

D R A F T  
FOR DISCUSSION ONLY

## Uniform Health-Care Decisions Act (20\_\_)

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Uniform Law Commission

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May 18, 2023

## Uniform Health-Care Decisions Act (20\_\_)

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# Uniform Health-Care Decisions Act (20\_\_)

## Prefatory Note

This Act enables individuals to appoint agents to make health care decisions for them should they be unable to make those decisions for themselves, provide their health-care professionals and agents with instructions about their values and priorities regarding their health care, and to indicate particular medical treatment they do or do not wish to receive. It also authorizes certain people to make health-care decisions for individuals incapable of making their own decisions but who have not appointed agents, thus avoiding the need to appoint a guardian or otherwise involve a court in most situations. In addition, it sets forth the related duties and powers of agents and health-care professionals, and provides protection in the form of immunity to both under specified circumstances.

More specifically, the Act modernizes and expands on the Uniform Health-Care Decisions Act approved by the Uniform Law Commission (“ULC”) in 1993 (“1993 Act”). The key goals of the 1993 Act, as articulated in its prefatory note, included: (1) acknowledging the right of a competent individual to make decisions about the provision, withdrawal or withholding of health care; (2) providing a single statute to govern the appointment of a health-care agent and the recording of an individual’s wishes regarding the individual’s own health care; (3) simplifying and facilitating the making of an advance health-care directive; (4) ensuring that decisions about an individual’s health care will be governed, to the extent possible, by the individual’s own desires; (5) addressing compliance with an individual’s instructions by health-care institutions and professionals; and (6) providing a procedure for resolution of disputes.

This Act shares those goals but is revised to reflect changes in how health care is delivered, increases in non-traditional familial relationships and living arrangements, the proliferation of the use of electronic documents, the growing use of separate advance directives exclusively for mental health care, and other recent developments. The Act also seeks to improve upon the 1993 Act based on decades of experience and knowledge about how people make health-care decisions and about the challenges associated with creating and using advance directives.

Some of the more important improvements to the 1993 Act are highlighted below.

First, this Act incorporates approaches designed to facilitate the use of advance directives. Although all states have enacted statutes enabling the use of advance directives, many adult Americans have never made one. Without an advance directive, individuals’ wishes are less likely to be honored. In addition, their health-care professionals, family, and friends may struggle to determine how to make health-care decisions for them and to identify what decisions to make. The Act therefore seeks to reduce the number of Americans who lack an advance directive by reducing unnecessary barriers to execution of these documents.

Second, this Act adds clarity around when an agent may act. Patients, surrogates, and health-care professionals are all disadvantaged when it is unclear whether an agent has authority to make decisions. The Act adds provisions clearly indicating when that power commences. In addition, it addresses an issue on which state statutes are typically silent: what happens if

1 patients object to a surrogate making a decision for them.

2  
3 Third, this Act adds provisions to guide determinations of incapacity, which is important because  
4 surrogates' authority to make health-care decisions for patients typically commences when  
5 patients lack capacity to make decisions for themselves. The Act modernizes the definition of  
6 capacity so that it accounts for the functional abilities of an individual and clarifies that the  
7 individual may lack capacity to make one decision but retain capacity to make other decisions.  
8 In addition, recognizing the growth of allied health professions, and that a variety of health-care  
9 professionals may have training and expertise in assessing capacity, the Act expands the list of  
10 health-care professionals who are recognized as being able to determine that an individual lacks  
11 capacity.

12  
13 Fourth, this Act authorizes the use of advance directives exclusively for mental health care.  
14 Since the 1993 Act, many states have authorized such advance directives, sometimes called  
15 "psychiatric advance directives." Among other things, these allow individuals with chronic  
16 mental health challenges to provide specific instructions as to their preferences for mental health  
17 care and to choose to allow those instructions to be binding in the event of an acute mental health  
18 crisis.

19  
20 Fifth, this Act modernizes default surrogate provisions that allow family members and certain  
21 other people close to a patient to make decisions in the event the patient lacks capacity and has  
22 not appointed a health-care agent. The new default surrogate provisions update the priority list  
23 in the 1993 Act to reflect a broader array of relationships and family structures. They also  
24 provide additional options to address disagreements among default surrogates who have equal  
25 priority.

26  
27 Sixth, this Act substantially updates the model form included in the 1993 Act. The revised form  
28 is designed to be readily understandable and accessible to diverse populations. In addition, it  
29 creates a new opportunity for individuals to share a range of information that can be used to  
30 guide future health-care decisions. Many commentators have expressed concern that instructions  
31 included in advance directives focus exclusively on preferences for particular treatments, and do  
32 not provide health-care professionals or surrogates with the type of information about patients'  
33 goals and values that could be used to make value-congruent decisions when novel or  
34 unexpected situations arise. Responding to these concerns, the new form provides options for  
35 individuals to indicate goals and values, in addition to specific treatment preferences.

36  
37 This Act is intended to supersede the 1993 Act. A state enacting it would repeal that Act or any  
38 other statute governing the issues addressed in this Act.

1                                   **Uniform Health-Care Decisions Act (20\_\_)**

2                   **Section 1. Title**

3                   This [act] may be cited as the Uniform Health-Care Decisions Act (20\_\_).

4                   **Section 2. Definitions**

5                   In this [act]:

6                               (1) “Advance health-care directive” means a power of attorney for health care,  
7 health-care instruction, or both. The term includes an advance mental health-care directive.

8                               (2) “Advance mental health-care directive” means a power of attorney for health  
9 care or advance health-care directive, or both, created under Section 9.

10                              (3) “Agent” means an individual appointed in a power of attorney for health care  
11 to make a health-care decision for the individual who made the appointment. The term includes a  
12 co-agent or alternate agent appointed under Section 20.

13                              (4) “Capacity” has the meaning in Section 3.

14                              (5) “Cohabitant” means each of two individuals who have been living together as  
15 a couple for at least one year after each became an adult or was emancipated and are not married  
16 to each other[ or are not [domestic partners] with each other].

17                              (6) “Default surrogate” means an individual authorized under Section 12 to make  
18 a health-care decision for another individual.

19                              (7) “Electronic” means relating to technology having electrical, digital, magnetic,  
20 wireless, optical, electromagnetic, or similar capabilities.

21                              (8) “Family member” means a spouse,[ domestic partner,] child, parent, or  
22 grandparent, or a descendant of a spouse,[ domestic partner,] child, parent, or grandparent.

23                              (9) “Guardian” means a person appointed under other law by a court to make

1 decisions regarding the personal affairs of an individual, which may include health-care  
2 decisions. The term does not include a guardian ad litem.

3 (10) “Health care” means care or treatment or a service or procedure to maintain,  
4 monitor, diagnose, or otherwise affect an individual’s physical or mental illness, injury, or  
5 condition. The term includes mental health care.

6 (11) “Health-care decision” means a decision made by an individual or the  
7 individual’s surrogate regarding the individual’s health care, including:

8 (A) selection or discharge of a health-care professional or health-care  
9 institution;

10 (B) approval or disapproval of a diagnostic test, surgical procedure,  
11 medication, therapeutic intervention, or other health care; and

12 (C) direction to provide, withhold, or withdraw artificial nutrition or  
13 hydration, mechanical ventilation, or other health care.

14 (12) “Health-care institution” means a facility or agency licensed, certified, or  
15 otherwise authorized or permitted by other law to provide health care in this state in the ordinary  
16 course of business.

17 (13) “Health-care instruction” means a direction, whether or not in a record, made  
18 by an individual that indicates the individual’s goals, preferences, or wishes concerning the  
19 provision, withholding, or withdrawal of health care. The term includes a direction intended to be  
20 effective if specified conditions arise.

21 (14) “Health-care professional” means a physician or other individual licensed,  
22 certified, or otherwise authorized or permitted by other law of this state to provide health care in  
23 this state in the ordinary course of business or the practice of the physician’s or individual’s

1 profession.

2 (15) “Individual” means an adult or emancipated minor.

3 (16) “Mental health care” means care or treatment or a service or procedure to  
4 maintain, monitor, diagnose, or otherwise affect an individual’s mental illness or other  
5 psychiatric, psychological, or psychosocial condition.

6 (17) “Nursing home” means a nursing facility as defined in 42 U.S.C. Section  
7 1396r(a)[, as amended] or skilled nursing facility as defined in 42 U.S.C. Section 1395i–3(a)[, as  
8 amended].

9 (18) “Person” means an individual, estate, business or nonprofit entity,  
10 government or governmental subdivision, agency, or instrumentality, or other legal entity.

11 (19) “Person interested in the welfare of the individual” means:

12 (A) the individual’s surrogate;

13 (B) a family member of the individual;

14 (C) the cohabitant of the individual;

15 (D) a public entity providing health care case management or protective  
16 services to the individual;

17 (E) a person appointed under other law to make decisions for the  
18 individual under a power of attorney for finances; or

19 (F) a person that has an ongoing personal or professional relationship with  
20 the individual, including a person that has provided educational or health-care services or  
21 supported decision making to the individual.

22 (20) “Physician” means an individual authorized to practice medicine under [cite  
23 to state law authorizing the practice of medicine][or osteopathy under [cite to state law



authorizing the practice of osteopathy]].

(21) “Power of attorney for health care” means a record in which an individual grants an agent the authority to make health-care decisions for the individual.

(22) “Reasonably available” means being able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of an individual’s health-care situation. When used to refer to an agent or default surrogate, the term includes being willing and able to comply with the duties under Section 17 in a timely manner considering the urgency of an individual’s health-care situation.

(23) “Record” means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(24) “Responsible health-care professional” means:

(A) a health-care professional designated by an individual or the individual’s surrogate to have primary responsibility for the individual’s health care or for overseeing a course of treatment; or

(B) in the absence of a designation under subparagraph (A), or if the professional designated under subparagraph (A) is not reasonably available, a health-care professional who has primary responsibility for overseeing the individual’s health care or for overseeing a course of treatment.

(25) “Sign” means, with present intent to authenticate or adopt a record:

(A) execute or adopt a tangible symbol; or

(B) attach to or logically associate with the record an electronic symbol,

1 sound, or process.

2 (26) “State” means a state of the United States, the District of Columbia, Puerto  
3 Rico, the United States Virgin Islands, or any other territory or possession subject to the  
4 jurisdiction of the United States. The term includes a federally recognized Indian tribe.

5 (27) “Supported decision making” means assistance, from one or more persons of  
6 an individual’s choosing, that helps the individual make or communicate a decision, including by  
7 helping the individual understand the nature and consequences of the decision.

8 (28) “Surrogate” means:

9 (A) an agent;

10 (B) a default surrogate; or

11 (C) a guardian authorized to make health-care decisions.

12 **Legislative Note:** *If the state recognizes domestic partnerships, insert the term used in the state*  
13 *in the bracketed text in paragraphs (5) and (8), and wherever the term appears in this act. If the*  
14 *state does not recognize domestic partnerships, delete the bracketed text.*

15  
16 *It is the intent of this act to incorporate future amendments to the federal law cited in paragraph*  
17 *(17). A state in which the constitution or other law does not permit incorporation of future*  
18 *amendments when a federal statute is incorporated into state law should omit the phrase “as*  
19 *amended.” A state in which, in the absence of a legislative declaration, future amendments are*  
20 *incorporated into state law also should omit the phrase.*

21  
22 *If the state has separate terms for and laws authorizing the practice of medicine and osteopathy,*  
23 *remove the brackets in paragraph (20) and cite to the appropriate statutes. However, if the*  
24 *practice of osteopathy in the state is included in the term “medicine” and is authorized by the*  
25 *state’s law regarding the practice of medicine, the bracketed text related to osteopathy should be*  
26 *deleted.*

## 27 **Comment**

28  
29 The Section contains definitions central to the Act’s purpose and scope.

30  
31 First, it defines “advance health-care directive” as either a power of attorney for health care or a  
32 health-care instruction. The first appoints an agent to make health-care decisions; the second  
33 provides information about an individual’s treatment preferences, goals, values, and related  
34 wishes to guide future health care decision-making. The term “health-care instruction” includes

1 oral and written directions. The instruction may relate to a particular health-care decision or to  
2 health care in general. The term “health-care instruction” replaces the term “individual  
3 instruction,” which was used in the 1993 Act. The change is designed to provide clarity, and to  
4 indicate that an instruction may include more than one piece of information.

5  
6 Second, it defines the subject matter covered by this Act with the term “health-care decisions”.  
7 Consistent with the purposes of the Act, the Act defines “health-care decision” very broadly.  
8 The term can include decisions about a full range of medical interventions and types of  
9 providers. It is not limited to decisions about care for certain body parts, but extends to, for  
10 example, dental and vision care.

11  
12 The term “health-care decisions” references the definition of “health care”. The definition of  
13 “health care” is to be given the broadest possible construction. It includes the types of care  
14 referred to in the definition of “health-care decision” and to care, including personal and  
15 custodial care, provided at a “health-care institution” or in a home-based setting. It also includes  
16 alternative medical treatment.

17  
18 The term “health-care institution” is likewise defined broadly. It includes a hospital, nursing  
19 home, residential-care facility, home health agency or hospice.

20  
21 Third, it defines an “individual” as an adult or an emancipated minor. This reflects the fact that  
22 the Act only covers adults and emancipated minors, leaving other state law to govern decision-  
23 making for unemancipated minors. Importantly, the Act is not intended to displace developing  
24 state law regarding medical decision-making by or for “mature” minors.

25  
26 Fourth, it defines surrogate to include an agent under a power of attorney for health care, a  
27 default surrogate, or a guardian. It also provides definitions to help differentiate these different  
28 types of surrogates. An “agent” is an individual appointed under a power of attorney for health  
29 care. The definition of “agent” is not limited to a single individual because the Act permits the  
30 appointment of co-agents and alternate agents. A “guardian” is a person appointed by a court  
31 under other law. A “default surrogate” is an individual authorized under Section 12 to make a  
32 health-care decision when there is neither an agent nor a guardian willing and able to make the  
33 decision. All three types are referred to, collectively, as surrogates. Notably, this terminology  
34 represents a change from the 1993 Act, which used the term “surrogate” only to refer to a default  
35 surrogate. The change reflects the more common use of these terms and is designed to provide  
36 clarity to users.

37  
38 Fifth, core to the Act’s goal of enabling decisions for individuals unable to make decisions for  
39 themselves, it defines the term “capacity”. The definition is consistent with the functional  
40 approach to determining abilities and limitations found in the Uniform Guardianship,  
41 Conservatorship, and Other Protective Arrangements Act (2017) (“Guardianship Act”). This  
42 definition also recognizes that what an individual must be able to understand to make a health-  
43 care decision or create an instruction may be different than what the individual must be able to  
44 understand to appoint an agent. As a result, it is possible that the individual would be found to  
45 lack capacity to do one and not the other. For example, an individual might know that they want  
46 their adult child to make health-care decisions for them, and that appointing their adult child as

1 their agent would allow that to happen. At the same time, the individual might not have the  
2 ability to understand the risks and benefits of particular health-care treatments. Thus, the  
3 individual might be found to lack capacity to make an instruction, but to nevertheless have  
4 capacity to create a health-care power of attorney. Similarly, the individual might have capacity  
5 to make certain instructions and not others.

7 The Act also contains a variety of definitions that were not in the original Act and that help  
8 update the Act to reflect modern developments. For example, reflecting a growing recognition  
9 that individuals' decisions should be respected even when they use help to reach those decisions,  
10 it defines the term "supported decision-making". Notably, this definition is consistent with the  
11 definition of that term in the Guardianship Act.

13 Likewise, it adds several terms designed to recognize a broad array of family and interpersonal  
14 arrangements. For example, reflecting the trend in the country of couples living together without  
15 getting married, the Act includes a patient's "cohabitant" in the expanded default surrogate list  
16 found in Section 12 and other places in the Act where the inclusion is appropriate. The  
17 definition of "cohabitant" in this Section is derived from the same definition in the Uniform  
18 Cohabitants' Economic Remedies Act, approved by the ULC in 2021, with a modification  
19 requiring a living-together relationship of at least 1 year precipitated by the need to acknowledge  
20 the different purposes of the two acts.

22 In addition, the Section includes other terms that facilitate clarity. For example, the term  
23 "reasonably available" is used in the Act to accommodate the reality that individuals will  
24 sometimes not be timely available. A person need not be available in-person to be considered  
25 reasonably available. A person should be considered reasonably available if available in-person,  
26 by phone, by videoconferencing, or by other means that allow for adequate communication.  
27 Similarly, it adds the term "responsible health-care professional". A responsible health-care  
28 professional is a health-care professional with primary responsibility for an individual's health  
29 care in general, or for overseeing a particular course of treatment. Some individuals may only  
30 have one responsible health-care professional. For example, a patient who lacks an existing  
31 relationship with a primary care provider (sometimes called a "PCP"), may present needing  
32 urgent care at an emergency department of a local hospital. During a period in which the  
33 attending physician in that emergency department assumes responsibility for coordinating the  
34 patient's care, that attending physician may be the individual's sole responsible health-care  
35 professional. However, an individual also may have more than one provider who falls into this  
36 category. For example, a cancer patient might have a primary care physician who coordinates  
37 the patient's health care in general, and an oncologist who oversees the patient's cancer  
38 treatment. Both physicians would be considered a "responsible health-care professional" under  
39 the definition. Thus, the term accommodates the reality of modern health care systems in which  
40 an individual may not have a single provider who is responsible for all care, but rather a team of  
41 providers.

### 43 **Section 3. Capacity**

44 (a) An individual has capacity for the purpose of this [act] if the individual:

(1) is able and willing to communicate a decision independently or with appropriate services, technological assistance, supported decision making, or other reasonable accommodation; and

(2) in making:

(A) a health-care decision, understands the nature and consequences of the decision, including the primary risks and benefits of the decision;

(B) a health-care instruction, understands the nature and consequences of the instruction, including the primary risks and benefits of the choices expressed in the instruction; and

(C) an appointment of an agent under a health-care power of attorney or identifying a default surrogate under Section 12(b)(1), recognizes the identity of the individual being appointed or identified and understands the general nature of the relationship of the individual making the appointment or identification with the individual being appointed or identified.

(b) The right of an individual who has capacity to make a decision about the individual's own health care is not affected by whether the individual creates or revokes an advance health-care directive.

#### **Comment**

The Act governs advance directives and default surrogates. It is not intended to affect the rights of individuals who have capacity to make health-care decisions for themselves.

#### **Section 4. Presumption of Capacity; Overcoming Presumption**

(a) Unless a court has determined that an individual lacks capacity to do so, the individual is presumed to have capacity to:

(1) make a health-care decision;

1 (2) make or revoke a health-care instruction; and

2 (3) make or revoke a power of attorney for health care.

3 (b) Subject to Sections 5 and 6, a presumption under subsection (a) may be rebutted by a  
4 finding that an individual lacks capacity:

5 (1) made on the basis of a contemporaneous examination by any of the following  
6 who is not a family member of the individual or the individual's surrogate:

7 (A) a physician;

8 (B) a psychologist licensed or otherwise authorized to practice in this  
9 state; [or]

10 [(C) an individual with training and expertise in the finding of lack of  
11 capacity who is licensed or otherwise authorized to practice in this state as:

12 (i) a physician assistant;

13 (ii) an advanced practice registered nurse; or

14 (iii) a social worker; or]

15 (D) a responsible health-care professional not described in subparagraph  
16 (A)[,] [or] (B)[, or (C)] if:

17 (i) the individual about whom the finding is to be made is  
18 experiencing a health condition requiring that a decision regarding health-care treatment be made  
19 promptly to avoid loss of life or serious harm to the health of the individual; and

20 (ii) an individual listed in subparagraph (A)[,] [or] (B)[, or (C)] is  
21 not reasonably available;

22 (2) made in accordance with accepted standards of medical judgment and to a  
23 reasonable degree of medical certainty; and

(3) documented in a record signed by the individual making the finding that includes an opinion of the cause, nature, extent, and probable duration of the lack of capacity.

(c) If after a finding under subsection (b) it is determined the finding was based on a condition the individual no longer has or a responsible health-care professional has good cause to believe the individual no longer lacks capacity, the individual is presumed to have capacity unless a court determines the individual lacks capacity or the presumption is rebutted under subsection (b).

**Legislative Note:** *If the state decides to include physician assistants, advanced practice registered nurses, and social workers in the list of health professionals who may make a finding that an individual lacks capacity even in a non-emergency situation, it should include bracketed subsection (b)(1)(C) and include reference to paragraph (C) in subsection (b)(1)(D).*

#### Comment

This Section states that an individual is presumed to have capacity to make health care decisions, to create or revoke an advance directive, and to designate an agent.

This Section also governs how a determination that an individual lacks capacity is made for the purposes of this Act; it does not govern how such determinations are made for other purposes.

Unlike some states that require two persons to make the determination that a person lacks capacity, this provision only requires one. However, as set forth in Section 5, a second finding may be required for the determination to be treated as valid if the individual, their surrogate, or a person interested in the individual's welfare objects to the first determination.

The individual making the finding must contemporaneously examine the individual. This means that their finding must be based, at least in part, on their own examination of the patient in the patient's current condition. They may not simply rely on a potentially outdated examination or on the examination made by another. The examination may occur in-person or by other means (e.g., telehealth) if consistent with applicable standards of law in the enacting state.

A finding under this section that an individual lacks capacity must be according to accepted medical standards and to a reasonable degree of medical certainty. As a practical matter, this means that the individual making a finding—especially if it is based on a diagnosis of mental illness or cognitive, intellectual, or developmental disability—will need to have training and expertise in the assessment of functional and cognitive abilities and limitations of persons with similar disabilities.

A wide variety of types of experiences and training might give rise to the training and expertise

1 that similarly situated professionals would recognize as sufficient. As a practical matter, an  
2 individual making the finding should have training as to the legal standards in this Act to be able  
3 to assess whether a person's cognitive and functional limitations satisfy those standards. A  
4 diagnosis, or a finding that an individual takes a particular medication or is receiving a particular  
5 treatment, is not a finding that the individual lacks capacity. It may be evidence to be taken into  
6 consideration as part of an evaluation; it is not a substitute for that evaluation.

7  
8 Notably, consistent with the way capacity is defined in Section 3, an individual might be  
9 determined or found to lack capacity to make certain medical decisions and not others. For  
10 example, an individual might be determined or found to have capacity to set goals for treatment,  
11 but not to select among therapies to meet those goals. Similarly, a person might have capacity to  
12 determine to accept nutrition and hydration and not have capacity to make more complex  
13 decisions.

14  
15 It is important to recognize that capacity may fluctuate and that a reassessment is appropriate  
16 where there is reason to believe that a prior finding may not reflect the individual's current  
17 abilities. Mindful of this, as set forth in subsection (d), if an individual is found to lack capacity  
18 because of a particular condition that the individual has, the finding is not effective to rebut the  
19 presumption of capacity if the individual no longer has that condition. For example, if an  
20 individual is found to lack capacity because they are delirious due to an acute infection, and the  
21 infection subsides, the finding becomes ineffective. Similarly, if a responsible health care  
22 professional has good cause to believe that the individual has capacity at the current time, a prior  
23 finding that the individual lacks capacity will be insufficient to rebut the presumption of capacity.  
24 In such situations, a new assessment and finding will be needed if the presumption is to be  
25 rebutted.

26  
27 Nothing in this Section supplants the existing common law rules regarding when a medical  
28 provider does or does not need informed consent. State statutory and common law recognize a  
29 variety of circumstances under which a medical provider can treat without consent. In these  
30 situations, treatment could be provided without consent even without a determination or finding  
31 that the patient lacks capacity.

32  
33 Similarly, nothing in this Section affects a court's ability to make a determination that an  
34 individual lacks capacity under the Guardianship Act or similar state law.

## 35 36 **Section 5. Notice of Finding of Lack of Capacity; Right to Object**

37 (a) An individual who makes a finding under Section 4(b), as soon as reasonably feasible,  
38 shall inform the individual about whom the finding was made or the individual's responsible  
39 health-care professional of the finding.

40 (b) A responsible health-care professional who is informed of a finding under Section  
41 4(b), as soon as reasonably feasible, shall inform the individual about whom the finding was



made and the individual's surrogate.

(c) An individual found under Section 4(b) to lack capacity may object to the finding by orally informing a responsible health-care professional, in a record provided to a responsible health-care professional or the health-care institution in which the individual resides or is receiving care, or by another act that clearly indicates the individual's objection.

(d) If the individual objects under subsection (c), the finding under Section 4(b) is not sufficient to rebut the presumption of capacity in Section 4(a), and the individual must be treated as having capacity, unless:

(1) the individual withdraws the objection;

(2) a court determines that the individual lacks the presumed capacity;

(3) the individual is experiencing a health condition requiring that a decision regarding health-care treatment be made promptly to avoid imminent loss of life or serious harm to the health of the individual; or

(4) subject to subsection (e), the finding is confirmed by a second finding made by an individual authorized under Section 4(b)(1) who:

(A) did not make the first finding;

(B) is not a family member of the individual who made the first finding;

and

(C) is not the cohabitant of the individual who made the first finding or a descendant of the cohabitant.

(e) A second finding that the individual lacks capacity under subsection (d)(4) is not sufficient to rebut the presumption of capacity if the individual is requesting the provision or continuation of life-sustaining treatment and the finding is being used to make a decision to

1 withhold or withdraw the treatment.

2 (f) A health-care professional who is informed of an objection under subsection (c), as  
3 soon as reasonably feasible, shall:

4 (1) communicate the objection to a responsible health-care professional; and

5 (2) document the objection and the date of the objection in the individual's  
6 medical record or communicate the objection and the date of the objection to an administrator  
7 with responsibility for medical records of the health-care institution providing health care to the  
8 individual who shall document the objection and the date of the objection in the individual's  
9 medical record.

#### 10 **Comment**

11 This Section addresses an important question on which the earlier Act was silent: what happens  
12 if the individual does not agree with a non-judicial finding of incapacity? It provides that if an  
13 individual is found to lack capacity under Section 4(b), the individual may object to that finding.  
14 It further provides that the finding will not be effective to rebut a presumption of capacity unless  
15 the individual withdraws the objection, a court determines the individual lacks capacity, the  
16 individual needs prompt treatment to avoid dying or experiencing serious harm, or the finding is  
17 confirmed by another qualified professional.

18  
19 However, there is one caveat to the provision that the finding can be deemed effective if  
20 confirmed by another professional: this is not sufficient if the finding would be used to withhold  
21 or withdraw life-sustaining treatment contrary to the current, expressed wishes of the individual.  
22 This caveat reflects a simple policy decision to disallow removal of life-sustaining treatment  
23 over the patient's contemporaneous opposition when the patient has not had the full benefit of  
24 due process provided by a court proceeding.

#### 25 26 **Section 6. Judicial Review of Finding of Lack of Capacity**

27 (a) An individual found under Section 4(b) to lack capacity, a responsible health-care  
28 professional, the health-care institution providing health care to the individual, or a person  
29 interested in the welfare of the individual may petition the [insert name of the appropriate court  
30 in the state for capacity cases] in the [county] in which the individual resides or is located to  
31 determine whether the individual lacks capacity.

(b) The court in which a petition under subsection (a) is filed shall appoint [legal counsel to represent the individual if the individual does not have legal counsel] [a guardian ad litem]. The court shall hear the petition [as soon as possible but not later than [seven] days after the petition is filed]. As soon as possible[, but not later than [seven] days after the hearing], the court shall determine whether the individual lacks capacity. The court may determine that the individual lacks capacity only if the court finds by clear and convincing evidence that the individual lacks capacity.

**Legislative Note:** *A state that uses a different term for “county” should insert that term in the brackets in subsection (a).*

*In subsection (b), the state should decide whether to require the appointment of legal counsel, if the individual does not have legal counsel, whose primary duty is to represent the individual and the individual’s wishes before the court, or a guardian ad litem, whose primary duty is to assist the court by representing the individual’s best interest.*

*A state in which court proceedings are solely or primarily within the purview of the state’s highest court may not wish to include the bracketed instructions to the court in subsection (b) regarding the timing of a hearing on a petition under subsection (a). A state in which that is not the case should include the bracketed material and insert an appropriate number of days.*

## Comment

Subsection (a) provides for standing for an individual found to lack capacity under Section 4(b), certain health care providers, and persons interested in the welfare of the individual to challenge the finding in court.

Subsection (b) requires prompt court action and requires the appointment of legal counsel or a guardian ad litem where a petition is brought under this Section. In appointing a guardian ad litem, a court should prioritize appointment of someone with training and expertise in the type of abilities and limitations alleged.

An individual may also challenge a determination of lack of capacity made by a court under Section 4(a). However, the procedure for that challenge is not covered by this Act. Rather, it would be governed by the Guardianship Act, the state’s own guardianship law, or by other state law.

## Section 7. Health-Care Instruction

(a) An individual may create a health-care instruction that expresses the individual’s

1 preferences for future health care, including preferences regarding:

2 (1) health-care professionals or health-care institutions;

3 (2) how a health-care decision will be made and communicated;

4 (3) persons that should or should not be consulted regarding a health-care  
5 decision;

6 (4) a person to serve as guardian for the individual if one is appointed; and

7 (5) an individual to serve as a default surrogate.

8 (b) A health-care professional to whom an individual communicates or provides an  
9 instruction under subsection (a) shall document the instruction and the date of the instruction in  
10 the individual's medical record or communicate the instruction and date of the instruction to an  
11 administrator with responsibility for medical records of the health-care institution providing  
12 health care to the individual, who shall document the instruction and the date of the instruction in  
13 the individual's medical record.

14 (c) A health-care instruction that conflicts with an earlier health-care instruction,  
15 including an instruction documented in a medical order, revokes the earlier instruction to the  
16 extent of the conflict.

17 (d) A health-care instruction may be in the same record as a power of attorney for health  
18 care.

### 19 **Comment**

20 The Act distinguishes between two types of advance directives—those which are instructions,  
21 i.e., an indication of an individual's preference for care, and those which appoint an agent—  
22 while recognizing that both may be created by a single document. This Section covers  
23 instructions but provides in subsection (d) that an instruction may be in the same record as a  
24 power of attorney for health care.

25  
26 This Section enables the individual to make a wide variety of instructions. These may apply  
27 broadly, or may pertain to specific circumstances, such as in the event of terminal illness. Under

subsection (a)(4) the individual may include, as part of the instructions, a nomination of a guardian. Such nomination does not provide any indication that the individual wishes to have a guardian appointed and should never be construed as consent to imposition of guardianship. Nor can such nomination guarantee that the nominee will be appointed. Rather, in the absence of cause to appoint another, the court would likely select the nominee. Notably, by nominating an agent appointed under a power of attorney for health care as a guardian, the principal may reduce the likelihood that a guardianship could be used to thwart the agent's authority.

Creating an instruction under this Section does not require compliance with any particular set of formalities. This reflects the fact that people make instructions in many ways—written, oral, etc.—and limiting their ability to do so by adding procedural requirements could run afoul of long-established rights and reduce the likelihood that they will be made at all.

Subsection (c) addresses the issue of multiple instructions. It provides that the most current instruction governs, regardless of the location of the instruction. For example, if a medical order (including a POLST, sometimes referred to as a Physician Order for Life Sustaining Treatment) recorded a preference inconsistent with a preference stated in a previously created advance directive, the direction in the medical order would govern. Similarly, if the medical order recorded a preference, and an individual subsequently provided a different instruction, the subsequent instruction would govern.

## **Section 8. Power of Attorney for Health Care**

(a) An individual may create a power of attorney for health care to appoint an agent to make health-care decisions for the individual.

(b) An individual is disqualified from acting as agent for an individual who lacks capacity to make health-care decisions if:

(1) a court finds that the potential agent poses a danger to the individual, even if the court does not issue a [restraining order] against the potential agent; or

(2) the potential agent is an owner, operator, employee, or contractor of a nursing home [or other residential care facility] in which the individual resides or is receiving care unless the owner, operator, employee, or contractor is a family member of the individual, the cohabitant of the individual, or a descendant of the cohabitant.

(c) A health-care decision made by an agent is effective without judicial approval.

(d) A power of attorney for health care must be in a record, signed by the individual

creating the power, and signed by an adult witness who:

(1) reasonably believes the act of the individual to create the power of attorney is voluntary and knowing;

(2) is not:

(A) the agent appointed by the individual;

(B) the agent's spouse[, domestic partner,] or cohabitant;

(C) if the individual resides or is receiving care in a nursing home[ or other residential care facility], the owner, operator, employee, or contractor of the nursing home [or other residential care facility]; and

(3) is present when the individual signs the power of attorney or when the individual represents that the power of attorney reflects the individual's wishes.

(e) A witness under subsection (d) is considered present if the witness and the individual are:

(1) physically present in the same location;

(2) using electronic means that allow for real time audio and visual transmission and communication in real time to the same extent as if the witness and the individual were physically present in the same location; or

(3) able to speak to and hear each other in real time through audio connection if:

(A) the identity of the individual is personally known to the witness; or

(B) the witness is able to authenticate the identity of the individual by receiving accurate answers from the individual that enable the authentication.

(f) A power of attorney for health care may include a health-care instruction.

**Legislative Note:** A state should insert the term the state uses for a protective order in place of the bracketed text in subsection (b)(2) and wherever it appears in the act.

1 *A state should insert the appropriate term or terms for the types of facilities the state wishes to*  
2 *include in subsection (b) and wherever the bracketed phrase “other residential care facility”*  
3 *appears in the act. These facilities are referred to by various names, including assisted living*  
4 *facilities and board and care homes.*

5  
6 *It is the intent of this act that a power of attorney under this act prevails over a conflicting*  
7 *provision in other state law. A state may need to revise its law on powers of attorney to resolve*  
8 *conflicts.*

### 10 **Comment**

11  
12 This Section provides for the second type of advance directive: the power of attorney for health  
13 care, which must be in a signed record. In some states, this document is currently referred to as a  
14 health care proxy.

15  
16 Consistent with the statement in Section 7 that an instruction may be in the same record as a  
17 power of attorney for health care, subsection (f) recognizes that a power of attorney for health  
18 care may be in the same record as a health-care instruction. Notably, putting both in the same  
19 record is typically advisable because the agent’s decision-making should be guided by such  
20 instructions. Having both in the same place facilitates an agent’s compliance with their duties  
21 under Section 17.

22  
23 The requirement that a power of attorney be in a record must be understood in the context of the  
24 definition of a “record” in Section 2. As defined, a record is information inscribed on a tangible  
25 medium (e.g., paper) or stored in an electronic or other medium and retrievable in perceivable  
26 form. Thus, it allows for electronic powers of attorney, including those captured on video.

27  
28 The Section includes execution requirements, as states overwhelmingly have adopted such  
29 requirements. However, consistent with concerns about undue barriers to execution, it aims to  
30 minimize the burden of execution requirements by requiring only a single witness and allowing  
31 witnessing to occur in various ways. To discourage forgery it requires a witness and identifies  
32 someone who can describe what took place should a concern about the validity of the document  
33 arise. By contrast, it does not require notarization. A person who is a notary, however, can serve  
34 as a witness. In addition, an individual may opt to have additional witnesses beyond the required  
35 single witness.

36  
37 Notwithstanding the acknowledgment in subsection (a) that multiple agents may be appointed,  
38 such appointment is not encouraged. Appointment of multiple agents where each can act  
39 separately can result in conflicting instructions being given to health-care professionals. It  
40 creates an opportunity for confusion and can frustrate the ability of agents to effectuate the  
41 individual’s wishes as required under Section 17. Appointment of agents who must act together  
42 also creates problems. Agents may fail to reach consensus. Obtaining consensus may also slow  
43 the decision-making process, potentially delaying treatment for the individual.

44  
45 Consistent with the 1993 Act, subsection (b) prohibits an owner, operator, employee, or  
46 contactor of a nursing home or other residential care facility in which the individual is residing

1 from serving as agent, unless related to the individual. This prohibition is not because such  
2 individuals are inherently suspicious; it is recognized that individuals working in such facilities  
3 are critically important caregivers and may form strong, caring bonds with residents. Rather, it  
4 reflects the nature of these institutions—institutions in which highly vulnerable individuals tend  
5 to become highly dependent on the facility and its staff to meet their needs. In this environment,  
6 it is important that the agent is independent of the facility.

7  
8 As indicated in the legislative note, a state will need to insert its own term or terms of the types  
9 of facilities the state wishes to include in subsection (b) and wherever the bracketed phrase  
10 “other residential care facility” appears in this Act. Such facilities go by various names,  
11 including assisted living facilities and board and care homes. To include facilities that provide  
12 residential services to people with intellectual disabilities and related conditions, states might  
13 include the term “Intermediate Care Facilities for Individuals with Intellectual Disability,” a term  
14 used in the context of the federal Medicaid program.

## 15 16 **Section 9. Advance Mental Health-Care Directive**

17 (a) An individual may create an advance mental health-care directive that addresses only  
18 mental health care for the individual.

19 (b) A health-care instruction that addresses only mental health care for an individual may  
20 include:

21 (1) a statement of the individual’s general philosophy and objectives regarding  
22 mental health care;

23 (2) the individual’s specific goals, preferences, and wishes regarding the  
24 provision, withholding, or withdrawal of a form of mental health care, including:

- 25 (A) preferences regarding professionals, programs, and facilities;
- 26 (B) admission to a mental facility, including duration of admission;
- 27 (C) preferences regarding medications;
- 28 (D) a refusal to accept a specific type of mental health care, including a  
29 medication; and
- 30 (E) preferences regarding crisis intervention.

31 (c) A health-care instruction under this section may be in the same record as a power of



1 attorney for health care.

2 [(d) An individual may direct in an advance mental health-care directive that:

3 (1) a health-care professional follow an instruction in the directive even if the  
4 individual objects and the presumption of capacity under Section 4(a) has not been rebutted; or

5 (2) the individual may not revoke the directive if the individual is experiencing a  
6 psychiatric or psychological event specified in the directive.

7 (e) If an advance mental health-care directive includes a direction under subsection (d),  
8 the advance mental health-care directive must be in a record that is separate from any other  
9 advance health-care directive created by the individual, and signed by the individual creating the  
10 advance mental health-care directive and at least two adult witnesses who:

11 (1) attest that to the best of their knowledge the individual:

12 (A) understood the nature and consequences of the direction, including its  
13 risks and benefits; and

14 (B) made the direction voluntarily and without coercion or undue  
15 influence;

16 (2) are not:

17 (i) the agent appointed by the individual;

18 (ii) the agent's spouse[, domestic partner,] or cohabitant; and

19 (iii) if the individual resides in a nursing home [or other residential care  
20 facility] the owner, operator, employee, or contractor of the nursing home [or other residential  
21 care facility]; and

22 (3) are physically present in the same location as the individual.]

23 **Legislative Note:** A state that wishes to include an option to allow an individual to waive the  
24 individual's right to be treated as having capacity (a "Ulysses clause") in an advance mental

1 *health-care directive should include subsections (d) and (e), Section 15(a)(3) and Section*  
2 *23(a)(6).*

#### 4 **Comment**

5 This Section governs what have sometimes been called “psychiatric advance directives.” The  
6 use of the term “mental health” instead of “psychiatric” reflects the fact that an individual might  
7 wish to create an advance directive to address a wide variety of mental health-care needs and  
8 mental conditions, not simply those which stem from what are traditionally referred to as  
9 “psychiatric” conditions.

10  
11 An advance mental health-care directive can be a power of attorney for only mental health care,  
12 an instruction for only mental health care, or a single record that includes both. An individual  
13 need not have a particular diagnosis to create an advance mental health-care directive. For  
14 example, an individual might wish to create one to govern in the event of an acute mental health  
15 crisis, but they might also create one to govern mental health care in the event of dementia or  
16 another cognitive disability. The list in subsection (b) of issues that can be addressed in an  
17 advance mental health-care is not exhaustive. Thus, an individual could have an advance mental  
18 health-care directive and no general advance directive, could have a general advance directive  
19 and no advance mental health-care directive, or could have both.

20  
21 An individual may choose to use an instruction only for mental health care to express a broad  
22 range of preferences. In many cases, these preferences may be based on prior experience and be  
23 a way to communicate to future health-care professionals what medication or treatments have  
24 had a positive or negative impact in the past. For example, an individual may wish to avoid a  
25 treatment method that had side effects that were personally intolerable, or an intervention that  
26 proved effective in the past.

27  
28 Since a person may designate an agent to make health-care instructions or provide an instruction  
29 related to mental health care in a general power of attorney, this Section is unnecessary to  
30 empower either. What it does is (1) clarify that an individual may make an appointment or  
31 instruction exclusively for mental health care; (2) prevent a general advance directive from  
32 mistakenly revoking the specific one, and vice versa; and (3) allow—but in no way require—an  
33 individual to essentially waive their right to be treated as having capacity pending confirmation  
34 of that finding of incapacity by a court or second health-care professional (a “Ulysses clause”).

35  
36 The Ulysses option is created by subsection (d), which allows the individual to agree in advance  
37 that an instruction made in an advance directive trumps a subsequent decision made by the  
38 individual if the individual is experiencing a particular psychiatric or psychological event. It  
39 does this by providing that an individual may create an advance mental health-care directive  
40 requiring that health care professionals follow an instruction in the directive if the individual is  
41 experiencing the particular psychiatric or psychological event specified in the directive, even  
42 though the individual has not been found to lack capacity and the individual is objecting to the  
43 care or treatment described in the instruction. Subsection (d) also allows an individual to include  
44 in the advance directive an instruction that prevents the individual from revoking the advance  
45 directive if the individual is experiencing the particular psychiatric or psychological event

1 specified in the directive.

2  
3 The individual may choose the level of specificity they want in identifying the event that would  
4 trigger the Ulysses clause. Some individuals might choose a broad category of event (e.g., “an  
5 acute mental health crisis”). Others might choose a much narrower event (e.g., if the individual  
6 is experiencing a particular type of mental health crisis or a particular symptom and is refusing a  
7 particular type of medication or intervention).

8  
9 This Ulysses provision is entirely optional, and thus individuals are free to create an advance  
10 mental health-care directive without any such provision. Because a Ulysses clause authorizes  
11 health-care professionals to disregard otherwise valid instructions or revocations, subsection (e)  
12 requires additional formalities when one is included. Specifically, it requires two witnesses who  
13 are physically present in the same location as the individual creating the directive. Further, these  
14 witnesses must attest that, to the best of their knowledge, the individual authorizing the provision  
15 understands the nature and consequences of the clause, and is making a voluntary decision (free  
16 of coercion or undue influence) to include it.

17  
18 The power of an agent under a power of attorney for mental health care to consent to voluntary  
19 admission to a psychiatric facility is governed by Section 18, which governs the powers of an  
20 agent.

## 21 22 **Section 10. Relationship of Advance Mental Health-Care Directive and Other**

### 23 **Advance Health-Care Directive**

24 (a) If a direction in an advance mental health-care directive conflicts with a direction in  
25 another advance health-care directive, the later direction revokes the earlier direction to the  
26 extent of the conflict.

27 (b) An individual’s appointment under a power of attorney for health care of an agent to  
28 make decisions only for mental health care does not revoke an earlier appointment of an agent  
29 under a power of attorney for health care to make other health-care decisions for the individual.  
30 A later appointment revokes the authority of an agent under the earlier appointment to make  
31 decisions about mental health care unless otherwise specified in the power of attorney making  
32 the later appointment.

33 (c) An individual’s appointment under a power of attorney for health care of an agent to  
34 make health-care decisions for the individual other than decisions about mental health care made,

after appointment of an agent authorized to make only mental health-care decisions, does not  
revoke the appointment of the agent authorized to make only mental health-care decisions.

### **Comment**

This section clarifies the relationship between an advance mental health-care directive and advance directives that are not limited in this way. It provides where instructions in the two differ, the later to be created governs to the extent of the conflict. It explains, however, that appointment of an agent in an advance mental health-care directive does not revoke the prior appointment of an agent under a general power-of-attorney, and vice versa. However, the appointment of an agent in an advance mental-health care directive does revoke the authority of an agent appointed under a general power of attorney for health care to make mental health care decisions for the individual, unless that later directive provides otherwise.

## **Section 11. Optional Form**

The following form may be used to create an advance health-care directive.

### **ADVANCE HEALTH-CARE DIRECTIVE**

#### **HOW YOU CAN USE THIS FORM**

You can use this form if you wish to name someone to make health-care decisions for you in case you cannot make decisions for yourself. This is called giving the person a Power of Attorney for Health Care. This person is called your Agent.

You can also use this form to state your wishes, preferences, and goals for health care, and to say if you want to be an organ donor after you die.

#### **YOUR NAME AND DATE OF BIRTH**

Name:

Date of birth:

#### **PART A: NAMING AN AGENT**

This part lets you name someone else to make health-care decisions for you. You may leave any item blank.

##### **1. NAMING AN AGENT**

I want the following person to make health-care decisions for me if I cannot make decisions for myself:

1 Name:

2  
3 Optional contact information (it is helpful to include information such as address, phone, and  
4 email):  
5  
6  
7

8 **2. NAMING AN ALTERNATE AGENT**  
9

10 I want the following person to make health-care decisions for me if I cannot and my Agent is  
11 not able or available to make them for me:  
12

13 Name:

14  
15 Optional contact information (it is helpful to include information such as address, phone, and  
16 email):  
17

18 **3. LIMITING YOUR AGENT'S AUTHORITY**  
19

20 I give my Agent the power to make all health-care decisions for me if I cannot make those  
21 decisions for myself, except the following:  
22  
23  
24

25 (If you do not add a limitation here, your Agent will be able make all health-care decisions  
26 that an Agent is permitted to make under state law.)  
27

28 **PART B: HEALTH CARE INSTRUCTIONS**  
29

30 This part lets you state your priorities for health care and the types of health care you do and do  
31 not want.  
32

33 **1. INSTRUCTIONS ABOUT LIFE-SUSTAINING TREATMENT**  
34

35 This section gives you the opportunity to say how you want your Agent to act while making  
36 decisions for you. You may mark or initial each item. You also may leave any item blank.  
37

38 **Treatment.** Medical treatment needed to keep me alive but not needed for comfort or any  
39 other purpose should (mark all that apply):

40 ☐ Always be given to me.

41 ☐ Not be given to me if I have a condition that is not curable and is expected to  
42 cause my death soon, even if treated.

43 ☐ Not be given to me if I am unconscious and I am not expected to be conscious  
44 again.

45 ☐ Not be given to me if I have a medical condition from which I am not  
46 expected to recover that prevents me from communicating with people I care

1 about, caring for myself, and recognizing family and friends.  
2 ( ) Other (write what you want or do not want):  
3  
4  
5

6 **Food and liquids.** If I can't swallow and staying alive requires me to get food or liquids  
7 through a tube or other means for the rest of my life, then food or liquids should (mark all  
8 that apply):

- 9 ( ) Always be given to me.  
10 ( ) Not be given to me if I have a condition that is not curable and is expected to  
11 cause me to die soon, even if treated.  
12 ( ) Not be given to me if I am unconscious and am not expected to be conscious  
13 again.  
14 ( ) Not be given to me if I have a medical condition from which I am not  
15 expected to recover that prevents me from communicating with people I care  
16 about, caring for myself, and recognizing family and friends.  
17 ( ) Other (write what you want or do not want):  
18  
19  
20

21 **Pain relief.** If I am in significant pain, care that will keep me comfortable but is likely to  
22 shorten my life should (mark all that apply):

- 23 ( ) Always be given to me.  
24 ( ) Never be given to me.  
25 ( ) Be given to me if I have a condition that is not curable and is expected to  
26 cause me to die soon, even if treated.  
27 ( ) Be given to me if I am unconscious and am not expected to be conscious  
28 again.  
29 ( ) Be given to me if I have a medical condition from which I am not  
30 expected to recover that prevents me from communicating with people I care  
31 about, caring for myself, and recognizing family and friends.  
32 ( ) Other (write what you want or do not want):  
33  
34  
35

## 36 2. MY PRIORITIES

37  
38 You can use this section to indicate what is important to you, and what is not important to  
39 you. This information can help your Agent make decisions for you if you cannot. It also helps  
40 others understand your preferences.  
41

42 You may mark or initial each item. You also may leave any item blank.  
43

44 Staying alive as long as possible even if I have substantial physical limitations is:

- 45 ( ) Very important  
46 ( ) Somewhat important

1           (    ) Not important

2  
3       Staying alive as long as possible even if I have substantial mental limitations is:

4           (    ) Very important

5           (    ) Somewhat important

6           (    ) Not important

7  
8       Being free from significant pain is:

9           (    ) Very important

10          (    ) Somewhat important

11          (    ) Not important

12  
13      Being independent is:

14          (    ) Very important

15          (    ) Somewhat important

16          (    ) Not important

17  
18      Having my Agent talk with my family before making decisions about my care is:

19          (    ) Very important

20          (    ) Somewhat important

21          (    ) Not important

22  
23      Having my Agent talk with my friends before making decisions about my care is:

24          (    ) Very important

25          (    ) Somewhat important

26          (    ) Not important

27  
28    **3. OTHER INSTRUCTIONS**

29  
30      You can use this section to provide more information about your goals, values, and  
31      preferences for treatment, including care you want or do not want. You can also use this  
32      section to name anyone who you do not want to make decisions for you under any  
33      conditions.

34  
35  
36  
37                   **PART C: OPTIONAL SPECIAL POWERS & GUIDANCE**

38  
39      This part lets you give your Agent additional powers, and to provide more guidance about your  
40      wishes. You may mark or initial each item. You also may leave any item blank.

41  
42    **1. OPTIONAL SPECIAL POWERS**

43      My Agent can do the following things ONLY if I have initialed or marked them below:

44          (    ) Admit me as a voluntary patient to a facility for mental health treatment for up to

1 7 days, or 14 days, or 30 days (circle one).  
2 (If I do not mark or initial this, my Agent MAY NOT admit me as a voluntary  
3 patient to this type of facility.)  
4

5 ( ) Place me in a nursing home for more than 100 days even if my needs can be met  
6 somewhere else, I am not terminally ill, and I object.  
7 (If I do not mark or initial this, my Agent MAY NOT do this.)  
8

## 9 2. ACCESS TO MY HEALTH INFORMATION

10  
11 My Agent may obtain, examine, and share information about my health needs and health care  
12 if I am not able to make decisions for myself. If I initial or mark below, my Agent may also  
13 do that at any time my Agent thinks it will help me.  
14

15 ( ) I give my Agent permission to obtain, examine, and share information about my  
16 health needs and health care whenever they think it will help me.  
17

## 18 3. FLEXIBILITY FOR MY AGENT

19  
20 Initial or mark below if you want to give your Agent flexibility in following instructions you  
21 provide in this form. If you do not, your Agent must follow the instructions even if they think  
22 something else would be better for you.  
23

24 ( ) I give my Agent permission to be flexible in applying these instructions if they  
25 think it would be in my best interest based on what they know about me.  
26

## 27 4. NOMINATION OF GUARDIAN

28  
29 Here you can say who you would want as your guardian if you needed one. A guardian is a  
30 person appointed by a court to make decisions for someone who cannot make decisions.  
31 Filling this out does NOT mean you want or need a guardian.  
32

33 If a court appoints a guardian to make personal decisions for me, I want the court to choose:

34 ( ) My Agent named in this form. If my Agent cannot be a guardian, I want the  
35 Alternate Agent named in this form.

36 ( ) Other (write who you would want and their contact information):  
37  
38  
39

## 40 PART D: ORGAN DONATION

41  
42 This part lets you donate your organs after you die. You may mark or initial each item. You also  
43 may leave any item blank.  
44

45 Even if it requires maintaining treatments that could prolong my dying process, and may be in  
46 conflict with other instructions I have put in this form, after I die:



1 ( ) I donate my organs, tissues, and other body parts, EXCEPT for those I list below  
2 (list any body parts you do NOT want to donate):  
3  
4

5 ( ) I do not want my organs, tissues, or body parts donated to anybody for any reason.  
6  
7

8 Organs, tissues, or body parts that I donate may be used for:

- 9 ( ) Transplant  
10 ( ) Therapy  
11 ( ) Research  
12 ( ) Education  
13 ( ) All of the above  
14

## 15 **PART E: SIGNATURES REQUIRED ON THIS FORM**

### 16 **YOUR SIGNATURE**

17 Sign your name:  
18  
19

20 Today's date:  
21  
22

23 City and State (optional):  
24  
25

### 26 **SIGNATURE OF A WITNESS**

27  
28 You need a witness if you are using this form to name an Agent. The witness must be an adult  
29 and cannot be the person you are naming as Agent or the Agent's spouse,[ domestic partner,] or  
30 someone the Agent lives with as a couple. If you live or are receiving care in a nursing home, the  
31 witness cannot be an employee or contractor of the home or someone who owns or runs the  
32 home.  
33

34 Witness's name:  
35

36 Witness's signature:  
37

38 Date witness signed:

39 (Only sign as a witness if you think that the person signing above is doing it voluntarily).  
40  
41

## 41 **PART F: INFORMATION FOR AGENTS**

- 42 1. If this form names you as an Agent, you can make decisions about health care for the person  
43 who named you when they cannot make their own.  
44  
45 2. If you make a decision for the person, follow any instructions the person gave, including any

1 in this form.

- 2
- 3 3. If you do not know what the person would want, make the decision that you think is in the
- 4 person's best interest. To figure out what is in the person's best interest, consider the person's
- 5 values, preferences, and goals if you know them or can learn them. Some of these
- 6 preferences may be in this form. You should also consider any behavior or communications
- 7 from the person that indicate what they currently want.
- 8
- 9 4. If this form names you as an Agent, you can also get and share the individual's health
- 10 information. But unless the person has said so in this form, you can get or share this
- 11 information only when the person cannot make their own decisions about their health care.
- 12

### 13 **Comment**

14

15 This form is not designed to be used by individuals wishing to create an advance directive

16 exclusively for mental health care. Individuals who wish to create such an advance directive will

17 likely want to spell out preferences that are highly specific to their individual health needs and

18 preferences.

19

20 The form includes two sections designed to reflect a growing concern that people too often

21 provide detailed instructions that are not well-informed, and which do not reflect evolving

22 preferences. Specifically, it allows the individual to (1) provide information about their values

23 (and not merely specific instructions) and (2) give the individual's agent leeway in following

24 instructions. The latter provision is a simplified version of one previously incorporated in the

25 State of Maryland's statutory short form.

26

27 The optional form provided in this Section is designed to simply be a form, not advice. This

28 helps make it simpler than many states' statutory forms. It also reduces the risk that the form

29 will provide advice that is not appropriate for a given individual or provide advice which—

30 although perhaps well-intentioned—lacks empirical support. Notably, the form could be

31 packaged with advice or other resources by providers or other actors.

32

33 The form consists of five parts that the individual may complete, as well as instructions. An

34 individual may complete all or any part of the form. Any part of the form left blank is not to be

35 given effect. For example, an individual may complete the instructions for health care part of the

36 form alone. Or an individual may complete the power of attorney for health care part of the form

37 alone. Or an individual may complete both the instructions and power of attorney for health care

38 parts of the form. An individual may also, but need not, complete the parts of the form

39 pertaining to donation of bodily organs and tissue.

40

41 Part A, the power of attorney for health care, appears first on the form in order to ensure to the

42 extent possible that it will come to the attention of a casual reader. This reflects the reality that

43 the appointment of an agent is a more comprehensive approach to the making of health-care

44 decisions than is the giving of an individual instruction, which cannot possibly anticipate all

45 future circumstances which might arise. Part 1 requires only the designation of a single agent,

46 but with opportunity given to designate a single first alternate, if the individual chooses. As in

the 1993 Act, no provision is made in the form for the designation of co-agents in order not to encourage the practice. Designation of co-agents is discouraged because of the difficulties likely to be encountered if the co-agents are not all readily available or do not agree. If co-agents are appointed, the instrument should specify that either is authorized to act if the other is not reasonably available. It should also specify a method for resolving disagreements.

Part B of the form enables the individual to provide instructions about specific forms of potential future care, as well as their priorities. Indeed, a key innovation in this part is to allow the individual to provide information about their goals and priorities, which can guide health-care decisions. This information can help surrogates make decisions that are consistent with the principal's preferences, values, goals, and wishes, recognizing that an individual cannot possibly anticipate and provide specific instructions for all future circumstances that might arise. In this way, the form is consistent with growing calls from the medical community for advance planning to be goal-focused, not merely treatment-focused.

Part C.1 and C.2 enable the individual to give the agent powers that, under Section 18, require express authorization. For example, under Part C.2, the individual can make the agent's power to obtain and disclose medical information immediately effective. Similarly, Part C.3 allows an individual to give an agent more leeway in applying instructions than would otherwise be permitted under Section 17.

Part C.2 allows an individual to nominate a guardian. Nomination of a guardian provides no indication that the individual desires or needs a guardian.

Part D of the form provides the individual an opportunity to express an intention to donate bodily organs and tissues at death. An individual using this form to do so gives permission for the donation to be made even if procedures necessary to effectuate donation run contrary to other instructions in the directive (for example, they require the dying process to be prolonged). In this way, it aims to remove a common barrier to successful organ donation. The form allows a person to indicate purposes for which the gift is made. The option "therapy" means medical treatment other than transplant. The act uses the term "therapy" recognizing that this is the term used in the Uniform Organ Donation Act.

Of course, this is only one way an individual can make such a gift. Failure to complete this portion does not preclude a making a gift in another way. Notably, in some cases, an individual may have made a more limited gift in another form (e.g., as part of agreeing to donate for transplant).

## **Section 12. Default Surrogate**

(a) A default surrogate may make a health-care decision for an individual who lacks capacity to make health-care decisions and for whom an agent, or guardian authorized to make health-care decisions, has not been appointed or is not reasonably available.

1 (b) Unless the individual has an advance health-care directive that indicates otherwise, a  
2 member of the following classes, in descending order of priority, who is reasonably available and  
3 not disqualified under Section 14, may act as a default surrogate for the individual:

4 (1) an adult who the individual has identified, other than in a power of attorney  
5 for health care, as the individual who should make a health-care decision for the individual if the  
6 individual cannot make the decision;

7 (2) the individual's spouse[ or domestic partner], unless:

8 (A) a petition for annulment, divorce, dissolution of marriage, legal  
9 separation, or termination has been filed and not dismissed or withdrawn;

10 (B) a decree of annulment, divorce, dissolution of marriage, legal  
11 separation, or termination has been issued; or

12 (C) the spouse[ or domestic partner] has [abandoned] the individual for  
13 more than one year;

14 (3) the individual's adult child or parent;

15 (4) the individual's cohabitant;

16 (5) the individual's adult sibling;

17 (6) the individual's adult grandchild or grandparent;

18 (7) an adult not listed in paragraphs (1) through (6) who has assisted the  
19 individual with supported decision making routinely during the preceding six months;

20 (8) the individual's adult stepchild not listed in paragraphs (1) through (7) whom  
21 the individual actively parented during the stepchild's minor years and with whom the individual  
22 has an ongoing relationship; or

23 (9) an adult not listed in paragraphs (1) through (8) who has exhibited special care

1 and concern for the individual and is familiar with the individual's personal values.

2 (c) A responsible health-care professional may require an individual who assumes  
3 authority to act as a default surrogate to provide a declaration in a record under penalty of  
4 perjury stating facts and circumstances reasonably sufficient to establish the authority.

5 (d) If a responsible health-care professional reasonably determines that an individual who  
6 assumed authority to act as a default surrogate is not willing or able to comply with a duty under  
7 Section 17 or fails to comply with the duty in a timely manner, the professional may recognize  
8 the individual next in priority under subsection (b) as the default surrogate.

9 (e) A health-care decision made by a default surrogate is effective without judicial  
10 approval.

11 **Legislative Note:** *A state should insert the term used in the state for abandonment in subsection*  
12 *(b)(2)(C) and wherever the term "abandoned" or "abandonment" appears in this act.*

#### 14 **Comment**

15 This Section governs the recognition of default surrogates.

16  
17 Subsection (a) authorizes a default surrogate to make a health-care decision for an individual in  
18 the event the individual lacks capacity to make health-care decisions and an agent or guardian  
19 has not been appointed or the agent or guardian is not reasonably available.

20  
21 Subsection (b) continues the 1993 Act's use of a priority list with some important modifications.  
22 At the top of the list is someone the individual has designated. This designation may be in a  
23 record or it may be oral. This provision allows for an individual's preferences to be given effect  
24 even though the individual has not complied with the formalities necessary to appoint an agent to  
25 make health-care decisions. Subsection (b)(3) includes adult children and parents. It may be  
26 necessary to consult other law of the state to determine who constitutes a "child" or a "parent".

27  
28 If the individual has not designated a surrogate, or the designee is not reasonably available,  
29 subsection (b) applies a default rule for selecting another to act as surrogate. Like all default  
30 rules, it is not tailored to every situation, but attempts to reflect the desire of the majority of those  
31 who would find themselves so situated. To reflect a broad array of families and support systems,  
32 it expands the list of persons on the priority list beyond those included in the 1993 Act.  
33 Similarly, it groups certain priority groups (e.g., parents and children are given equal priority),  
34 recognizing that which individual may be best equipped to serve in this role will vary based on  
35 the individual and family structure. An adult who has priority under (b)(7) because they have

1 provided the individual with decision-making support may have done so informally, or pursuant  
2 to a formal decision-making agreement.

3  
4 The priority list is designed to approximate the likely wishes of as many individuals as possible.  
5 Empirical research on surrogate decision-making indicates that most Americans choose close  
6 relatives as their health care agents, with spouses being the most common first choice and  
7 children being the most common second choice. See Nina A. Kohn & Jeremy A. Blumenthal,  
8 *Designating Health Care Decision-Makers for Patients without Advance Directives: A*  
9 *Psychological Critique*, 42 GEORGIA LAW REVIEW 979, 990 (2008). Consistent with this, spouses  
10 and domestic partners are given top priority in this Act's priority list, and adult children are  
11 placed in the next priority group. Nevertheless, the priority list may be a poor fit for some  
12 individuals, and this is yet another reason to reduce barriers to execution of powers of attorney  
13 for healthcare elsewhere in this Act.

14  
15 By adopting a priority list, this Act rejects an alternative approach taken by a minority of states  
16 that gives a patient's physician substantial discretion to select among potential surrogates. This  
17 choice reflects several considerations. First, the Act's approach appears to be more consistent  
18 with the preferences of most Americans. *Id.* (reviewing empirical literature on surrogate  
19 decision-making preferences and concluding that "fixed priority lists ... appear to do a  
20 reasonable job of capturing the process preferences of the majority"). Second, one role of the  
21 surrogate is to provide a check on health-care professionals. If health-care professionals have  
22 discretion to choose among potential surrogates, they would have the ability to choose surrogates  
23 whose views accord with their own, thus blunting any ability for the surrogate to serve as such a  
24 check. Third, many Americans do not have a close and trusting relationship with a physician.  
25 The physician treating the individual may not know the individual's values and preferences to  
26 the extent that would allow the physician to select a surrogate based on more than convenience  
27 or the physician's own assessment of a potential surrogate's capacities. Fourth, although it  
28 adopts a clear priority list, the Act does empower a responsible health-care professional to  
29 recognize a surrogate other than one with top priority under the limited circumstances set forth in  
30 subsection (d).

31  
32 Subsection (c) permits the professional to obtain evidence of a claimed authority to act as default  
33 surrogate. The professional, however, does not have a duty to investigate the qualifications of an  
34 individual claiming the authority to act.

35  
36 Subsection (d) allows a health-care professional to take direction from an individual of lower  
37 priority than the one who originally assumed authority to act as a default surrogate if the  
38 individual who originally assumed authority fails to make decisions consistent with the default  
39 surrogate's fiduciary duty and the decision-making standards set forth in Section 17. In  
40 determining whether to look to an individual of lower priority to make such decisions, a  
41 responsible professional working in an institution that has an Ethics Committee may wish to  
42 consult that committee.

### 43 44 **Section 13. Disagreement Among Default Surrogates**

45 (a) A default surrogate who assumes authority under Section 12 shall inform a

1 responsible health-care professional if two or more members of a class under Section 12(b) have  
2 assumed authority to act as default surrogates and the members do not agree on a health-care  
3 decision.

4 (b) A responsible health-care professional shall comply with the decision of a majority of  
5 the members of the class with highest priority under Section 12(b) who have communicated their  
6 views to the professional and are acting consistent with their duties under Section 17.

7 (c) If a responsible health-care professional is informed that the members of the class  
8 who have communicated their views to the professional are evenly divided concerning the  
9 health-care decision, the professional shall make a reasonable effort to solicit the views of other  
10 members of the class who are reasonably available but have not yet communicated their views to  
11 the professional. The professional, after the solicitation, shall comply with the decision of a  
12 majority of the members who have communicated their views to the professional and are acting  
13 consistent with their duties under Section 17.

14 (d) If the class remains evenly divided after the effort is made under subsection (c), the  
15 health-care decision must be made as provided by other law of this state regarding the treatment  
16 of an individual who is found or determined to lack capacity.

#### 17 **Comment**

18  
19 This Section addresses the situation where more than one member of the same class has assumed  
20 authority to act as surrogate and a disagreement over a health-care decision arises of which a  
21 responsible health-care professional is informed. Should that occur, a responsible health-care  
22 professional must comply with the decision of a majority of the members of that class who have  
23 communicated their views to the professional and are acting in a manner that is consistent with  
24 their duties under Section 17. If the class is divided, a responsible healthcare professional should  
25 make reasonable efforts to solicit the views of class members who have yet to weigh in. If  
26 disagreement persists, however, the decision will be made as provided by other law of the state  
27 governing incapacity issues.

28  
29 Nothing in this Section requires a health-care professional to affirmatively seek out all members  
30 of a class.

1           **Section 14. Disqualification to Act as Default Surrogate**

2           (a) An individual for whom a health-care decision would be made may disqualify another  
3 individual from acting as default surrogate for the first individual. The disqualification must be in  
4 a record signed by the first individual or communicated verbally or nonverbally to the individual  
5 being disqualified, another individual, or a responsible health-care professional. Disqualification  
6 under this subsection is effective even if made by an individual who lacks capacity to make an  
7 advance directive if the individual clearly communicates a desire that the individual being  
8 disqualified not make health care decisions for the individual.

9           (b) An individual is disqualified from acting as a default surrogate for an individual who  
10 lacks capacity to make health-care decisions if:

11                   (1) a court finds that the potential default surrogate poses a danger to the  
12 individual, even if the court does not issue a [restraining order] against the potential surrogate

13                   (2) the potential default surrogate is an owner, operator, employee, or contractor  
14 of a nursing home [or other residential care facility] in which the individual is residing or  
15 receiving care unless the owner, operator, employee, or contractor is a family member of the  
16 individual, the cohabitant of the individual or a descendant of the cohabitant; or

17                   (3) the potential default surrogate refuses to provide a timely declaration under  
18 Section 12(c).

19                                   **Comment**

20  
21 This Section disqualifies certain people from acting as a default surrogate, either because of the  
22 individual's stated wishes or as a matter of law. Subsection (a) permits the individual to  
23 disqualify any other individual from acting as the individual's default surrogate. This ability is  
24 not conditioned on the individual having capacity; individuals without capacity may have a  
25 strong sense that they do not feel comfortable with a particular person making decisions for  
26 them, and the Act takes the position that such opinions should be respected regardless of the  
27 individual's cognitive disability. Subsection (b)(1) disqualifies an individual who has been  
28 found by a court to pose a risk to the individual, regardless of whether the court has imposed a



1   restraining order. Subsection (b)(2) disqualifies an owner, operator, employee, or contractor of a  
2   nursing home or other residential care facility at which a patient is receiving care from acting as  
3   the patient's surrogate unless related to the patient. This disqualification is similar to that for  
4   appointed agents.

5  
6   Subsection (b)(3) disqualifies an individual who has refused to provide the written declaration  
7   required under Section 12(c) in a timely manner.

## 8 9       **Section 15. Revocation**

10       (a) An individual may revoke the appointment of an agent under a power of attorney for  
11   health care, the designation of a default surrogate, or a health-care instruction in whole or in part,  
12   unless:

13           (1) a court determines the individual lacks capacity to do so; [or]

14           (2) the individual is found under Section 4(b) to lack capacity to do so and, if the  
15   individual objects to the finding, the finding is confirmed under Section 5(d)[; or

16           (3) the individual created an advance mental health-care directive that includes  
17   the provision under Section 9(d)(2) and the individual is experiencing the psychiatric or  
18   psychological event specified in the directive].

19       (b) Revocation under subsection (a) may be by any act by the individual clearly  
20   indicating that the individual intends to revoke the appointment, designation, or instruction,  
21   including an oral statement to a health-care professional.

22       (c) Except as provided in Section 10, an advance health-care directive that conflicts with  
23   an earlier advance health-care directive revokes the earlier directive to the extent of the conflict.

24       (d) Unless otherwise provided in an individual's advance health-care directive appointing  
25   an agent, the appointment of a spouse[ or domestic partner] of an individual as agent for the  
26   individual is revoked by:

27           (1) a filing for annulment, divorce, dissolution of marriage, legal separation, or

1 termination that has not been dismissed or withdrawn;

2 (2) a decree of annulment, divorce, dissolution of marriage, legal separation, or  
3 termination; or

4 (3) [abandonment] of the individual for more than one year by the individual's  
5 spouse[ or domestic partner].

6 **Legislative Note:** *A state that wishes to include an option for a Ulysses type clause in an advance*  
7 *mental health care directive by including Section 9(d) and (e) should also include subsection*  
8 *(a)(3).*

## 10 **Comment**

11 This Section governs revocation of advance directives, including advance directives for mental  
12 health care. It allows a wide variety of acts to constitute revocation.

13  
14 With one caveat, subsection (a) allows an individual to revoke an appointment of an agent, the  
15 designation of a default surrogate, or a health-care instruction so long as they have not been  
16 determined by a court, or found under Section 4, to lack capacity to do so. The caveat is that an  
17 individual cannot revoke an advance directive if doing so is inconsistent with their direction in  
18 an advance mental health-care directive that contains the type of “Ulysses clause” enabled by  
19 Section 9(d).

20  
21 It is possible that an individual would lack capacity to make a particular health-care decision, but  
22 retain the capacity to revoke the appointment or designation, or vice versa. For example, the  
23 individual might not be able to understand a complex medical decision but know that they no  
24 longer want their sister, who they previously appointed but with whom they subsequently had a  
25 falling out, to make decisions for them.

26  
27 Subsection (b) explains that a revocation can be accomplished by any act clearly indicating intent  
28 to revoke.

29  
30 Subsection (c) explains that a subsequent advance health-care directive revokes a prior advance  
31 health-care directive to the extent that the two conflict. If there is no conflict, then both are  
32 effective.

33  
34 Subsection (d) revokes the appointment of a spouse or domestic partner under certain situations  
35 in which the would-be agent's relationship to the principal has changed since the appointment  
36 was made.

## 38 **Section 16. Validity of Advance Health-Care Directive; Conflict with Other Law**

39 (a) An advance health-care directive created outside this state is valid if it complies with:

(1) the law of the state specified in the directive or, if a state is not specified, the state in which the individual created the directive; or

(2) this [act].

(b) A person may assume without inquiry that an advance health-care directive is genuine, valid, and still in effect, and may implement and rely on it, if the person does not have good cause to believe the directive is invalid or has been revoked.

(c) An advance health-care directive or a revocation of a directive may not be denied legal effect or enforceability solely because it is in electronic form.

(d) Evidence relating to an advance health-care directive, revocation of a directive, or a signature on a directive or revocation may not be excluded in a proceeding solely because the evidence is in electronic form.

(e) This [act] does not affect the validity of an electronic record or signature that is valid under [cite to state's Uniform Electronic Transactions Act].

(f) If this [act] conflicts with other law of this state relating to the creation, execution, implementation, or revocation of an advance health-care directive, this [act] prevails.

### **Comment**

This Section governs the portability of advance directives, something especially important for individuals who travel, move, or live in multiple jurisdictions. The Section allows an advance directive to be valid if it complied with the procedural and substantive requirements of the state in which the individual was physically located at the time they created it or in the state in which the document is presented. It also provides for a presumption of validity so that a health-care professional is not required to look behind the document unless they have good cause to believe it is invalid or has been revoked. It also explains that an advance health-care directive or revocation of a directive cannot be denied legal effect or enforceability simply because it is in an electronic form, as such directives increasingly are. Finally, if the document contains a choice-of-law provision, that will be honored.

### **Section 17. Duties of Agent and Default Surrogate**

(a) An agent or default surrogate has a fiduciary duty to the individual for whom the

1 agent or default surrogate is acting when exercising or purporting to exercise a power under  
2 Section 18.

3 (b) An agent or default surrogate shall make a health-care decision in accordance with the  
4 direction of the individual in an advance health-care directive and other goals, preferences and  
5 wishes of the individual to the extent known to or reasonably ascertainable by the agent or  
6 default surrogate.

7 (c) If there is not a direction in an advance health-care directive and the goals,  
8 preferences and wishes of the individual regarding a health-care decision are not known or  
9 reasonably ascertainable by the agent or default surrogate, the agent or default surrogate shall  
10 make the decision in accordance with the agent's or default surrogate's determination of the  
11 individual's best interest.

12 (d) In determining the individual's best interest under subsection (c), an agent or default  
13 surrogate shall:

14 (1) give primary consideration to the individual's contemporaneous  
15 communications, including verbal and nonverbal expressions;

16 (2) consider the individual's values to the extent known or reasonably  
17 ascertainable; and

18 (3) consider the risks and benefits of a potential health-care decision.

19 (e) An agent or default surrogate who is informed of a revocation of an advance health-  
20 care directive or disqualification of the agent or default surrogate, as soon as reasonably feasible,  
21 shall communicate the revocation or disqualification to a responsible health-care professional.

## 22 **Comment**

23 Once an individual begins to act as an agent or default surrogate, they assume a fiduciary duty to  
24 the individual for whom they are making or purporting to make a health-care decision. This

1 means that the agent or default surrogate must exercise reasonable care, diligence, and prudence  
2 in acting on behalf of that individual.

3  
4 Subsections (b), (c) and (d) provide guidance as to the factors to be considered when making a  
5 health-care decision under this Act.

6  
7 In subsection (b), the agent or default surrogate is instructed to make the decision the individual  
8 would have made if able. This approach is often referred to as a “substituted judgment”  
9 standard, in that the surrogate is substituting the preferences of the individual for the surrogate’s  
10 own preferences, which might be different. Notably, the preferences need not have been  
11 expressed exclusively prior to the onset of lack of capacity. Contemporaneous expressions may  
12 also be considered.

13  
14 Subsections (c) and (d) allows an agent or default surrogate who does not know and cannot  
15 reasonably ascertain an individual’s preferences, to act in the individual’s interest. It then spells  
16 out factors to be taken into account in determining an individual’s best interest. The emphasis is  
17 on considering the individual’s contemporaneous expressions and values.

18  
19 Subsection (e) imposes a duty on an agent or default surrogate who is informed or a revocation  
20 or disqualification to promptly communicate it to a responsible health-care professional.

## 21 22 **Section 18. Powers of Agent and Default Surrogate**

23 (a) Except as provided in subsection (c), the power of an agent or default surrogate  
24 commences when the individual is found under Section 4(b) or determined by a court to lack  
25 capacity to make a health-care decision. The power ceases if the individual later is found or  
26 determined to have capacity to make a health-care decision, or the individual objects under  
27 Section 5(c) to the finding of lack of capacity under Section 4(b). If the power ceases because  
28 the individual objects under Section 5(c), the power resumes if the finding of lack of capacity is  
29 confirmed under Section 5(d)(5) or a court later determines that the individual lacks capacity to  
30 make a health-care decision.

31 (b) An agent or default surrogate may request, receive, examine, copy, and consent to the  
32 disclosure of, medical and other health-care information about the individual if the individual  
33 would have the right to request, receive, examine, copy, or disclose the information.

34 (c) A power of attorney for health care may provide that the power of an agent under

subsection (b) commences on appointment.

(d) If no other person is authorized to do so, an agent or default surrogate may apply for public or private health insurance and benefits on behalf of the individual. An agent or default surrogate who may apply for insurance and benefits does not, solely by reason of the power, have a duty to apply for the insurance or benefits.

(e) An agent or default surrogate has the following powers only if specifically authorized by the individual in an advance health-care directive in a record:

(1) consent to voluntary admission of the individual to a facility for mental health treatment for a maximum of the number of days specified in the directive or [insert the number of days a guardian may commit an adult subject to guardianship without using the state's involuntary commitment procedure], whichever is less; and

(2) consent to placement of the individual in a nursing home if the placement is intended to be for more than [100] days, even if:

(A) an alternative living arrangement is reasonably feasible;

(B) the individual objects to the placement; and

(C) the individual is not terminally ill.

### **Comment**

This Section governs the general powers of an agent or default surrogate. It also allows for additional powers to be explicitly granted to an agent.

An agent under a power of attorney for health care or a default surrogate is not authorized to make decisions for an individual unless the individual lacks capacity to make those decisions for themselves. Thus, the power to consent to or refuse to consent to the provision of health care can be said to be “springing.” The fact that the power is not immediately effective, however, does not mean that the individual with capacity cannot choose to defer to the agent’s judgment in making decisions. To the contrary, an individual with capacity faced with a health-care decision could instruct a health-care professional to provide the care the agent thinks best in the particular situation.

1 The power of an agent to obtain and disclose the individual's health-care information, by  
2 contrast, can commence upon appointment if the individual has so specified in an advance  
3 directive. The rationale for allowing immediate powers in this limited context is two-fold. First,  
4 making the power immediately effective allows an agent to obtain information that may be  
5 needed to determine if they should act as agent (e.g., if the person lacks capacity). Second, many  
6 people with capacity may wish to be supported by their agent in making decisions, even if they  
7 are ultimately making those decisions themselves. Agents will be better able to provide this type  
8 of decision-making support if they have the power to obtain and, where appropriate, share  
9 information.

10  
11 Subsection (d) allows the surrogate to apply for health care benefits if no other person has  
12 authority to do so. This is a limited power and does not give the surrogate the power to do all  
13 things that might be necessary to establish eligibility for benefits. For example, it does not give  
14 the surrogate the power to spend-down assets to accelerate eligibility for Medicaid or other  
15 means-tested benefits. Subsection (e), moreover, merely permits the surrogate to apply for  
16 benefits; it does not create any duty for the surrogate to do so.

17  
18 Subsection (e) sets forth powers (other than the power to immediately access and disclose  
19 records) that an agent has if explicitly granted by the terms of the power of attorney for health  
20 care.

## 21 22 **Section 19. Limitation on Powers**

23 (a) If an individual has a long-term disability requiring routine treatment by artificial  
24 nutrition, hydration, or mechanical ventilation and a history of using the treatment without  
25 objection, an agent or default surrogate may not consent to withdrawal of the treatment unless:

26 (1) the treatment is not necessary to sustain the individual's life or maintain the  
27 individual's well-being;

28 (2) the individual has expressly authorized the withdrawal in a health-care  
29 instruction that has not been revoked; or

30 (3) the individual has experienced a major reduction in health or functional ability  
31 from which the individual is not expected to recover, even with other appropriate treatment, and  
32 the individual has not:

33 (A) given a direction inconsistent with withdrawal; or

34 (B) communicated, by verbal or nonverbal expression, a desire for

1 artificial nutrition, hydration, or mechanical ventilation.

2 (b) A default surrogate may not make a health-care decision if, under other law of this  
3 state, the decision:

4 (1) may not be made by a guardian; or

5 (2) may be made by a guardian only if the court appointing the guardian  
6 specifically authorizes the guardian to make the decision.

#### 7 **Comment**

8 The limitation on the surrogate's authority in subsection (a) recognizes that the use of artificial  
9 nutrition, hydration, and mechanical ventilation can be routine health care for some individuals  
10 with disabilities.

11  
12 Subsection (b) denies a default surrogate the power to make a health-care decision if, under a  
13 state's other law, a guardian would be prohibited from making that decision or would only be  
14 able to make that decision with specific court authorization. This provision is designed to  
15 prevent the default surrogate option from becoming an end-run around protections for  
16 individuals with disabilities that can be found in state's guardianship laws. For example, if a  
17 state prohibits a guardian from consenting to sterilization of an individual without prior court  
18 approval, subsection (b) would deny a default surrogate the power to consent to sterilization.  
19 Thus, sterilization of an individual who lacks the ability to consent to it, and who has not  
20 themselves authorized that procedure by creating an advance directive, would only be legally  
21 permitted if court approval was obtained. One effect of subsection (b) may be to effectively  
22 require that a guardian be appointed, or a court order in lieu of guardianship (such as those  
23 authorized under Article 5 of the Guardianship Act) to be granted, before certain types of health  
24 care can be provided to an individual who has not appointed an agent.

#### 25 26 **Section 20. Co-Agents and Alternate Agent**

27 (a) An individual in a power of attorney for health care may appoint multiple individuals  
28 to act as co-agents. Unless the power of attorney provides otherwise, each co-agent may exercise  
29 independent authority.

30 (b) An individual in a power of attorney for health care may appoint multiple individuals  
31 to act as alternate agents if an agent resigns, dies, becomes disqualified, is not reasonably  
32 available, or otherwise is unwilling or unable to act as agent.



(c) Unless the power of attorney provides otherwise, an alternate agent has the same authority as the original agent:

(1) at any time the original agent is not reasonably available or is otherwise unwilling or unable to act, for the duration of the unavailability or inability to act; or

(2) if the original agent and all other predecessor agents have resigned, died, or are disqualified from acting as agent.

#### **Comment**

This section allows an individual to appoint more than one individual to serve as an agent. Where co-agents are appointed, subsection (a) establishes a default rule that each agent may act separately. An individual can opt out of this default by stating a different rule in the power of attorney for health care that appoints the co-agents. Thus, an individual naming co-agents could lawfully require co-agents to reach consensus as to any health care decision or could stipulate that the views of the majority of individuals appointed as co-agents govern.

### **Section 21. Duties of Health-Care Professional, Responsible Health-Care Professional, and Health-Care Institution**

(a) A responsible health-care professional who is aware that an individual has been found or determined to lack capacity to make a decision shall make a reasonable effort to determine if the individual has a surrogate.

(b) If possible before implementing a health-care decision made by a surrogate, a responsible health-care professional as soon as reasonably feasible shall communicate to the individual the decision made and the identity of the person making the decision.

(c) A responsible health-care professional who makes or is informed of a finding or determination that an individual lacks capacity to make a health-care decision or no longer lacks capacity, or that other circumstances exist that affect a health-care instruction or the authority of a surrogate, as soon as reasonably feasible shall:

(1) document the finding, determination, or circumstance in the individual's

1 medical record; and

2 (2) if possible, communicate to the individual and the individual's surrogate the  
3 finding, determination, or circumstance and that the individual may object under Section 5(c) to  
4 a finding under Section 4(b).

5 (d) A responsible health-care professional who is informed that an individual has created  
6 or revoked an advance health-care directive, or that a surrogate for an individual has been  
7 appointed, designated, or disqualified, shall:

8 (1) document the information as soon as reasonably feasible in the individual's  
9 medical record; and

10 (2) if evidence of the directive, revocation, appointment, designation, or  
11 disqualification is in a record, request a copy and, on receipt, cause the copy to be included in the  
12 individual's medical record.

13 (e) Except as provided in subsections (f) and (h), a health-care professional or health-care  
14 institution providing health care to an individual shall comply with:

15 (1) a health-care instruction given by the individual regarding the individual's  
16 health care;

17 (2) a reasonable interpretation by the individual's surrogate of an instruction given  
18 by the individual; and

19 (3) a health-care decision for the individual made by the individual's surrogate to  
20 the same extent as if the decision had been made by the individual at a time when the individual  
21 had capacity.

22 (f) A health-care professional or a health-care institution may refuse to provide care  
23 consistent with a health-care instruction or health-care decision if:

1 (1) the instruction or decision is contrary to a policy of the health-care institution  
2 providing health care to the individual that is based expressly on reasons of conscience and the  
3 policy was timely communicated to the individual or to the individual's surrogate;

4 (2) the care would require care or treatment that is not available to the  
5 professional or institution; or

6 (3) compliance would:

7 (A) require the professional or institution to provide care that is contrary to  
8 generally accepted health-care standards applicable to the professional or institution; or

9 (B) violate a court order or other law.

10 (g) A health-care professional or health-care institution that refuses care under subsection  
11 (f) shall:

12 (1) as soon as reasonably feasible, inform the individual, if possible, and the  
13 individual's surrogate of the refusal;

14 (2) immediately make a reasonable effort to transfer the individual to another  
15 health-care professional or health-care institution that is willing to comply with the instruction or  
16 decision; and:

17 (A) if care is refused under subsection (f)(1) or (2), provide life-sustaining  
18 care and care needed to keep or make the individual comfortable, consistent with accepted  
19 medical standards to the extent feasible, until a transfer is made; or

20 (B) if care is refused under subsection (f)(3), provide life-sustaining care  
21 and care needed to keep or make the individual comfortable, consistent with accepted medical  
22 standards, until a transfer is made or, if the professional or institution reasonably believes that a  
23 transfer cannot be made, for at least [10] days after the refusal.

## Comment

This Section discusses health-care professionals' and institutions' obligations.

Subsection (a) requires a responsible health-care professional who knows that a patient has been found or determined to lack capacity to make a health-care decision to make a reasonable effort to figure out if the patient has a surrogate. This increases the likelihood that decisions will be made by the agent chosen by the patient, if the patient has appointed an agent.

Subsection (b) further reinforces the Act's respect for patient self-determination by requiring a responsible health-care professional, if possible, to promptly communicate to a patient, prior to implementation, a health-care decision made for the patient and the identity of the person making the decision.

Subsection (c) requires a responsible health-care professional who is aware of certain information related to an actual or potential change in capacity to document that knowledge and share the information with the individual and the individual's surrogate if possible. Where a finding has been made that the individual no longer lacks capacity, this helps make sure that surrogates are aware that their authority has ceased. Similarly, it is important where a finding has been made that the individual lacks capacity so that the individual can object to that finding.

Subsection (d), which requires a responsible health-care professional to reflect the existence or revocation of an advance directive in a patient's medical record, is designed to reduce the risk that a health-care professional will fail to comply with an advance directive that is in effect, or will rely on an advance directive that is no longer valid.

Subsection (e) requires health-care professionals and institutions to comply, absent an exception in subsection (f), with a patient's individual instruction and with a reasonable interpretation of that instruction made by a person then authorized to make health-care decisions for the patient. A health-care professional or institution must also comply with a health-care decision made by a person then authorized to make health-care decisions for the patient to the same extent as if the decision had been made by the patient while having capacity. These requirements help to protect the individual's right to self-determination and effectuate the surrogate decision making authorized by the Act.

Section (f) sets forth limited situations in which a responsible health-care professional may lawfully refuse to comply with a health-care instruction or decision. Failure to comply is permitted if the instruction or decision is contrary to a policy of the health-care institution providing health care to the individual which is expressly based on reasons of conscience and the policy was timely communicated to the individual who gave the instruction or about whom the decision was to be made or to the individual's surrogate. It is also permitted if compliance would require the provision of care that is contrary to accepted medical standards. This would include care that is medically ineffective. In addition, it is permitted if compliance would require the use of a form of care or treatment that is not available to the professional or institution, or violate a court order or other law.

Subsections (g) and (h) set forth obligations for a health-care professional or institution that declines to comply with an instruction or health-care decision. Regardless of the reason for the refusal, a health care-professional or institution must promptly communicate the refusal to the patient, if possible, and to any person then authorized to make health-care decisions for the patient. What more is required depends on the reason for the refusal. If the refusal is under (f)(1) or (2)—the provisions governing refusals for reasons particular to the provider—the professional or institution must immediately make all reasonable efforts to effect the transfer of the patient to another health-care professional or health-care institution that is willing to comply with the instruction or decision. They must also provide life-sustaining care and comfort care consistent with accepted medical standards until transfer is made. If the refusal is under (f)(3), by contrast, these obligations are time-limited.

## **Section 22. Decision by Guardian**

(a) A guardian may refuse to comply with or revoke the individual's advance health-care directive only if the court appointing the guardian expressly orders the noncompliance or revocation.

(b) Unless a court orders otherwise, a health-care decision made by an agent appointed by an individual subject to guardianship prevails over a decision of the guardian appointed for the individual.

***Legislative Note:*** *If necessary to avoid a conflict, a state should amend its guardianship laws.*

## **Comment**

This Section is consistent with the Guardianship Act. It governs the relationship between guardian and health care agent.

## **Section 23. Immunity**

(a) A health-care professional or health-care institution acting in good faith is not subject to civil or criminal liability or to discipline for unprofessional conduct for:

(1) complying with a health-care decision made for an individual by another person if compliance is based on a reasonable belief that the person has authority to make the decision, including a decision to withhold or withdraw health care;

(2) refusing to comply with a health-care decision made for an individual by

another person if the refusal is based on a reasonable belief that the person lacked authority or capacity to make the decision;

(3) complying with an advance health-care directive based on a reasonable belief that the directive is valid;

(4) refusing to comply with an advance health-care directive based on a reasonable belief that the directive is not valid, including a reasonable belief that the advance directive was not made by the individual or after its creation was substantively altered by a person other than the individual who created it; [or]

(5) determining that an individual who otherwise might be authorized to act as an agent or default surrogate is not reasonably available[; or]

(6) complying with an individual's direction under Section 9(d)].

(b) An agent, default surrogate, or individual with a reasonable belief that the individual is an agent or a default surrogate is not subject to civil or criminal liability or to discipline for unprofessional conduct for a health-care decision made in a good faith effort to comply with Section 17.

**Legislative Note:** A state that includes Section 9(d) and (e) to include an option for a Ulysses type clause in an advance mental health-care directive should also include subsection (a)(6).

### Comment

This Section provides immunities for providers, agents, and default surrogates who undertake or fail to take certain actions covered by this Act. It does not provide immunity from liability that stems from allegedly deficient health care treatment.

Subsection (a) provides immunity to a health-care professional who complies with an instruction of an individual who lacks authority to provide that instruction if the professional is acting in good faith and reasonably believes the person has such authority. Similarly, it provides immunity to a professional acting in good faith who refuses to comply with an instruction by an individual who does have such authority if the professional reasonably believes that individual does not have authority to make it, or that the directive was not made by the individual or was subsequently altered by someone other than the individual. Thus, a provider who reasonably and

1 in good faith believes that an advance directive has been tampered with or is a fake, may refuse  
2 to comply with it. It also provides immunity to a professional who, acting in good faith,  
3 reasonably determines that an agent or would-be default surrogate is not willing or able to  
4 assume the duties of an agent or default surrogate, and who therefore looks to someone else to  
5 make decisions for a patient. This includes a determination made under Section 12(e).

6  
7 Subsection (b) provides immunity to agents and default surrogates who make health-care  
8 decisions in good faith. The underlying health-care decision need not be reasonable in order for  
9 immunity to apply. This allows the agent or default surrogate confidently to make decisions  
10 consistent with the individual's wishes, even if those decisions might not appear objectively  
11 reasonable to others.

12  
13 Subsection (b) also protects from liability individuals who mistakenly but reasonably believe  
14 they have the authority to make a health-care decision for a patient. For example, an individual  
15 who has been designated as agent in a power of attorney for health care might assume authority  
16 unaware that the power has been revoked. Or a family member might assume authority to act as  
17 a default surrogate unaware that a family member having a higher priority was reasonably  
18 available and authorized to act.

## 19 20 **Section 24. Prohibited Conduct; Damages**

21 (a) A person may not:

22 (1) intentionally falsify, in whole or in part, an advance health-care directive;

23 (2) intentionally conceal, deface, obliterate, or delete an advance health-care  
24 directive or revocation of an advance health-care directive without consent of the individual who  
25 created or revoked the directive;

26 (3) coerce or fraudulently induce an individual to create, revoke, or refrain from  
27 creating or revoking an advance health-care directive;

28 (4) intentionally withhold knowledge of the existence or revocation of an advance  
29 health-care directive from a responsible health-care professional or health-care institution  
30 providing health care to the individual who created or revoked the directive; or

31 (5) require or prohibit the creation or revocation of an advance health-care  
32 directive as a condition for providing health care.

33 (b) An individual who is the subject of conduct prohibited under subsection (a), or the

individual's estate, has a cause of action against a person that violates subsection (a) for statutory damages of \$[25,000] or actual damages resulting from the violation, whichever is greater.

(c) An individual who makes a health-care instruction, or the individual's estate, has a cause of action against a health-care professional or health-care care institution that intentionally violates Section 21 for statutory damages of \$[50,000] or actual damages resulting from the violation, whichever is greater.

(d) In an action under this section, a prevailing plaintiff may recover reasonable attorney's fees, court costs, and other reasonable litigation expenses.

(e) A cause of action or remedy under this section is in addition to any cause of action or remedy under other law.

#### **Comment**

This Section prohibits certain conduct that would undermine the purpose of this Act. Unlike the 1993 Act, it explicitly provides a private right of action, thus enabling the provisions of this Act to be directly enforced by the individual or the individual's estate.

Subsection (a) details prohibited conduct. Among other things, it prohibits coercing or fraudulently inducing an individual to create, revoke, or refrain from creating or revoking an advance health-care directive. It does not explicitly prohibit the use of "undue influence" as what constitutes "undue influence" is highly subjective and has been heartily criticized for enabling collateral attacks on individuals in non-traditional relationships or who make non-normative choices. See, e.g., Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should be Abolished*, 8 U. KAN. L. REV. 245 (2010) (summarizing prior critiques of the doctrine and vigorously arguing that "As a matter of doctrine, undue influence fails to meet any standard of clarity, fairness, or predictability that a legal doctrine should satisfy"). However, much of the behavior that might be categorized as "undue influence" is captured by coercion and fraud. Subsection (a)(4), forbidding a health-care professional or institution to condition provision of health care on execution, non-execution, or revocation of an advance health-care directive, tracks the provisions of the federal Patient Self-Determination Act (42 U.S.C. 1395cc(f)(1)(C) (Medicare); 42 U.S.C. § 1396a(w)(1)(C) (Medicaid).

The legislature of an enacting state will have to determine the amount of damages which should be authorized in order to encourage the level of potential private enforcement actions necessary to effect compliance with the obligations and responsibilities imposed by the Act. The damages provided by this section do not supersede but are in addition to remedies available under other law.



1 As set forth in Subsection (e), this Act does not limit any claims that would exist under other law  
2 of this state, including tort liability for medical malpractice. Thus, although subsection (b) only  
3 provides for actual damages or statutory damages, punitive damages might be available under  
4 other state law.

## 5 6 **Section 25. Effect of Copy; Certification of Physical Copy**

7 (a) A physical or electronic copy of an advance health-care directive, revocation of an  
8 advance health-care directive, or appointment, designation, or disqualification of a surrogate has  
9 the same effect as the original.

10 (b) An individual may create a certified physical copy of an advance health-care directive  
11 or revocation of an advance health-care directive that is in electronic form by affirming under  
12 penalty of perjury that the physical copy is a complete and accurate copy of the directive or  
13 revocation.

## 14 **Comment**

15  
16 The need to rely on an advance health-care directive may arise when the original is not readily  
17 accessible. For example, an individual may be receiving care from several health-care  
18 professionals or may be receiving care at a location distant from that where the original is kept.  
19 To facilitate prompt and informed decision making, this Section provides that a copy of a health-  
20 care direction, revocation of a health-care direction, or designation or disqualification of a  
21 surrogate in a record has the same effect as the original. The Section also recognizes the growing  
22 use of documents in electronic form.

## 23 24 **Section 26. Construction**

25 (a) This [act] does not authorize mercy killing, assisted suicide, or euthanasia.

26 (b) This [act] does not affect other law of this state governing treatment for mental illness  
27 of an individual involuntarily committed to a [mental health-care institution] under [cite to state  
28 law governing involuntary commitments].

29 (c) Death of an individual caused by withholding or withdrawing health care in  
30 accordance with this [act] does not constitute a suicide or homicide or legally impair or  
31 invalidate a policy of insurance or an annuity providing a death benefit, notwithstanding any

1 term of the policy or annuity.

2 (d) This [act] does not create a presumption concerning the intention of an individual who  
3 has not created or who has revoked an advance health-care directive.

4 **Legislative Note:** *In subsection (b), include in the brackets the name for a mental health facility*  
5 *used in the state's law governing involuntary commitments and cite to the law.*

6  
7 **Comment**  
8

9 In the interest of avoiding all confusion, this Section clearly states what the Act does not do. It  
10 also states that death caused by withholding or withdrawing health care in accordance with the  
11 Act does not constitute suicide or homicide, nor does it impair or invalidate an insurance policy  
12 or annuity providing a death benefit.  
13

14 **Section 27. Judicial Relief**

15 (a) On petition of an individual, the individual's surrogate, a health-care professional or  
16 health-care institution providing health care to the individual, or a person interested in the  
17 welfare of the individual, the court may:

18 (1) enjoin implementation of a health-care decision made by an agent or default  
19 surrogate on behalf of the individual, on a finding that the decision is inconsistent with Section  
20 17 or 18;

21 (2) enjoin an agent from making a health-care decision for the individual, on a  
22 finding that the individual's appointment of the agent has been revoked or the agent:

23 (A) is disqualified under Section 8(c);

24 (B) is unable or unwilling to comply with Section 17; or

25 (C) poses a danger to the individual;

26 (3) enjoin another individual from acting as a default surrogate, on a finding that  
27 the other individual acting as a default surrogate did not comply with Section 12 or the other  
28 individual:

1 (A) is disqualified under Section 14;

2 (B) is unable or unwilling to comply with Section 17; or

3 (C) poses a danger to the first individual;

4 (4) order implementation of a health-care decision made:

5 (A) by and for the individual; or

6 (B) by an agent or default surrogate who is acting in compliance with the  
7 powers and duties of the agent or default surrogate.

8 (b) In this [act], advocacy for the withholding or withdrawal of health care or mental  
9 health care from an individual is not itself an indication that an agent or default surrogate, or a  
10 potential agent or default surrogate, poses a danger to the individual.

11 (c) A proceeding under this section is governed by [cite to the state's rules of procedure or  
12 statutory provisions governing expedited proceedings and proceedings affecting persons  
13 determined to lack capacity].

#### 14 **Comment**

15  
16 While the provisions of the Act are in general to be effectuated without litigation, situations will  
17 arise where judicial proceedings may be appropriate. For example, a court may be called upon to  
18 determine whether a particular person has authority to act as an agent or default surrogate or  
19 whether an agent's or default surrogate's purported decision on behalf of a patient is consistent  
20 with the agent's or default surrogate's underlying duties or powers. Decisions made by  
21 guardians, however, are outside of the scope of this Act and as a result are excluded from the  
22 provisions of this Section. A state's guardianship laws will govern who has authority to  
23 challenge the decision of a guardian.

24  
25 A court acting under this Section may grant only equitable relief. Other adequate avenues exist  
26 for those who wish to pursue money damages. The class of potential petitioners is limited to  
27 those with a direct interest in an individual's health care.

#### 28 29 **Section 28. Transitional and Saving Provisions; Interpretation**

30 (a) This [act] applies to an advance health-care directive created before, on, or after [the  
31 effective date of this [act]].

1 (b) An advance health-care directive created before [the effective date of this [act]] is  
2 valid if it complies with this [act] or complied at the time of creation with the law of the state in  
3 which it was created.

4 (c) This [act] does not affect the validity or effect of an act done before [the effective date  
5 of this [act]].

6 (d) An individual who assumed authority to act as default surrogate before [the effective  
7 date of this [act]] may continue to act as default surrogate until the individual for whom the  
8 default surrogate is acting no longer lacks capacity or the default surrogate is disqualified,  
9 whichever occurs first.

10 (e) An advance health-care directive created before, on, or after [the effective date of this  
11 [act]] must be interpreted in accordance with the law of this state, excluding the state's choice-  
12 of-law rules, at the time the directive is implemented.

### 13 **Comment**

14  
15 An advance directive created before this Act became effective in a state is valid if it satisfies the  
16 requirements for validity in existence at the time it was created or if it satisfies the requirements  
17 for validity under this Act. The contents of the advance directive, including the powers and  
18 duties of agents appointed under the advance directive, by contrast, shall be interpreted  
19 according to the law after the date of enactment of this Act.

### 20 21 **Section 29. Uniformity of Application and Construction**

22 In applying and construing this uniform act, a court shall consider the promotion of  
23 uniformity of the law among jurisdictions that enact it.

### 24 **[Section 30. Severability]**

25 If a provision of this [act] or its application to a person or circumstance is held invalid,  
26 the invalidity does not affect another provision or application that can be given effect without the  
27 invalid provision.]

1 **Legislative Note:** *Include this section only if the state lacks a general severability statute or a*  
2 *decision by the highest court of the state stating a general rule of severability.*

3  
4 **Section 31. Repeals; Conforming Amendments**

5 (a) [The Uniform Health-Care Decisions Act] is repealed.

6 (b) . . .

7 **Legislative Note:** *A state that has enacted the Uniform Health-Care Decisions Act or*  
8 *comparable statute should repeal it.*

9  
10 *A state should examine its statutes to determine whether repeals or conforming revisions are*  
11 *required by Section 8 {Power of Attorney for Health Care} and other provisions of this act*  
12 *relating to health-care powers of attorney, Section 22 {Decision by Guardian} and other provisions*  
13 *of this act relating to guardians.*

14  
15 **Section 32. Effective Date**

16 This [act] takes effect . . .