

D R A F T
FOR DISCUSSION ONLY

INTERJURISDICTIONAL RECOGNITION OF ADVANCE PLANNING DOCUMENTS

NATIONAL CONFERENCE OF COMMISSIONERS ON
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INTERJURISDICTIONAL RECOGNITION OF ADVANCE PLANNING DOCUMENTS ACT

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INTERJURISDICTIONAL RECOGNITION OF ADVANCE PLANNING DOCUMENTS ACT

Prefatory Note

Statutes in all United States jurisdictions as well as a number in other countries permit individuals to delegate substitute decision-making authority for property and health care. The majority of these statutes, however, do not have portability provisions to recognize the validity of advance planning documents created in another jurisdiction. Lack of interjurisdictional recognition of advance planning documents defeats the purpose of a substitute decision-making plan. Once an individual has lost capacity, rejection of an advance planning document often results in guardianship, which burdens judicial resources and undermines the individual's self-determination interests. The purpose of the Uniform Interjurisdictional Recognition of Advance Planning Documents Act (the "Act") is to promote the portability and usefulness of advance planning documents.

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

1 **INTERJURISDICTIONAL RECOGNITION OF ADVANCE PLANNING DOCUMENTS ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform
3 Interjurisdictional Recognition of Advance Planning Documents Act.

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

5 (1) “Advance planning document” means a writing or other record that grants authority
6 to an agent to act in the place of the principal with respect to property or health care.

7 (2) “Agent” means a person granted authority to act for an individual under an advance
8 planning document, whether denominated an agent, attorney-in-fact, proxy, representative, or
9 other title. The term includes an original agent, coagent, successor agent, and a person to which
10 an agent’s authority is delegated.

11 (3) “Good faith” means honesty in fact.

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

14 (5) “Person” means an individual, corporation, business trust, estate, trust, partnership,
15 limited liability company, association, joint venture, public corporation, government or
16 governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

17 (6) “Principal” means an individual who grants authority to an agent in an advance
18 planning document.

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

21 (8) “State” means a state of the United States, the District of Columbia, Puerto Rico, the
22 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of
23 the United States.

SECTION 3. VALIDITY OF ADVANCE PLANNING DOCUMENT.

(a) An advance planning document executed by the principal other than in this state [province] is valid in this state [province] if, when the advance planning document was executed, the execution complied with the law of the jurisdiction that determines the meaning and effect of the advance planning document pursuant to Section 4.

(b) Except as otherwise provided by statute other than this [act], a photocopy or electronically transmitted copy of an original advance planning document has the same effect as the original.

Comment

Section 3 makes clear that an advance planning document created in another jurisdiction will be recognized as valid if the execution of the document complies with the law of the jurisdiction that controls the meaning and effect of the document (*see* Section 4). While the effect of this section is to recognize the validity of an advance planning document created under other law, it does not abrogate the traditional grounds for contesting the validity of execution such as forgery, fraud, or undue influence.

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

SECTION 4. MEANING AND EFFECT OF ADVANCE PLANNING

DOCUMENT. The meaning and effect of an advance planning document is determined by the law of the jurisdiction indicated in the advance planning document and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the advance planning document was executed.

Comment

This section provides that the meaning and effect of an advance planning document is to be determined by the law under which it was created. Section 4 recognizes that an advance

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

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

31 **SECTION 5. ACCEPTANCE OF AND RELIANCE UPON ADVANCE** 32 **PLANNING DOCUMENT.**

33 (a) Except as otherwise provided by statute other than this [act], a person that in good
34 faith accepts an advance planning document without actual knowledge that the advance planning
35 document is void, invalid, or terminated, or that the purported agent’s authority is void, invalid,
36 or terminated, may rely upon the advance planning document as if the advance planning
37 document were genuine, valid and still in effect and the agent’s authority were genuine, valid
38 and still in effect.

1 (b) A person that is asked to accept an advance planning document may request, and rely
2 upon, without further investigation:

3 (1) an agent's certification under penalty of perjury of any factual matter
4 concerning the principal, agent, or advance planning document;

5 (2) an English translation of the advance planning document if the advance
6 planning document contains, in whole or in part, language other than English; and

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

10 (c) For purposes of this section and Section 6, a person that conducts activities through
11 employees is without actual knowledge of a fact relating to an advance planning document, a
12 principal, or an agent if the employee who is asked to accept the advance planning document is
13 without actual knowledge of the fact.

14 **Comment**

15 Section 5 permits a person to rely in good faith on the validity of an advance planning
16 document and the validity of the agent's authority unless the person has actual knowledge to the
17 contrary. The introductory phrase to subsection (a), "except as otherwise provided by statute
18 other than this [act]," indicates that other relevant statutory provisions, such as those in a
19 jurisdiction's power of attorney statute or health care proxy statute, may supersede those in
20 Section 5. For example, Section 119(b) of the Uniform Power of Attorney Act permits persons
21 to rely upon a presumption that the principal's signature is genuine only if the power of attorney
22 is purportedly acknowledged. *See* Unif. Power of Atty. Act § 119 cmt. (2006). Section 119(b) of
23 the UPOAA would therefore qualify Section 5 of this Act.

24
25 Absent stricter requirements emanating from other law in the jurisdiction, the Act does
26 not require a person to investigate the validity of an advance planning document or the agent's
27 authority. Further protection is provided in subsection (c) for persons that conduct activities
28 through employees. Subsection (c) states that for purposes of Section 5 and 6, a person is
29 without actual knowledge of a fact if the employee who is asked to accept the advance planning
30 document is without actual knowledge of the fact.

1 Although a person that is asked to accept an advance planning document is not required
2 to investigate the validity of the document, the person may, under subsection (b), request an
3 agent's certification of any factual matter related to the advance planning document and may
4 request an opinion of counsel as to any matter of law. If the advance planning document
5 contains, in whole or part, language other than English, an English translation may also be
6 requested. Subsection (b) recognizes that a person that is asked to accept an advance planning
7 document may be unfamiliar with the law or the language of another jurisdiction. The option to
8 request agent certification of facts related to the power of attorney may also protect an
9 incapacitated principal. An untrustworthy agent may be reluctant to provide the requested
10 certification or, if provided, the certification can serve as a record of the agent's
11 misrepresentations.

12
13 **SECTION 6. LIABILITY FOR REFUSAL TO ACCEPT ADVANCE PLANNING**
14 **DOCUMENT.**

15 (a) Except as otherwise provided in subsection (b) or by statute other than this [act], a
16 person shall timely accept an advance planning document that purportedly meets the validity
17 requirements of Section 3 and may not require an additional or different form of advance
18 planning document for authority granted in the advance planning document presented.

19 (b) A person is not required to accept an advance planning document if:

20 (1) the person is not otherwise required to engage in the requested transaction or
21 perform the requested act if dealing with the principal in the same circumstances;

22 (2) the person has actual knowledge of the termination of the agent's authority or
23 of the advance planning document;

24 (3) the person in good faith believes that the advance planning document is not
25 valid or that the agent does not have the authority to request the transaction or act;

26 (4) the person makes, or has actual knowledge that another person has made, a
27 report to the [local adult protective services office] stating a good faith belief that the principal
28 may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent
29 or a person acting for or with the agent.

(c) A person that refuses in violation of this section to accept an advance planning document is subject to:

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

Comment

As a complement to Section 5, Section 6 enumerates the bases for legitimate refusals of an advance planning document and sanctions for refusals that violate the Act. As in Section 5, the introductory phrase, "except as otherwise provided . . . by statute other than this [act]," allows a jurisdiction through other statutes to impose stricter or different requirements for accepting an advance planning document. For example, Section 120 of the Uniform Power of Attorney Act requires that a power of attorney be accepted no later than seven business days after presentation. In a jurisdiction that has adopted the UPOAA, Section 120 would supersede the provision in Section 6 that "a person shall timely accept an advance planning document."

Subsection (b) of Section 6 provides the bases upon which an advance planning document may be refused without liability. The last paragraph of subsection (b) permits refusal of an otherwise valid advance planning document if the person in good faith believes that the principal is subject to abuse by the agent or someone acting in concert with the agent (paragraph (4)). A refusal under this paragraph is protected if the person makes, or knows another person has made, a report to the governmental agency authorized to protect the welfare of the principal. This basis for refusing an otherwise valid advance planning document is also a feature of the Uniform Power of Attorney Act. *See* Unif. Power of Atty. Act § 120(b)(6) (Alternative A) (2006).

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

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

Comment

The remedies under the Act are not intended to be exclusive with respect to causes of action that may accrue in relation to an advance planning document. The Act applies to many

1 persons, individual and entity (*see* Section 2(5) (defining “person” for purposes of the Act), that
2 may serve as agents or that may be asked to accept an advance planning document. Likewise,
3 the Act applies to many subject areas over which principals may delegate property or health care
4 decision-making authority. Remedies under other laws which govern such persons and subject
5 matters should be considered by aggrieved parties in addition to remedies available under this
6 Act.

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

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

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

17 **SECTION 10. EFFECTIVE DATE.** This [act] takes effect....