

D R A F T  
FOR DISCUSSION ONLY

# **INTERJURISDICTIONAL RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS ON  
UNIFORM STATE LAWS

UNIFORM LAW COMMISSION OF CANADA

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For  
April 5-6, 2013 Drafting Committee Meeting

*With Prefatory Note and Comments*

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## **INTERJURISDICTIONAL RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT**

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# **INTERJURISDICTIONAL RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT**

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# **INTERJURISDICTIONAL RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT**

## **Prefatory Note**

Statutes in all Canadian and United States jurisdictions permit individuals to delegate substitute decision-making authority. The majority of these statutes, however, do not have portability provisions to recognize the validity of substitute decision-making documents created in another jurisdiction. Lack of interjurisdictional recognition of substitute decision-making documents defeats the purpose of a substitute decision-making plan. Once an individual has lost capacity, rejection of a substitute decision-making document often results in guardianship, which burdens judicial resources and undermines the individual's self-determination interests. The Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act (the "Act") is a joint endeavor of the Uniform Law Commission and the Uniform Law Conference of Canada, undertaken to promote the portability and usefulness of substitute decision-making documents.

The Act embodies a three-part approach to portability modeled after the Uniform Power of Attorney Act (2006) (the "UPOAA"). First, similar to Section 106 of the UPOAA, Section 3 of the Act recognizes the validity of substitute decision-making documents created under the law of another jurisdiction. The term "jurisdiction" is intended to be read in its broadest sense to include any country or governmental subdivision that permits individuals to delegate substitute decision-making authority. Second, like Section 107 of the UPOAA, Section 4 of the Act preserves the meaning and effect of a substitute decision-making document as defined by the law under which it was created. Third, Sections 5 and 6 of the Act protect good faith acceptance or rejection of a substitute decision-making document. Under Section 6(c) refusals in violation of the Act are subject to a court order mandating acceptance and to liability for reasonable attorney's fees and costs. Sections 119 and 120 of the UPOAA contain similar provisions. The remedies under this Act are not exclusive and do not abrogate any other right or remedy in the adopting jurisdiction. The Act is designed to complement existing statutes by providing portability features where none exist or by supplementing portability provisions that lack desirable features of the Act.

1 **INTERJURISDICTIONAL RECOGNITION OF SUBSTITUTE DECISION-MAKING**  
2 **DOCUMENTS ACT**

3 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform  
4 Interjurisdictional Recognition of Substitute Decision-Making Documents Act.

5 **SECTION 2. DEFINITIONS.** In this [act]:

6 (1) “Decision maker” means a person granted authority to act for an individual under a  
7 substitute decision-making document, whether denominated a decision maker, agent, attorney-in-  
8 fact, proxy, representative, or other title. The term includes an original decision maker, co-  
9 decision maker, successor decision maker, and a person to which a decision maker’s authority is  
10 delegated.

11 (2) “Health care” means any care, treatment, service, or procedure to maintain, diagnose,  
12 or otherwise affect an individual’s physical or mental condition.

13 (3) “Person” means an individual, estate, business, nonprofit entity, public corporation,  
14 government or governmental subdivision, agency, or instrumentality or other legal entity.

15 (4) “Property” means anything that may be subject to ownership, whether real or  
16 personal, or legal or equitable, or any interest or right therein.

17 (5) “Substitute decision-making document” means a writing or other record executed by  
18 an individual to authorize a decision maker to act with respect to property or health care on  
19 behalf of the individual.

20 **SECTION 3. VALIDITY OF SUBSTITUTE DECISION-MAKING DOCUMENT.**

21 (a) A substitute decision-making document executed by an individual other than in this  
22 [state] is valid in this [state] if, when the substitute decision-making document was executed, the  
23 execution complied with the law of the jurisdiction indicated in the substitute decision-making

document or, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the substitute decision-making document was executed.

(b) Except as otherwise provided by statute or administrative rule other than this [act], a photocopy or electronically transmitted copy of an original substitute decision-making document has the same effect as the original.

**Legislative Note:** *The brackets in this section indicate where an enacting jurisdiction should insert the appropriate designation for the jurisdiction.*

#### Comment

Section 3 makes clear that a substitute decision-making document created in another jurisdiction will be recognized as valid if the execution of the document complied with the law of the jurisdiction intended to apply to the substitute decision-making document or, in the absence of an indication of such jurisdiction, with the law of the jurisdiction in which the document was executed. The term “jurisdiction” is intended to be read in its broadest sense to include any country or governmental subdivision that permits individuals to delegate substitute decision-making authority. While the effect of this section is to recognize the validity of a substitute decision-making document created under other law, it does not abrogate the traditional grounds for contesting the validity of execution such as forgery, fraud, or undue influence.

This section also provides that unless another law or administrative rule in the jurisdiction requires presentation of the original substitute decision-making document, a photocopy or electronically transmitted copy has the same effect as the original. An example of another law that might require presentation of the original substitute decision-making document is a jurisdiction’s recording act, which often mandates presentation of the original power of attorney in conjunction with the recording of documents executed by an agent. *See* Unif. Power of Atty. Act § 106 cmt. (2006).

#### SECTION 4. MEANING AND EFFECT OF SUBSTITUTE DECISION-MAKING

**DOCUMENT.** The meaning and effect of a substitute decision-making document is determined by the law of the jurisdiction indicated in the substitute decision-making document or, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the substitute decision-making document was executed.

#### Comment

1 This section provides that the meaning and effect of a substitute decision-making  
2 document is to be determined by the law under which it was created. Section 4 recognizes that a  
3 substitute decision-making document created in another jurisdiction may be subject to different  
4 default rules. For example, a decision maker with authority over insurance transactions may  
5 have authority to change beneficiary designations under the default rules of one jurisdiction but  
6 not so under the rules of another. *See* Unif. Power of Atty. Act § 107 cmt. (2006) (providing  
7 additional examples of common differences among power of attorney default rules). Likewise,  
8 the scope of authority under health care power of attorney and proxy statutes varies by  
9 jurisdiction. *See* Charles P. Sabatino, *The Evolution of Health Care Advance Planning Law and*  
10 *Policy*, 88 Milbank Q. 211, 221 (2010) (noting, for example, differences in statutory limitations  
11 on a decision maker's authority to consent to withholding of artificial nutrition and hydration or  
12 the performance of extraordinary procedures such as sterilization, abortion, and psychosurgery).  
13 Section 4 clarifies that an individual's intended grant of authority will be neither enlarged nor  
14 narrowed by virtue of the decision maker using the substitute decision-making document in a  
15 different jurisdiction.

16  
17 This section also establishes an objective means for determining what jurisdiction's law  
18 was intended to govern the substitute decision-making document. The phrase, "the law of the  
19 jurisdiction indicated in the substitute decision-making document," is intentionally broad, and  
20 includes any statement or reference in a substitute decision-making document that indicates an  
21 individual's choice of law. Examples of an indication of jurisdiction include a reference to the  
22 name of the jurisdiction in the title or body of the substitute decision-making document, citation  
23 to the jurisdiction's statute, or an explicit statement that the substitute decision-making document  
24 is created or executed under the laws of a particular jurisdiction. In the absence of an indication  
25 of jurisdiction in the substitute decision-making document, Section 4 provides that the law of the  
26 jurisdiction in which the substitute decision-making document was executed controls. The  
27 distinction between "the law of the jurisdiction indicated in the substitute decision-making  
28 document" and "the law of the jurisdiction in which the substitute decision-making document  
29 was executed" is an important one. For example, an individual may execute in one jurisdiction a  
30 power of attorney that was created and intended to be interpreted under the laws of another  
31 jurisdiction. A clear indication of the jurisdiction's law that is intended to govern the meaning  
32 and effect of a substitute decision-making document is therefore advisable in all substitute  
33 decision-making documents.

## 34 35 **SECTION 5. ACCEPTANCE OF AND RELIANCE UPON SUBSTITUTE** 36 **DECISION-MAKING DOCUMENT.**

37 (a) Except as otherwise provided by statute other than this [act], a person that in good  
38 faith accepts a substitute decision-making document without actual knowledge that the substitute  
39 decision-making document is void, invalid, or terminated, or that the purported decision maker's  
40 authority is void, invalid, or terminated, may assume without inquiry that the substitute decision-



1 making document is genuine, valid and still in effect and the decision maker's authority is  
2 genuine, valid and still in effect.

3 (b) A person that is asked to accept a substitute decision-making document may request,  
4 and rely upon, without further investigation:

5 (1) a decision maker's assertion of any factual matter concerning the individual  
6 for whom decisions will be made, the decision maker, or the substitute decision-making  
7 document;

8 (2) a translation of the substitute decision-making document if the substitute  
9 decision-making document contains, in whole or in part, language other than English[or the  
10 language of the person that is asked to accept the substitute decision-making document]; and

11 (3) an opinion of counsel as to any matter of law concerning the substitute  
12 decision-making document if the person requesting the opinion of counsel provides in a writing  
13 or other record the reason for the request.

14 [(c) For purposes of this section and Section 6, a person that conducts activities through  
15 employees is without actual knowledge of a fact relating to a substitute decision-making  
16 document, the individual for whom decisions will be made, or the decision maker if the  
17 employee who is asked to accept the substitute decision-making document is without actual  
18 knowledge of the fact.]

### 19 **Comment**

20 Section 5 permits a person to rely in good faith on the validity of a substitute decision-  
21 making document and the validity of the decision maker's authority unless the person has actual  
22 knowledge to the contrary. The introductory phrase to subsection (a), "except as otherwise  
23 provided by statute other than this [act]," indicates that other relevant statutory provisions, such  
24 as those in a jurisdiction's power of attorney statute or health care proxy statute, may supersede  
25 those in Section 5. For example, Section 119(b) of the Uniform Power of Attorney Act permits  
26 persons to rely upon a presumption that an individual's signature is genuine only if the power of  
27 attorney is purportedly acknowledged. *See* Unif. Power of Atty. Act § 119 cmt. (2006).

1  
2 Absent stricter requirements emanating from other law in the jurisdiction, the Act does  
3 not require a person to investigate the validity of a substitute decision-making document or the  
4 decision maker's authority. [Further protection is provided in subsection (c) for persons that  
5 conduct activities through employees. Subsection (c) states that for purposes of Section 5 and 6,  
6 a person is without actual knowledge of a fact if the employee who is asked to accept the  
7 substitute decision-making document is without actual knowledge of the fact.]

8 Although a person that is asked to accept a substitute decision-making document is not  
9 required to investigate the validity of the document, the person may, under subsection (b),  
10 request a decision maker's assertion of any factual matter related to the substitute decision-  
11 making document and may request an opinion of counsel as to any matter of law. If the  
12 substitute decision-making document contains, in whole or part, language other than English [or  
13 the language of the person that is asked to accept the substitute decision-making document], a  
14 translation may also be requested. Subsection (b) recognizes that a person that is asked to accept  
15 a substitute decision-making document may be unfamiliar with the law or the language of the  
16 jurisdiction intended to determine the meaning and effect of the document.  
17

## 18 **SECTION 6. LIABILITY FOR REFUSAL TO ACCEPT SUBSTITUTE**

### 19 **DECISION-MAKING DOCUMENT.**

20 (a) Except as otherwise provided in subsection (b) or by statute other than this [act], a  
21 person shall accept within a reasonable time a substitute decision-making document that  
22 purportedly meets the validity requirements of Section 3 and may not require an additional or  
23 different form of substitute decision-making document for authority granted in the document  
24 presented.

25 (b) A person is not required to accept a substitute decision-making document if:

26 (1) the person is not otherwise required to engage in the requested transaction or  
27 perform the requested act for the individual who executed the substitute decision-making  
28 document;

29 (2) the person has actual knowledge of the termination of the decision maker's  
30 authority or of the substitute decision-making document;

1 (3) the person’s request under Section 5 for a decision-maker’s assertion of fact, a  
2 translation, or an opinion of counsel is refused;

3 (4) the person in good faith believes that the substitute decision-making document  
4 is not valid or that the decision maker does not have the authority to request the transaction or the  
5 act;

6 (5) the person makes, or has actual knowledge that another person has made, a  
7 report to the [local adult protective services office] stating a good faith belief that the individual  
8 for whom decisions will be made may be subject to physical or financial abuse, neglect,  
9 exploitation, or abandonment by the decision maker or a person acting for or with the decision  
10 maker.

11 (c) A person that refuses in violation of this section to accept a substitute decision-  
12 making document is subject to:

13 (1) a court order mandating acceptance of the substitute decision-making  
14 document; and

15 (2) liability for reasonable attorney’s fees and costs incurred in any action or  
16 proceeding that mandates acceptance of the substitute decision-making document.

17 ***Legislative Note:*** *The phrase “local adult protective services office” is bracketed to indicate*  
18 *where an enacting jurisdiction should insert the appropriate designation for the governmental*  
19 *agency with regulatory authority to protect the welfare of the individual who executed the*  
20 *substitute decision-making document.*

#### 21 **Comment**

22 As a complement to Section 5, Section 6 enumerates the bases for legitimate refusals of a  
23 substitute decision-making document and the sanctions for refusals that violate the Act. As in  
24 Section 5, the introductory phrase, “except as otherwise provided . . . by statute other than this  
25 [act],” allows a jurisdiction through other statutes to impose stricter or different requirements for  
26 accepting a substitute decision-making document and the authority of the decision maker. For  
27 example, Section 120 of the Uniform Power of Attorney Act requires that a power of attorney be  
28 accepted no later than seven business days after presentation. In a jurisdiction that has enacted  
29 the UPOAA, Section 120 would supersede the provision in Section 6 that requires a person to

1 accept a substitute decision-making document “within a reasonable time.” With respect to  
2 substitute health care decisions, other statutes in a jurisdiction may impose public policy limits  
3 on a decision maker’s scope of authority in certain contexts or for certain medical procedures.  
4 Examples include decisions on behalf of pregnant patients and consent to forgo procedures such  
5 as artificially supplied nutrition and hydration or to perform extraordinary procedures such as  
6 sterilization and psychosurgery. *See* Charles P. Sabatino, *The Evolution of Health Care Advance*  
7 *Planning Law and Policy*, 88 Milbank Q. 211, 221 (2010).

8  
9 Subsection (b) of Section 6 provides the bases upon which a substitute decision-making  
10 document may be refused without liability. The last paragraph of subsection (b) permits refusal  
11 of an otherwise valid substitute decision-making document if the person in good faith believes  
12 that the individual for whom decisions will be made is subject to abuse by the decision maker or  
13 someone acting in concert with the decision maker (paragraph (5)). A refusal under this  
14 paragraph is protected if the person makes, or knows another person has made, a report to the  
15 governmental agency authorized to protect the welfare of the individual for whom decisions will  
16 be made. This basis for refusing an otherwise valid substitute decision-making document is also  
17 a feature of the Uniform Power of Attorney Act. *See* Unif. Power of Atty. Act § 120(b)(6)  
18 (Alternative A) (2006).

19  
20 Subsection (c) provides that a person that refuses a substitute decision-making document  
21 in violation of Section 6 is subject to a court order mandating acceptance and to reasonable  
22 attorney’s fees and costs incurred in the action to mandate acceptance. An unreasonable refusal  
23 may be subject to other remedies provided by other law. *See* Section 7 Comment.

24  
25 **SECTION 7. REMEDIES UNDER OTHER LAW.** The remedies under this [act] are  
26 not exclusive and do not abrogate any right or remedy under the law of this [state] other than this  
27 [act].

28 ***Legislative Note:*** *The brackets in this section indicate where an enacting jurisdiction should*  
29 *insert the appropriate designation for the jurisdiction.*

### 30 31 **Comment**

32 The remedies under the Act are not intended to be exclusive with respect to causes of  
33 action that may accrue in relation to a substitute decision-making document. The Act applies to  
34 many persons, individual and entity (*see* Section 2 (defining “person” for purposes of the Act)),  
35 that may serve as decision makers or that may be asked to accept a substitute decision-making  
36 document. Likewise, the Act applies to many subject areas over which individuals may delegate  
37 property or health care decision-making authority. Remedies under other laws which govern  
38 such persons and subject matters should be considered by aggrieved parties in addition to  
39 remedies available under this Act.

1           **SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

2   applying and construing this uniform act, consideration must be given to the need to promote  
3   uniformity of the law with respect to its subject matter among the [states] that enact it.

4   ***Legislative Note:** The brackets in this section indicate where an enacting jurisdiction should*  
5   *insert the appropriate designation for the jurisdiction.*

6  
7           **SECTION 9. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**

8   **NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal  
9   Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but  
10   does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or  
11   authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15  
12   U.S.C. Section 7003(b).

13           **SECTION 10. EFFECT ON EXISTING SUBSTITUTE DECISION-MAKING**

14   **DOCUMENT.** This [act] applies to a substitute decision-making document created before, on,  
15   or after [the effective date of this [act]].

16           **SECTION 11. EFFECTIVE DATE.** This [act] takes effect....