan, “The Case of Jahi McMath: A Neurologist’s View,” *Defining Death: Organ Transplantation and the Fifty-Year Legacy of the Harvard Report on Brain Death*, special report, Hastings Center Report 48, no. 6 (2018): S74- S76. DOI: 10.1002/hast.962.



the term “permanent” means “will not be restored through [medical] intervention.”<sup>4</sup> It is not permanent because there is no potential to reverse the patient’s condition, but rather because no attempts will be made to do so. It becomes less about what medicine and the body can do, and more about what physicians are *willing* to do. Irreversibility denotes that there was brain function that was lost that cannot be regained no matter what attempts are made. The current use of the term “irreversible” should incentivize physicians to treat their patients if the potential for recovery is unknown. Texas Right to Life is gravely concerned that replacing the term “irreversible” with “permanent” in the UDDA would result in brain-injured patients receiving less care and attention in practice.

However, Texas Right to Life supports the intent of the proposed language to add Sections 4-6, which among other things, allow patients and their families to object to and opt out of the use of the neurological criteria for the declaration of death.

Texas Right to Life’s positions on the current UDDA and the proposals arise from our perspective as patient advocates, helping patients’ families navigate these issues in Texas hospitals, as well as our experience and expertise in public policy. Accordingly, Texas Right to Life supports the direction of the newly drafted Sections 4-6, while concluding that the proposed criteria under Option 2 of Section 3 should be rejected. This proposed language for Section 3 broadens the definition of death by relying on subjective and non-biological criteria.

We appreciate your serious consideration to these concerns as you approach deliberations with the Uniform Law Commission. For further information, please contact our Legislative Department at 713-782-5433 or [ProLife@TexasRightToLife.com](mailto:ProLife@TexasRightToLife.com).

Respectfully,

Dr. John Seago, President  
Texas Right to Life  
4500 Bissonnet Street, Suite 305  
Bellaire, Texas 77401

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<sup>4</sup> Joffe, Ari, “DCDD Donors Are Not Dead,” *Defining Death: Organ Transplantation and the Fifty-Year Legacy of the Harvard Report on Brain Death*, special report, *Hastings Center Report* 48, no. 6 (2018): S29- 32. DOI: 10.1002/hast.949.