INTERJURISDICTIONAL RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
UNIFORM LAW COMMISSION OF CANADA

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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**TABLE OF CONTENTS**

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>SHORT TITLE</td>
<td>2</td>
</tr>
<tr>
<td>2</td>
<td>DEFINITIONS</td>
<td>2</td>
</tr>
<tr>
<td>3</td>
<td>VALIDITY OF SUBSTITUTE DECISION-MAKING DOCUMENT</td>
<td>2</td>
</tr>
<tr>
<td>4</td>
<td>MEANING AND EFFECT OF SUBSTITUTE DECISION-MAKING DOCUMENT</td>
<td>3</td>
</tr>
<tr>
<td>5</td>
<td>ACCEPTANCE OF AND RELIANCE UPON SUBSTITUTE DECISION-MAKING DOCUMENT</td>
<td>4</td>
</tr>
<tr>
<td>6</td>
<td>LIABILITY FOR REFUSAL TO ACCEPT SUBSTITUTE DECISION-MAKING DOCUMENT</td>
<td>6</td>
</tr>
<tr>
<td>7</td>
<td>REMEDIES UNDER OTHER LAW</td>
<td>8</td>
</tr>
<tr>
<td>8</td>
<td>UNIFORMITY OF APPLICATION AND CONSTRUCTION</td>
<td>9</td>
</tr>
<tr>
<td>9</td>
<td>RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT</td>
<td>9</td>
</tr>
<tr>
<td>10</td>
<td>EFFECT ON EXISTING SUBSTITUTE DECISION-MAKING DOCUMENT</td>
<td>9</td>
</tr>
<tr>
<td>11</td>
<td>EFFECTIVE DATE</td>
<td>9</td>
</tr>
</tbody>
</table>
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.
INTERJURISDICTIONAL RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT

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

SECTION 2. DEFINITIONS. In this [act]:

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

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

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

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

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

SECTION 3. VALIDITY OF SUBSTITUTE DECISION-MAKING DOCUMENT. (a) A substitute decision-making document executed by an individual other than in this [state] is valid in this [state] if, when the substitute decision-making document was executed, the 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

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

This section also establishes an objective means for determining what jurisdiction’s law was intended to govern the substitute decision-making document. The phrase, “the law of the jurisdiction indicated in the substitute decision-making document,” is intentionally broad, and includes any statement or reference in a substitute decision-making document that indicates an individual’s choice of law. Examples of an indication of jurisdiction include a reference to the name of the jurisdiction in the title or body of the substitute decision-making document, citation to the jurisdiction’s statute, or an explicit statement that the substitute decision-making document is created or executed under the laws of a particular jurisdiction. In the absence of an indication of jurisdiction in the substitute decision-making document, Section 4 provides that the law of the jurisdiction in which the substitute decision-making document was executed controls. The distinction between “the law of the jurisdiction indicated in the substitute decision-making document” and “the law of the jurisdiction in which the substitute decision-making document was executed” is an important one. For example, an individual may execute in one jurisdiction a power of attorney that was created and intended to be interpreted under the laws of another jurisdiction. A clear indication of the jurisdiction’s law that is intended to govern the meaning and effect of a substitute decision-making document is therefore advisable in all substitute decision-making documents.

SECTION 5. ACCEPTANCE OF AND RELIANCE UPON SUBSTITUTE DECISION-MAKING DOCUMENT.

(a) Except as otherwise provided by statute other than this [act], a person that in good faith accepts a substitute decision-making document without actual knowledge that the substitute decision-making document is void, invalid, or terminated, or that the purported decision maker’s authority is void, invalid, or terminated, may assume without inquiry that the substitute decision-
making document is genuine, valid and still in effect and the decision maker’s authority is
genuine, valid and still in effect.

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

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

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

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

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

Comment

Section 5 permits a person to rely in good faith on the validity of a substitute decision-
making document and the validity of the decision maker’s authority unless the person has actual
knowledge to the contrary. The introductory phrase to subsection (a), “except as otherwise
provided by statute other than this [act],” indicates that other relevant statutory provisions, such
as those in a jurisdiction’s power of attorney statute or health care proxy statute, may supersede
those in Section 5. For example, Section 119(b) of the Uniform Power of Attorney Act permits
persons to rely upon a presumption that an individual’s signature is genuine only if the power of
Absent stricter requirements emanating from other law in the jurisdiction, the Act does not require a person to investigate the validity of a substitute decision-making document or the decision maker’s authority. [Further protection is provided in subsection (c) for persons that conduct activities through employees. Subsection (c) states that for purposes of Section 5 and 6, a person is without actual knowledge of a fact if the employee who is asked to accept the substitute decision-making document is without actual knowledge of the fact.]

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

SECTION 6. LIABILITY FOR REFUSAL TO ACCEPT SUBSTITUTE DECISION-MAKING DOCUMENT.

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

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

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

(2) the person has actual knowledge of the termination of the decision maker’s authority or of the substitute decision-making document;
(3) the person’s request under Section 5 for a decision-maker’s assertion of fact, a translation, or an opinion of counsel is refused;

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

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

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

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

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

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

Comment

As a complement to Section 5, Section 6 enumerates the bases for legitimate refusals of a substitute decision-making document and the sanctions for refusals that violate the Act. As in Section 5, the introductory phrase, “except as otherwise provided . . . by statute other than this [act],” allows a jurisdiction through other statutes to impose stricter or different requirements for accepting a substitute decision-making document and the authority of the decision maker. For example, Section 120 of the Uniform Power of Attorney Act requires that a power of attorney be accepted no later than seven business days after presentation. In a jurisdiction that has enacted the UPOAA, Section 120 would supersede the provision in Section 6 that requires a person to
accept a substitute decision-making document “within a reasonable time.” With respect to substitute health care decisions, other statutes in a jurisdiction may impose public policy limits on a decision maker’s scope of authority in certain contexts or for certain medical procedures. Examples include decisions on behalf of pregnant patients and consent to forgo procedures such as artificially supplied nutrition and hydration or to perform extraordinary procedures such as sterilization and psychosurgery. See Charles P. Sabatino, *The Evolution of Health Care Advance Planning Law and Policy*, 88 Milbank Q. 211, 221 (2010).

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

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

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

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

Comment

The remedies under the Act are not intended to be exclusive with respect to causes of action that may accrue in relation to a substitute decision-making document. The Act applies to many persons, individual and entity (see Section 2 (defining “person” for purposes of the Act)), that may serve as decision makers or that may be asked to accept a substitute decision-making document. Likewise, the Act applies to many subject areas over which individuals may delegate property or health care decision-making authority. Remedies under other laws which govern such persons and subject matters should be considered by aggrieved parties in addition to remedies available under this Act.
SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the [states] that enact it.

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

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

SECTION 10. EFFECT ON EXISTING SUBSTITUTE DECISION-MAKING DOCUMENT. This [act] applies to a substitute decision-making document created before, on, or after [the effective date of this [act]].

SECTION 11. EFFECTIVE DATE. This [act] takes effect….