

DRAFT
FOR DISCUSSION ONLY

INTERJURISDICTIONAL RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For December 2013 Drafting Committee Meeting

WITH PREFATORY NOTE AND COMMENTS

Copyright ©2013
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

Nov. 21, 2013

INTERJURISDICTIONAL RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT

DAVID ENGLISH, University of Missouri-Columbia School of Law, 203 Hulston Hall,
Columbia, MO 65211, *Chair*

ULC Members

TOM IVESTER, Oklahoma State Capitol, 2300 N. Lincoln Blvd., Room 529A,
Oklahoma City, OK 73105
PETER F. LANGROCK, P.O. Drawer 351, Middlebury VT 05753-0351
JEFFREY REX McLAUGHLIN, 321 Blount Ave., Guntersville, AL 35976-1105
BRADLEY MYERS, University of North Dakota School of Law, 215 Centennial Dr.,
Stop 9003, Grand Forks, ND 58202-9003
ELISA WHITE, 419 Natural Resources Dr., Little Rock, AR 72205

ULCC Members

MYRIAM ANCTIL, Ministere de la Justice, 1200 Route de L'Eglise, 4E Etage, Quebec,
QC G1V 4M1
ARTHUR CLOSE, 234 4th Ave., New Westminster, BC V3L 1N7
PETER J.M. LOWN, Alberta Law Reform Institute, 402 Law Ctr., University of Alberta,
89th Ave. & 111th St., Edmonton, AB T6G 2H5
MARIE RIENDEAU, Department of Justice Canada, International Private Law Section,
Ottawa, ON K1A 0H8

Reporter

LINDA WHITTON, Valparaiso University, 656 S. Greenwich St., Wesemann Hall, Valparaiso,
IN 46383-4945

EX OFFICIO

HARRIET LANSING, 1 Heather Pl., St. Paul, MN 55102-2615, *President*
BRIAN K. FLOWERS, 1350 Pennsylvania Ave., NW, Suite 300, Washington, DC 20004,
Division Chair

AMERICAN BAR ASSOCIATION ADVISORS

ROBERT L. SCHWARTZ, University of New Mexico School of Law, 1 University of New
Mexico, Msc 11 6070, Albuquerque, NM 87131-0001, *ABA Advisor*
ROLF C. SCHUETZ, JR., 218 73rd St., North Bergen, NJ 07047-5704, *ABA Section Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.uniformlaws.org

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

TABLE OF CONTENTS

SECTION 1. SHORT TITLE.	2
SECTION 2. DEFINITIONS.	2
SECTION 3. VALIDITY OF SUBSTITUTE DECISION-MAKING DOCUMENT.	3
SECTION 4. MEANING AND EFFECT OF SUBSTITUTE DECISION-MAKING DOCUMENT.	4
SECTION 5. ACCEPTANCE OF AND RELIANCE ON SUBSTITUTE DECISION-MAKING DOCUMENT.	6
SECTION 6. LIABILITY FOR REFUSAL TO ACCEPT SUBSTITUTE DECISION-MAKING DOCUMENT.	7
SECTION 7. REMEDIES UNDER OTHER LAW.	9
SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION.	10
SECTION 9. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.	10
SECTION 10. APPLICABILITY.	10
SECTION 11. EFFECTIVE DATE.	10

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 term substitute decision-making document is intended to be an omnibus designation for a document created by an individual to delegate authority over the individual's property, health care, or personal care to a substitute decision maker. Jurisdictions use different nomenclature for substitute decision-making documents. Common terms include power of attorney, proxy, and representation agreement. In some jurisdictions, delegated authority over property, health care, and personal care may be granted in one document. More commonly, separate delegations are made with respect to property decisions and those affecting health care and personal care. The Act does not apply to documents that merely provide advance directions for future decisions such as living will declarations and do-not-resuscitate orders. The critical distinction for purposes of this Act is that the document must contain a delegation of authority to a specific decision maker.

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

3 (8) “Record” means information that is inscribed on a tangible medium or that is stored
4 in an electronic or other medium and is retrievable in perceivable form.

5 (9) “Substitute decision-making document” means a **writing or other** record, ~~including~~
6 ~~a writing,~~ executed by an individual to authorize a decision maker to act **on behalf of the**
7 **individual** with respect to property, health care, or personal care. ~~on behalf of the individual.~~
8 **The term includes a power of attorney, proxy, and representation agreement.**

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

10 (a) A substitute decision-making document **for property decisions** executed by an
11 individual outside this [state] is valid in this [state] if, when the document was executed, the
12 execution complied with **the law of the jurisdiction indicated in the substitute decision-**
13 **making document and, if no jurisdiction is indicated, the law of the jurisdiction in which**
14 **the document was executed.**

15 (b) A substitute decision-making document for health care or personal care
16 executed by an individual outside this [state] is valid in this [state] if, when the document
17 was executed, the execution complied with:

18 (1) **the law of the jurisdiction indicated in the substitute decision-making**
19 **document and, if no jurisdiction is indicated, the law of the jurisdiction in which the**
20 **document was executed; or**

21 (2) **law of this [state] other than this [act].**

22 (c) Except as otherwise provided by statute of this [state] other than this [act], **court**
23 **rule, or administrative rule,** a photocopy or electronically-transmitted copy of an original

substitute decision-making document has the same effect as the original.

***Legislative Note:** The bracketed word “state” in this section indicates where an enacting jurisdiction should insert the appropriate designation for the jurisdiction. The jurisdiction also should reference its statutes that authorize delegation of substitute decision-making authority for property, health care, and personal care and amend, if necessary for consistency, the terminology and substance of Section 3.*

Comment

Section 3(a) provides that a substitute decision-making document **for property decisions executed** in another jurisdiction will be recognized as valid if the execution of the document complied with the law under which the document was created. **This approach to portability of substitute decision-making authority for property decisions is consistent with Section 106 of the Uniform Power of Attorney Act.**

With respect to a substitute decision-making document for health care or personal care, Section 3(b) provides that a document created under the law of another jurisdiction is valid if the execution complied with the law under which the document was created or the law of the jurisdiction where the document is presented for acceptance. This approach to recognition of substitute decision-making documents for health care is followed by a number of states. *See, e.g.,* Conn. Gen. Stat. § 19a-580g (West 2011); N.C. Gen. Stat. Ann. § 32A-27 (LexisNexis 2011); W. Va. Code § 16-30-21 (LexisNexis 2011). Section 3(b) is also consistent with Section 2(h) of the Uniform Health-Care Decisions Act (treating a power of attorney for health care as valid “if it complies with this [Act], regardless of when or where 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 **statute, court rule, 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 **other** law that might require presentation of the original substitute decision-making document is **the mandate in most jurisdictions for presentation of an 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 and the authority of the decision maker is determined by the law of the jurisdiction indicated in the

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

3 **Comment**

4 This section provides that the meaning and effect of a substitute decision-making
5 document is to be determined by the law under which it was created. Section 4 recognizes that a
6 substitute decision-making document created in another jurisdiction may be subject to different
7 default rules. For example, a decision maker with authority over insurance transactions may
8 have authority to change beneficiary designations under the default rules of one jurisdiction but
9 not so under the rules of another. *See* Unif. Power of Atty. Act § 107 cmt. (2006) (providing
10 additional examples of common differences among power of attorney default rules). Likewise,
11 the scope of authority under health care power of attorney and proxy statutes varies by
12 jurisdiction. *See* Charles P. Sabatino, *The Evolution of Health Care Advance Planning Law and*
13 *Policy*, 88 Milbank Q. 211, 221 (2010). **Statutes or the common law in a jurisdiction may**
14 **also impose public policy limits on a decision maker’s scope of authority in certain contexts**
15 **or for certain medical procedures. Examples include decisions on behalf of pregnant**
16 **patients and consent to forgo procedures such as artificially supplied nutrition and**
17 **hydration or to perform extraordinary procedures such as sterilization and psychosurgery.**
18 *Id.* Section 4 clarifies that an individual’s intended grant of authority will not be enlarged by
19 virtue of the decision maker using the substitute decision-making document in a different
20 jurisdiction.

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

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

(a) Except as otherwise provided by statute of this [state] other than this [act], a person that in good faith accepts a substitute decision-making document without actual knowledge that the 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 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 on, without further investigation:

(1) a decision maker's assertion of a fact concerning the individual for whom a decision will be made, the decision maker, or the substitute decision-making document;

(2) a translation of the document if the document contains, in whole or in part, language other than English; and

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

Legislative Note: The enacting jurisdiction should reference its statutes that authorize delegation of substitute decision-making authority for property, health care, and personal care to determine whether those statutes have different requirements for the protections afforded by Section 5 to persons that accept a substituted decision-making document. A specific cross-reference in Section 5 to such statutes is advisable. For example, if the enacting jurisdiction has adopted the Uniform Power of Attorney Act, Section 5(a) may be revised to read: Except as otherwise provided by Section 119 of the Uniform Power of Attorney Act,[citation], a person that in good faith accepts . . .” An enacting jurisdiction should also examine these statutes to determine whether the use and definition of terms such as “good faith” is consistent with this Act. Appropriate amendments should be made where necessary for consistency.

Comment

Section 5 permits a person to rely in good faith on the validity of a substitute decision-

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

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

19 20 **SECTION 6. LIABILITY FOR REFUSAL TO ACCEPT SUBSTITUTE**

21 **DECISION-MAKING DOCUMENT.**

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

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

27 **(1) the person would not otherwise be required in the same circumstances to**
28 **act if requested by the individual who executed the substitute decision-making document;**

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

31 **(3) the person's request under Section 5 for the decision-maker's assertion of fact,**
32 **a translation, or an opinion of counsel is refused;**

33 **(4) the person in good faith believes that the document is not valid or that the**

1 decision maker does not have the authority to request the transaction or the act; or
2 (5) the person makes, or has actual knowledge that another person has made, a
3 report to the [local adult protective services office] stating a good faith belief that the individual
4 for whom decisions will be made may be subject to abuse, neglect, exploitation, or abandonment
5 by the decision maker or a person acting for or with the decision maker.

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

- 8 (1) a court order mandating acceptance of the document; and
9 (2) liability for reasonable attorney's fees and costs incurred in an action or
10 proceeding that mandates acceptance of the document.

11 ***Legislative Note: The enacting jurisdiction should reference its laws that authorize delegation***
12 ***of substitute decision-making authority for property, health care, and personal care to***
13 ***determine whether those laws have different requirements for acceptance of a substitute***
14 ***decision-making document than those provided in Section 6. When such differences exist, a***
15 ***specific cross-reference in Section 6 is advisable. For example, if the enacting jurisdiction has***
16 ***adopted the Uniform Power of Attorney Act, Section 6(a) may be revised to read: "Except as***
17 ***otherwise provided in subsection (b) or Section 120 of the Uniform Power of Attorney***
18 ***Act,[citation], a person shall accept . . ." An enacting jurisdiction should also examine its***
19 ***laws to determine whether the use and definition of terms such as "good faith" is consistent***
20 ***with this Act. Appropriate amendments should be made where necessary for consistency.***

21
22 ***The phrase "local adult protective services office" is bracketed to indicate where an enacting***
23 ***jurisdiction should insert the appropriate designation for the governmental agency with***
24 ***regulatory authority to protect the welfare of the individual who executed the substitute decision-***
25 ***making document. Such designation may include, for example, offices of local law***
26 ***enforcement.***

27 28 **Comment**

29 As a complement to Section 5, Section 6 enumerates the bases for legitimate refusals of a
30 substitute decision-making document and the sanctions for refusals that violate the Act. The
31 introductory phrase, "except as otherwise provided . . . by law other than this [act]," allows a
32 jurisdiction through common law and other statutes to impose stricter or different requirements
33 for accepting a substitute decision-making document and the authority of the decision maker.
34 For example, Section 120 of the Uniform Power of Attorney Act (the "UPOAA") requires that a
35 power of attorney be accepted no later than seven business days after presentation. In a

1 jurisdiction that has enacted the UPOAA, Section 120 would supersede the provision in Section
2 6 that requires a person to accept a substitute decision-making document “within a reasonable
3 time.” With respect to substitute health care decisions, other statutes or the common law in a
4 jurisdiction may impose public policy limits on a decision maker’s scope of authority in certain
5 contexts or for certain medical procedures. *See Section 4 Comment.*

6
7 Subsection (b) of Section 6 provides the bases upon which a substitute decision-making
8 document may be refused without liability. **The first paragraph of subsection (b) permits a**
9 **person to refuse to act in response to the authority in a substitute decision-making**
10 **document if “the person would not otherwise be required in the same circumstances to act**
11 **if requested by the individual who executed the substitute decision-making document.” An**
12 **example of such a circumstance in the health care context is a statute that permits an**
13 **attending physician to refuse to use, withhold, or withdraw life prolonging procedures from**
14 **a patient otherwise qualified to request use, withholding, or withdrawal of life prolonging**
15 **procedures. See, e.g., Ind. Code § 16-36-4-13(e), -13(f) (West 2007).** The UPOAA contains a
16 similar basis for refusing substitute decision-making authority for property decisions. *See* Unif.
17 Power of Atty. Act § 120(b)(1) (Alternative A) (2006).

18
19 The last paragraph of subsection (b) permits refusal of an otherwise valid substitute
20 decision-making document if the person in good faith believes that the individual for whom
21 decisions will be made is subject to abuse by the decision maker or someone acting in concert
22 with the decision maker (paragraph (5)). A refusal under this paragraph is protected if the person
23 makes, or knows another person has made, a report to the governmental agency authorized to
24 protect the welfare of the individual for whom decisions will be made. This basis for refusing an
25 otherwise valid substitute decision-making document is also a feature of the Uniform Power of
26 Attorney Act. *See id.* at § 120(b)(6) (Alternative A) (2006).

27
28 Subsection (c) provides that a person that refuses a substitute decision-making document
29 in violation of Section 6 is subject to a court order mandating acceptance and to reasonable
30 attorney’s fees and costs incurred in the action to mandate acceptance. An unreasonable refusal
31 may be subject to other remedies provided by other law. *See* Section 7 Comment.

32
33 **SECTION 7. REMEDIES UNDER OTHER LAW.** The remedies under this [act] are
34 not exclusive and do not abrogate any right or remedy under law of this [state] other than this
35 [act].

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

38 39 **Comment**

40 The remedies under the Act are not intended to be exclusive with respect to causes of
41 action that may accrue in relation to a substitute decision-making document. The Act applies to
42 many persons, individual and entity (*see* Section 2 (defining “person” for purposes of the Act)),

1 that may serve as decision makers or that may be asked to accept a substitute decision-making
2 document. Likewise, the Act applies to many subject areas over which individuals may delegate
3 property or health care decision-making authority. Remedies under other laws which govern
4 such persons and subject matters should be considered by aggrieved parties in addition to
5 remedies available under this Act.

6
7 **SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

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

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

12
13 **SECTION 9. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
14 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic
15 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not
16 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize
17 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.
18 Section 7003(b).

19 **SECTION 10. APPLICABILITY.** This [act] applies to a substitute decision-making
20 document created before, on, or after [the effective date of this [act]].

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