

UNIFORM RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM 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 a substitute decision-making document created in another jurisdiction, nor do many have provisions to protect good faith reliance on a substitute decision-making document created within the jurisdiction. Lack of recognition and acceptance of a substitute decision-making document 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 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 (the "ULCC"), undertaken to promote the portability and usefulness of substitute decision-making documents. The ULCC version of the Act closely tracks the Act's substantive provisions with variations as needed to reflect differences in style and terminology. The ULCC version of the Act was approved at the Annual Meeting of the ULCC in August 2014.

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

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 without regard to whether the document was created under the law of another jurisdiction or the law of the enacting jurisdiction. 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 that do not adequately address portability and recognition of substitute decision-making documents.

UNIFORM RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT

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

SECTION 2. DEFINITIONS. In this [act]:

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

(2) “Good faith” means honesty in fact.

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

(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 an arrangement or service to provide an individual shelter, food, clothing, transportation, education, recreation, social contact, or assistance with the activities of daily living.

(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 created by an individual to authorize a decision maker to act for the individual with respect to property, health care, or

personal care.

Comment

The definitions in Section 2 explain the meaning of terms used in the Act and should not be read to define the meaning of terms used in a substitute decision-making document. The meaning of a term used in a substitute decision-making document is determined by the law of the jurisdiction under which the document was created. *See* Section 4 Comment.

The definitions of “health care,” “personal care,” and “property” in this section are intended to be read in their broadest sense to include any substitute decision-making document created by an individual to authorize decisions with respect to that individual’s property, health care, or personal care. The scope of the decision-maker’s authority under such a document, however, is to be determined by the law under which the document was created. For example, authority with respect to “health care” may include authority to withhold or withdraw life prolonging procedures in some jurisdictions and not in others. *See* Charles P. Sabatino, *The Evolution of Health Care Advance Planning Law and Policy*, 88 Milbank Q. 211, 220-221 (2010). *See, e.g.*, Ind. Code § 30-5-5-17 (West 2009) (requiring specific language to authorize a decision maker to request withdrawal or withholding of health care).

SECTION 3. VALIDITY OF SUBSTITUTE DECISION-MAKING DOCUMENT.

(a) A substitute decision-making document for property executed outside this state is valid in this state if, when the document was executed, the execution complied with the law of the jurisdiction indicated in the document or, if no jurisdiction is indicated, the law of the jurisdiction in which the document was executed.

(b) A substitute decision-making document for health care or personal care executed 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 document or, if no jurisdiction is indicated, the law of the jurisdiction in which the document was executed; or

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

(c) Except as otherwise provided by law of this state other than this [act], a photocopy or electronically transmitted copy of an original substitute decision-making document has the same

effect as the original.

Legislative Note: *The enacting jurisdiction should examine 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

This section specifies the requirements for recognition of the formal validity of a substitute decision-making document executed in another jurisdiction. The meaning and effect of the document is determined as provided in Section 4.

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

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

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

This section also provides that unless another law 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. The term “law” is to be read broadly to include statutes, the common law, as well as court and administrative rules. An example of other law that might require presentation of the original substitute decision-making document is the mandate in most jurisdictions for presentation of an original power of attorney in conjunction with the recording of documents executed by an agent. *See* Unif. Power of Atty. Act § 106 cmt. (2006).

SECTION 4. MEANING AND EFFECT OF SUBSTITUTE DECISION-MAKING DOCUMENT. The meaning and effect of a substitute decision-making document and the

authority of the decision maker are determined by the law of the jurisdiction indicated in the document or, if no jurisdiction is indicated, the law of the jurisdiction in which the document was executed.

Comment

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

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

SECTION 5. RELIANCE ON SUBSTITUTE DECISION-MAKING DOCUMENT.

(a) [Except as otherwise provided by [insert a cross-reference to statutes in the enacting

jurisdiction, if any, that have different requirements for protected acceptance of a substitute decision-making document], a) [A] person that in good faith accepts a substitute decision-making document without actual knowledge that the document is void, invalid, or terminated, or that the authority of the purported decision maker is void, invalid, or terminated, may assume without inquiry that the document is genuine, valid, and still in effect and that the decision maker's authority is genuine, valid, and still in effect.

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

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

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

(3) an opinion of counsel regarding any matter of law concerning the document if the person provides in a record the reason for the request.

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

Comment

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

those in Section 5. For example, Section 119(b) of the Uniform Power of Attorney Act permits persons to rely on a presumption that an individual's signature is genuine only if the power of attorney is purportedly acknowledged. *See* Unif. Power of Atty. Act § 119 cmt. (2006).

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

SECTION 6. OBLIGATION TO ACCEPT SUBSTITUTE DECISION-MAKING DOCUMENT.

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

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

(1) the person otherwise would not be required in the same circumstances to act if requested by the individual who executed the document;

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

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

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

maker does not have the authority to request a particular transaction or action; or

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

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

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

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

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

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

Comment

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

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

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

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

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

SECTION 7. REMEDIES UNDER OTHER LAW. The remedies under this [act] are not exclusive and do not abrogate any right or remedy under law of this state 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 a substitute decision-making document. The Act applies to many persons, individual and entity (*see* Section 2 (defining “person” for purposes of the Act)), that may serve as decision makers or that may be asked to accept a substitute decision-making document. Likewise, the Act applies to many subject areas over which an individual may delegate decision-making authority. Remedies under other laws which govern such persons and subject matters should be considered by aggrieved parties in addition to remedies available under

this Act.

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

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

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

SECTION 11. REPEALS; CONFORMING AMENDMENTS.

(a)

(b)

(c)

Legislative Note: *The enacting jurisdiction should examine its statutes that authorize delegation of substitute decision-making authority for property, health care, and personal care and set forth in this section necessary repeals and conforming amendments.*

SECTION 12. EFFECTIVE DATE. This [act] takes effect....