

ULC/ULCC Interjurisdictional Recognition of Substitute Decision-Making Documents Act Comparison

ULC Draft Act	ULCC Draft Act	Explanatory Notes
<p>SECTION 2. DEFINITIONS. In this [act]:</p> <p>(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.</p> <p>(2) “Good faith” means honesty in fact.</p> <p>(3) “Health care” means care, treatment, service, or procedure to maintain, diagnose, or otherwise affect an individual’s physical or mental condition. The term includes the withholding or termination of such care, treatment, service, or procedure.</p> <p>(4) “Jurisdiction” means a geographic area that has legislative authority. 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, a federally</p>	<p>Definitions</p> <p>1 The following definitions apply in this Act.</p> <p>“decision maker” means a person, however denominated, who</p> <p>(a) is granted authority under a substitute decision-making document to act for an individual, whether as a sole decision maker or co-decision maker, or as an original decision-maker or a successor decision maker; or</p> <p>(b) is a person to whom a decision maker’s authority is delegated.</p> <p>“enactment” means an Act or a regulation made under the authority of an Act.</p> <p>“health care” means any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect an individual’s physical or mental condition.</p> <p>“person” includes [a corporation,] [a partnership or other unincorporated organization] a government or department, branch or division of a government, and [the</p>	<p>Does this bring in the possibility of a corporation as a health care decision-maker? Might be acceptable for a trustee, but what is the experience with including an</p>

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<p>recognized Indian tribe, and a foreign country or subdivision of a foreign country.</p> <p>(5) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.</p> <p>(6) “Personal care” means care, arrangement, or service to provide an individual with shelter, food, clothing, transportation, education, recreation, social contact, or assistance with the activities of daily living.</p> <p>(7) “Property” means anything that may be subject to ownership, whether real or personal, or legal or equitable, or any interest or right therein.</p> <p>(8) “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.</p> <p>(9) “Substitute decision-making document” means a writing or other record, executed by an individual to authorize a decision maker to act on behalf of the individual with respect to property, health</p>	<p>personal or other legal representatives of a person to whom the context can apply according to law executors, administrators and other legal representatives of a person].</p> <p>In this Act, “person” is used in the following contexts.</p> <ul style="list-style-type: none"> • a decision maker is a person • a person may accept and rely on a substitute decision-making document, and may be required to accept such a document. <p>“personal care” means any care, arrangement, or service to provide an individual with shelter, food, clothing, transportation, education, recreation, or social contact.</p> <p>“property” means anything, whether real or personal, that may be the subject of ownership, whether legal or equitable, and includes any interest or right in property.</p> <p>“substitute decision-making document” means a writing or other record 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.</p>	<p>HMO and is there any concern about conflict of interest?</p> <p>How broad is the term “record” and would this take us outside the normal documentation we have in mind?</p>

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care, or personal care. The term includes a power of attorney, proxy, and representation agreement.		
<p>SECTION 3. VALIDITY OF SUBSTITUTE DECISION-MAKING DOCUMENT.</p> <p>(a) A substitute decision-making document for property decisions executed by an individual 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 substitute decision-making document and, if no jurisdiction is indicated, the law of the jurisdiction in which the document was executed.</p> <p>(b) A substitute decision-making document for health care or personal care executed by an individual outside this [state] is valid in this [state] if, when the document was executed, the execution complied with:</p> <p>(1) the law of the jurisdiction indicated in the substitute decision-making document and, if no jurisdiction is indicated, the law of the jurisdiction in which the document was executed; or</p> <p>(2) law of this [state] other than this [act].</p> <p>(c) Except as otherwise provided by</p>	<p>Validity of substitute decision-making document</p> <p>2(1) A substitute decision-making document executed by an individual outside of [this province or territory] is formally valid in [this province or territory] if, when it was executed, the execution complied with</p> <p>(a) the law of the jurisdiction indicated in the document or, if no jurisdiction is indicated, the law of</p> <p>(i) the jurisdiction in which it was executed, or</p> <p>(ii) the jurisdiction in which the individual was habitually resident; or</p> <p>(b) the law of [this province or territory].</p> <p>Copy has same effect as original</p> <p>2(2) Except as otherwise provided by any other enactment, a photocopy or electronically transmitted copy of an original substitute decision-making document has the same effect as the original.</p>	<p>We agreed to keep this word in.</p> <p>We are still “thinking” about whether to add “former habitual residence.”</p>

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<p>statute of this [state] other than this [act], court rule, or administrative rule, a photocopy or electronically-transmitted copy of an original substitute decision-making document has the same effect as the original.</p>		
<p>SECTION 4. MEANING AND EFFECT OF SUBSTITUTE DECISION-MAKING DOCUMENT.</p> <p>The meaning and effect of a substitute decision-making document and the authority of the decision maker is determined by the law of the jurisdiction indicated in the substitute decision-making document and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the substitute decision-making document was executed.</p>	<p>Which law governs</p> <p>3(1) The existence, extent, modification and extinction of the powers of the decision maker under a formally valid substitute decision-making document are governed by</p> <ul style="list-style-type: none"> (a) the law of the jurisdiction indicated in the document, if <ul style="list-style-type: none"> (i) the individual is a national or former habitual resident of that jurisdiction, or (ii) the powers in question are to be exercised in relation to the individual's property located in that jurisdiction; or (b) the law of the jurisdiction of which the individual was a habitual resident at the time of executing the document, if the document does not indicate a jurisdiction or the jurisdiction indicated is not a jurisdiction described in clause (a). 	

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	<p>Same 3(2) The laws of [this province or territory] apply to the manner in which the powers of a decision maker are or may be exercised.</p>	<p>It is important to balance the relationship between the applicable law and the law of the place where the substitute decision-maker acts. In one sense we want the substitute decision-maker to follow local protocol in exercising authority – do we know and can we define what those are. But we do not want local law to trump or override the applicable law unless there is something very important.</p> <p>We do this by making a clear exception to the applicable law: <i>The application of the law designated by sections 2 and 3 can be refused only if this application would be manifestly contrary to the public policy of this Province.</i></p>
<p>SECTION 5. ACCEPTANCE OF AND RELIANCE ON DECISION-MAKING DOCUMENT.</p> <p>(a) Except as otherwise provided by statute of this [state] other than this [act], a person that in good faith accepts a substitute decision-making document without actual knowledge that the document is void, invalid, or terminated, or that the purported decision maker’s authority is void, invalid, or terminated, may assume without inquiry that the document is genuine, valid, and still in effect and the decision maker’s authority is genuine, valid, and still in effect.</p>	<p>Acceptance of substitute decision-making document in good faith 4(1) Except as otherwise provided by any other Act, a person who accepts a substitute decision-making document in good faith and without knowing that the document is void, invalid, or terminated, or that the purported decision maker’s authority is void, invalid, or terminated, may assume without inquiry that the substitute decision-making document is genuine, valid and still in effect and the decision maker’s authority is genuine, valid and still in effect.</p>	<p>Does this section adequately deal with the service provider acting in good faith on what turns out to be a defective document?</p>

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<p>(b) A person that is asked to accept a substitute decision-making document may request, and rely on, without further investigation:</p> <p>(1) a decision maker’s assertion of a fact concerning the individual for whom a decision will be made, the decision maker, or the substitute decision-making document;</p> <p>(2) a translation of the document if the document contains, in whole or in part, language other than English; and</p> <p>(3) an opinion of counsel as to any matter of law concerning the document if the person requesting the opinion of counsel provides in a writing or other record the reason for the request.</p>	<p>Reliance on decision maker’s assertion, translation, or legal opinion</p> <p>4(2) A person who is asked to accept a substitute decision-making document may request, and rely upon, without further investigation,</p> <p>(a) the decision maker’s assertion of any factual matter concerning</p> <p>(i) the individual for whom decisions will be made,</p> <p>(ii) the decision maker, or</p> <p>(iii) the substitute decision-making document</p> <p>(b) a translation of the document if it contains, in whole or in part, language other than [English]; and</p> <p>(c) an opinion of legal counsel as to any matter of law concerning the document if the request is made in writing and includes the person’s reason for the request.</p>	
<p>SECTION 6. LIABILITY FOR REFUSAL TO ACCEPT SUBSTITUTE DECISION-MAKING DOCUMENT.</p> <p>(a) Except as otherwise provided in subsection (b) or by law of this [state] other than this [act], a person shall accept within a reasonable time a substitute decision-making document that purportedly meets the validity requirements of Section 3 and may not require an additional or different</p>	<p>Requirement to accept substitute decision-making document</p> <p>5(1) Except as provided in subsection (2) or (3) or in any other enactment, a person shall accept, within a reasonable time, a substitute decision-making document that purportedly meets the formal validity requirements of subsection 2(1) and may not require an additional or different form of substitute decision-making document for authority</p>	<p>Our drafting protocol requires us to use “must” rather than “shall.” Are we clear that these actions are mandatory?</p>

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<p>form of document for authority granted in the document presented.</p> <p>(b) A person is not required to accept a substitute decision-making document if:</p> <p>(1) 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;</p> <p>(2) the person has actual knowledge of the termination of the decision maker’s authority or the document;</p> <p>(3) the person’s request under Section 5 for the decision-maker’s assertion of fact, a translation, or an opinion of counsel is refused;</p> <p>(4) the person in good faith believes that the document is not valid or that the decision maker does not have the authority to request the transaction or the act; or</p> <p>(5) the person makes, or has actual knowledge that another person has made, a report to the [local adult protective services office] stating a good faith belief that the individual for whom decisions will be made may be subject to abuse, neglect, exploitation, or abandonment by the decision maker or a person acting for or with</p>	<p>granted in the document presented.</p> <p>Exception — knowledge of termination</p> <p>5(2) A person shall not accept a substitute decision-making document if the person has actual knowledge of the termination of the document or of the decision maker’s authority.</p> <p>Other exceptions</p> <p>5(3) A person is not required to accept a substitute decision-making document if</p> <p>(a) the person’s request under subsection 4(2) for the decision-maker’s assertion of fact, a translation, or an opinion of counsel is refused;</p> <p>(b) the person in good faith believes that the substitute decision-making document is not valid or that the decision maker does not have the authority to request the transaction or the act;</p> <p>(c) the person makes, or has actual knowledge that another person has made, a report to the [local adult protective services office] stating a good faith belief that the individual for whom decisions will be made may be subject to abuse, neglect, exploitation, or abandonment by</p>	

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<p>the decision maker.</p> <p>(c) A person that in violation of this section refuses to accept a substitute decision-making document is subject to:</p> <p>(1) a court order mandating acceptance of the document; and</p> <p>(2) liability for reasonable attorney's fees and costs incurred in an action or proceeding that mandates acceptance of the document.</p>	<p>the decision maker or a person acting for or with the decision maker.</p> <p>Liability for legal costs</p> <p>5(3) A person who refuses in violation of subsection (1) to accept a substitute decision making document and is ordered by a court to accept the document is liable for reasonable legal fees and costs incurred in any proceeding to obtain that order.</p>	
<p>SECTION 7. REMEDIES UNDER OTHER LAW.</p> <p>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].</p>	<p>Remedies under other law</p> <p>6 The remedies under this Act are not exclusive and do not abrogate any other right or remedy under the law of [this province or territory].</p>	
<p>SECTION 10. APPLICABILITY.</p> <p>This [act] applies to a substitute decision-making document created before, on, or after [the effective date of this [act]].</p>	<p>Application to existing documents</p> <p>7 This Act applies to a substitute decision-making document created before, on, or after the day this Act comes into force.</p>	
<p>SECTION 11. EFFECTIVE DATE.</p> <p>This [act] takes effect....</p>	<p>Coming into force</p> <p>8 This Act comes into force [on the day this Act receives royal assent].</p>	