

D R A F T

FOR DISCUSSION ONLY

INTERJURISDICTIONAL RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT

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ON UNIFORM STATE LAWS

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INTERJURISDICTIONAL RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT

WITH PREFATORY NOTE AND COMMENTS

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INTERJURISDICTIONAL RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT

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

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INTERJURISDICTIONAL RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT

Prefatory Note

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

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

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

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

SECTION 2. DEFINITIONS. In this [act]:

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

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

(3) “Jurisdiction” means a geographic area. The term includes a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, any territory or insular possession of the United States, and a foreign country.

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

(5) “Personal care” means care, arrangement, or service to provide an individual with shelter, food, clothing, transportation, education, recreation, or social contact.

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

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

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

SECTION 3. VALIDITY OF SUBSTITUTE DECISION-MAKING DOCUMENT.

(a) A substitute decision-making document executed by an individual outside this [state] is valid in this [state] if, when the document was executed, the execution complied with:

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

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

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

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

Comment

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

This section also provides that unless another law or administrative rule in the jurisdiction requires presentation of the original substitute decision-making document, a photocopy or electronically transmitted copy has the same effect as the original. An example of

1 another law that might require presentation of the original substitute decision-making document
2 is a jurisdiction's recording act, which often mandates presentation of the original power of
3 attorney in conjunction with the recording of documents executed by an agent. *See* Unif. Power
4 of Atty. Act § 106 cmt. (2006).

6 **SECTION 4. MEANING AND EFFECT OF SUBSTITUTE DECISION-MAKING**

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

11 **Comment**

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

27
28 This section also establishes an objective means for determining what jurisdiction's law
29 was intended to govern the substitute decision-making document. The phrase, "the law of the
30 jurisdiction indicated in the substitute decision-making document," is intentionally broad, and
31 includes any statement or reference in a substitute decision-making document that indicates an
32 individual's choice of law. Examples of an indication of jurisdiction include a reference to the
33 name of the jurisdiction in the title or body of the substitute decision-making document, citation
34 to the jurisdiction's statute, or an explicit statement that the substitute decision-making document
35 is created or executed under the laws of a particular jurisdiction. In the absence of an indication
36 of jurisdiction in the substitute decision-making document, Section 4 provides that the law of the
37 jurisdiction in which the substitute decision-making document was executed controls. The
38 distinction between "the law of the jurisdiction indicated in the substitute decision-making
39 document" and "the law of the jurisdiction in which the substitute decision-making document
40 was executed" is an important one. For example, an individual may execute in one jurisdiction a

1 power of attorney that was created and intended to be interpreted under the laws of another
2 jurisdiction. A clear indication of the jurisdiction's law that is intended to govern the meaning
3 and effect of a substitute decision-making document is therefore advisable in all substitute
4 decision-making documents.

5 6 **SECTION 5. ACCEPTANCE OF AND RELIANCE ON SUBSTITUTE**

7 **DECISION-MAKING DOCUMENT.**

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

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

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

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

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

22 **Comment**

23 Section 5 permits a person to rely in good faith on the validity of a substitute decision-
24 making document and the validity of the decision maker's authority unless the person has actual
25 knowledge to the contrary. The introductory phrase to subsection (a), "except as otherwise
26 provided by statute other than this [act]," indicates that other relevant statutory provisions, such
27 as those in a jurisdiction's power of attorney statute or health care proxy statute, may supersede
28 those in Section 5. For example, Section 119(b) of the Uniform Power of Attorney Act permits

1 persons to rely upon a presumption that an individual's signature is genuine only if the power of
2 attorney is purportedly acknowledged. *See* Unif. Power of Atty. Act § 119 cmt. (2006).

3
4 Absent stricter requirements emanating from another statute in the jurisdiction, the Act
5 does not require a person to investigate the validity of a substitute decision-making document or
6 the decision maker's authority. Although a person that is asked to accept a substitute decision-
7 making document is not required to investigate the validity of the document, the person may,
8 under subsection (b), request a decision maker's assertion of any factual matter related to the
9 substitute decision-making document and may request an opinion of counsel as to any matter of
10 law. If the substitute decision-making document contains, in whole or part, language other than
11 English, a translation may also be requested. Subsection (b) recognizes that a person that is
12 asked to accept a substitute decision-making document may be unfamiliar with the law or the
13 language of the jurisdiction intended to determine the meaning and effect of the document.

14
15 **SECTION 6. LIABILITY FOR REFUSAL TO ACCEPT SUBSTITUTE**
16 **DECISION-MAKING DOCUMENT.**

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

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

22 (1) the person has actual knowledge of the termination of the decision maker's
23 authority or the document;

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

26 (3) the person in good faith believes that the document is not valid or that the
27 decision maker does not have the authority to request the transaction or the act; or

28 (4) the person makes, or has actual knowledge that another person has made, a
29 report to the [local adult protective services office] stating a good faith belief that the individual

1 for whom decisions will be made may be subject to abuse, neglect, exploitation, or abandonment
2 by the decision maker or a person acting for or with the decision maker.

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

5 (1) a court order mandating acceptance of the document; and

6 (2) liability for reasonable attorney's fees and costs incurred in an action or
7 proceeding that mandates acceptance of the document.

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

12 **Comment**

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

28
29 Subsection (b) of Section 6 provides the bases upon which a substitute decision-making
30 document may be refused without liability. The last paragraph of subsection (b) permits refusal
31 of an otherwise valid substitute decision-making document if the person in good faith believes
32 that the individual for whom decisions will be made is subject to abuse by the decision maker or
33 someone acting in concert with the decision maker (paragraph (5)). A refusal under this
34 paragraph is protected if the person makes, or knows another person has made, a report to the
35 governmental agency authorized to protect the welfare of the individual for whom decisions will
36 be made. This basis for refusing an otherwise valid substitute decision-making document is also
37 a feature of the Uniform Power of Attorney Act. *See* Unif. Power of Atty. Act § 120(b)(6)
38 (Alternative A) (2006).

1 Subsection (c) provides that a person that refuses a substitute decision-making document
2 in violation of Section 6 is subject to a court order mandating acceptance and to reasonable
3 attorney’s fees and costs incurred in the action to mandate acceptance. An unreasonable refusal
4 may be subject to other remedies provided by other law. *See* Section 7 Comment.
5

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

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

12 **Comment**

13 The remedies under the Act are not intended to be exclusive with respect to causes of
14 action that may accrue in relation to a substitute decision-making document. The Act applies to
15 many persons, individual and entity (*see* Section 2 (defining “person” for purposes of the Act)),
16 that may serve as decision makers or that may be asked to accept a substitute decision-making
17 document. Likewise, the Act applies to many subject areas over which individuals may delegate
18 property or health care decision-making authority. Remedies under other laws which govern
19 such persons and subject matters should be considered by aggrieved parties in addition to
20 remedies available under this Act.
21

22 **SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
23 applying and construing this uniform act, consideration must be given to the need to promote
24 uniformity of the law with respect to its subject matter among the [states] that enact it.

25 ***Legislative Note:*** *The brackets in this section indicate where an enacting jurisdiction should*
26 *insert the appropriate designation for the jurisdiction.*
27

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

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

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