

UNIFORM LAW CONFERENCE OF CANADA

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

**Yellowknife, Northwest Territories
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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 endeavour 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 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 substitute decision-making documents. 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 embodies a three-part approach to portability modelled after the Uniform Law Commission's Uniform Power of Attorney Act (2006) (the "UPOAA"). First, similar to Section 106 of the UPOAA, Section 2 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. Second, Section 2 creates two options. Option 1 separates out formal validity, whereas Option 2 applies the same law to all aspects of validity, i.e., the existence, extent, modification and extinction of the document (including formal validity). Section 4 explicitly recognises the concept of public policy. Third, Sections 5 and 6 of the Act protect good faith rejection or acceptance 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 5(4) refusals in violation of the Act are subject to a court order mandating acceptance. 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 and by supplementing provisions that lack desirable features of the Act.

[HER MAJESTY, by and with the advice and consent of the Legislative Assembly of [this province or territory], enacts as follows:]
Adjust according to the preferred format of your province or territory.

Definitions

1 The following definitions apply in this Act.

“decision maker” means a person, however denominated, who

- (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
- (b) is a person to whom a decision maker's authority is delegated.

“enactment” means an Act or a regulation made under the authority of an Act.

“health care” means any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect an individual's physical or mental condition.

“person” includes [a corporation,] [a partnership or other unincorporated organization] a government or department, branch or division of a government, and [the 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].

“personal care” means any care, arrangement, or service to provide an individual with shelter, food, clothing, transportation, education, recreation, social contact or assistance with daily living.]

“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.

“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.

Section 1 Comments

The Definitions 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 applicable to the existence, extent, modification and extinction of a document. See Section 2 Comment.

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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 applicable law. 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.

Note: Jurisdictions should review the definitions to determine whether all are required or appropriate for their own jurisdiction. “Property” is defined exclusively in a common law context. The Civil Code describes both moveable and immovable property and the definition is contained in the Civil Code.

Applicable Law

The Conference has put forward two options for how to deal with the question of applicable law. The first option is closer to the conventional approach in wills and health care directives. In this approach, a distinction is made between formal and essential validity. Slightly more generous provisions govern formal validity and include the place where the document is created. This is also in line with the approach taken by the ULC which distinguishes between “validity” and “meaning and effect.” Formal requirements are designed to ensure that the creator of the document understands its nature and consents to create it. The jurisprudence around the distinction between formal and essential validity is well developed, but there may be situations where a particular requirement straddles the two, or even where different jurisdictions characterize the requirement differently.

The second option tracks the language of section 15 of the Hague Convention on Protection of Adults. Under this approach, all elements of “existence, extent, modification and extinction” are governed by one law. This approach removes any need to distinguish between formal and essential validity and therefore any problems created by the distinction. All aspects of formal and essential validity are subsumed in the phrase “existence, extent, modification and extinction.”

In the vast majority of cases, the two approaches will yield the same result, in that place of execution, habitual residence and nationality will be one and the same. A jurisdiction which chooses Option 1 will have to revisit the provisions, if and when implementation of the Adult Convention is considered.

Option 1

Applicable law

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

- (a) the law of the jurisdiction indicated in the document or, if no jurisdiction is indicated, the law of
 - (i) the jurisdiction in which it was executed, or
 - (ii) the jurisdiction in which the individual was habitually resident; or
- (b) the law of [this province or territory].

2(2) The existence, extent, modification and extinction of the powers of the decision maker under a formally valid substitute decision-making document are governed by

- (a) the law of the jurisdiction expressly indicated in the document, if
 - (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).

Same

2(3) The laws of [this province or territory] apply to the manner in which the powers of a decision maker are or may be exercised.

Section 2 Comment

Subsection 2(1) specifies the connecting factors determining the law governing the formal validity of a substitute decision-making document executed in another jurisdiction. Formal validity covers only the legal formalities such as notarization or the witnessing of signatures. The law governing the existence, extent, modification and extinction of the document is determined as provided in Subsection 2(2).

Subsection 2(1) provides that a substitute decision-making document for property, health care or personal care decisions executed in another jurisdiction will be recognized as formally valid if the execution of the document complied with: the law indicated in the document; in the absence of

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a choice, the law of the place of habitual residence of the grantor at the time of execution or the place of execution of the document; or the law of the enacting province or territory. This approach provides some consistent elements with Quebec civil law where, as a rule, the formal validity of a juridical act, such as a substitute decision-making document, is governed by the law of the place where it was entered into. The juridical act may nevertheless be valid if it is in the form prescribed by: the law applicable to its content – i.e. the law expressly designated or whose designation may be inferred or, in the absence, the law of the State with which the act is most closely connected; the law of the place where the property which is the object of the juridical act is situated at the time of its conclusion; or the law of the domicile of one of the parties at the time the juridical act is concluded.

Subsection 2(2) provides that the existence, extent, modification and extinction of a formally valid substitute decision-making document are determined by the law expressly indicated in the document if the chosen law is that of the grantor's nationality or former place of habitual residence, or, with respect to property, the place where such property is located. In the absence of an indication or of a valid choice of law, the default applicable law is that of the grantor's place of habitual residence at the time of execution.

Subsection 2(2) establishes an objective means for determining what jurisdiction's law was intended to govern the substitute decision-making document. It provides that the indication must be done expressly in the document. The reason for this requirement is to avoid any uncertainty as to the applicable law given that the document will be given effect to at a time when the grantor is no longer in a position to express their views or protect their interests.

Subsection 2(2) is generally consistent with Article 15 of the Hague *Convention on the Protection of Adults*, except in that the latter also covers formal validity, which is dealt with separately under subsection 2(1) of the Uniform Act. The policy reasons for this limited "carve-out" are explained above.

The term "existence" covers the conditions under which a decision-maker's authority to represent the grantor is given effect. This may include, for example, whether the grantor's incapacity must be established by one or more medical professionals or, as is the case under Quebec civil law, through a judicial process known as homologation. It may also include whether the decision-maker's authority is subject to other formalities such as providing a written "Notice of Representative Commencing to Act" to the members of the grantor's family. Subsection 2(2) does not abrogate the traditional grounds for contesting the validity of execution such as forgery, fraud, or undue influence.

The term "extent" refers to the decision-maker's powers as the grantor's designated representative and any limitations thereto. For example, the governing law will determine whether the authority to manage property on behalf of the grantor includes the power to dispose of such property and/or whether judicial authorization may be necessary before doing so. It will also determine whether a decision-maker with authority over insurance transactions has the authority to change beneficiary designations. As a final example, the governing law will determine whether the authority to consent to health care on behalf of the grantor extends to all forms of treatment or is limited to certain forms of treatments. In effect therefore, this provision 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. See also section 5(3)(a).

Subsection 2(2) does not cover issues that are separate from the decision-maker's authority to act or the extent of the powers as the designated representative. These issues may include matters related to property law, contracts, medical law, civil procedure or professional requirements affecting lawyers or notaries. This means, for example, that subsection 2(2) would not determine the law governing the interpretation of a contract between the decision-maker acting on behalf of the grantor and the other party to the contract or the law applicable to the sale of real property belonging to the grantor. All such matters would continue to be governed by existing conflict of laws rules.

The terms "modification" and "extinction" follow their ordinary meaning.

The application of the governing law determined under subsection 2(2) may be subject to any mandatory rule of the enacting province or territory. This provision is consistent with article 20 of the Hague *Convention on the Protection of Adults*. Mandatory rules cover provisions whose respect is regarded as crucial for safeguarding the forum's public or vital interests to such an extent that they apply to any situation falling within their scope. These rules override the application of the governing law but only to the extent required. As the mandatory rules exception is well-established in private international law in both the common law and civil law, it is not necessary to expressly provide for it in the Act.

In the context of substitute decision-making documents, mandatory rules are more likely to exist in regard to health and personal care matters. For example, they may include specific rules and procedures for legal representation or authorization for certain forms of medical treatment, e.g. admission to a psychiatric hospital or *inter vivos* organ donation. The requirements of the Quebec Code relating to "homologation" would be similarly treated.

Subsection 2(3) provides that the laws of the enacting province or territory apply to the manner in which the powers of a decision-maker are or may be exercised. The "manner of exercise" is limited to points of detail that may include, for example, reference to the procedural rules (or rules of court) of the enacting province or territory in cases where homologation would be required under the applicable law to give effect to the substitute decision-making document.

Option 2

Applicable law

2(1) The existence, extent, modification and extinction of the powers of the decision maker under a substitute decision-making document are governed by

- (a) the law of the jurisdiction expressly indicated in the document, if
 - (i) the individual is a national or former habitual resident of that jurisdiction, or

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- (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).

Same

2(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.

Section 2 Comment

Subsection 2(1) provides that the existence, extent, modification and extinction of a substitute decision-making document are determined by the law expressly indicated in the document if the chosen law is that of the grantor's nationality or former place of habitual residence, or, with respect to property, the place where such property is located. In the absence of an indication or of a valid choice of law, the default applicable law is that of the grantor's place of habitual residence at the time of execution. Subsection 2(1) is consistent with article 15 of the *Hague Convention on the Protection of Adults*.

Subsection 2(1) establishes an objective means for determining what jurisdiction's law was intended to govern the substitute decision-making document. It provides that the indication must be done expressly in the document. The reason for this formality is to avoid any uncertainty as to the applicable law given that the document will be given effect to at a time when the grantor is no longer in a position to express their views or protect their interests.

The term "existence" covers formal validity and the conditions under which a decision-maker's authority to represent the grantor is given effect. This may include, for example, whether the grantor's incapacity must be established by one or more medical professionals or, as is the case under Quebec civil law, through a judicial process known as homologation. It may also include whether the decision-maker's authority is subject to other formalities such as providing a written "Notice of Representative Commencing to Act" to the members of the grantor's family. Subsection 2(1) does not abrogate the traditional grounds for contesting the validity of execution such as forgery, fraud, or undue influence.

The term "extent" refers to the decision-maker's powers as the grantor's designated representative and any limitations thereto. For example, the governing law will determine whether the authority to manage property on behalf of the grantor includes the power to dispose of such property and/or whether judicial authorization may be necessary before doing so. It will also determine whether a decision-maker with authority over insurance transactions has the authority to change beneficiary designations. As a final example, the governing law will determine whether the authority to consent to health care on behalf of the grantor extends to all forms of treatment or is limited to certain forms of treatments. In effect therefore, this provision 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. See also section 5(3)(a).

Subsection 2(1) does not cover issues that are separate from the decision-maker's authority to act or the extent of the powers as the designated representative. These issues may include matters related to property law, contracts, medical law, civil procedure or professional requirements affecting lawyers or notaries. This means, for example, that subsection 2(1) would not determine the law governing the interpretation of a contract between the decision-maker acting on behalf of the grantor and the other party to the contract or the law applicable to the sale of real property belonging to the grantor. All such matters would continue to be governed by existing conflict of laws rules.

The terms "modification" and "extinction" follow their ordinary meaning.

The application of the governing law determined under subsection 2(1) may be subject to any mandatory rule of the enacting province or territory. This provision is consistent with article 20 of the Hague *Convention on the Protection of Adults*. Mandatory rules cover provisions whose respect is regarded as crucial for safeguarding the forum's public or vital interests to such an extent that they apply to any situation falling within their scope. These rules override the application of the governing law but only to the extent required. As the mandatory rules exception is well-established in private international law in both the common law and civil law, it is not necessary to expressly provide for it in the Act.

In the context of substitute decision-making documents, mandatory rules are more likely to exist in regard to health and personal care matters. For example, they may include specific rules and procedures for legal representation or authorization for certain forms of medical treatment, e.g. admission to a psychiatric hospital or *inter vivos* organ donation. The requirements of the Quebec Code relating to "homologation" would be similarly treated.

Subsection 2(2) provides that the laws of the enacting province or territory apply to the manner in which the powers of a decision-maker are or may be exercised. The "manner of exercise" is limited to points of detail that may include, for example, reference to the procedural rules (or rules of court) of the enacting province or territory in cases where homologation would be required under the applicable law to give effect to the substitute decision-making document.

Copy has same effect as original

3 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.

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Section 3 Comment

This section also provides that unless another statute, court rule, 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 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.

Manifestly contrary to public policy

4 The application of the law designated by section 2 can be refused only if this application would be manifestly contrary to public policy.

Section 4 Comments

This section, which deals with the public policy exception, is consistent with Article 21 of the *Hague Convention on the Protection of Adults*. Statutes or the common law may impose limits on the extent of a decision maker's authority under the law designated by section 2 where the application of such law would be contrary to the enacting province or territory's conception of essential justice or morality or to its fundamental public policies. This exception is more likely to arise in regard to decisions relating to certain medical procedures. Examples include decisions related to forgoing procedures such as artificially supplied nutrition and hydration.

Requirement to accept substitute decision-making document

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 requirements of the governing law [OPTION 1: for formal validity OPTION 2: for existence] as established under section 2 and may not require an additional or different form of substitute decision-making document for authority granted in the document presented.

Requirement to reject substitute decision-making document

5(2) A person must not accept a substitute decision-making document if:

- (a) the person has actual knowledge of the termination of the decision maker's authority or the document; or
- (b) the person in good faith believes that the document is not valid or that the decision maker does not have the authority to request a particular transaction or action.

Authority to reject substitute decision-making document

5(3) A person is not required to accept a substitute decision-making document if:

- (a) the person otherwise would not be required in the same circumstances to act if requested by the individual who executed the document;
- (b) the person's request under Section 6(2) for the decision maker's assertion of fact, a translation, or an opinion of counsel is refused;
- (c) 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.

Liability for legal costs

5(4) 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.

Section 5 Comment

Sections 5 and 6 work in a complementary way. Section 5 enumerates the bases for acceptance or legitimate refusals of a substitute decision-making document and the sanctions for refusals that violate the Act. The introductory phrase of subsection 1, "*except as provided in subsection (2) or (3) or in any other enactment,*" 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. 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.

Subsections 2 and 3 provide the bases upon which a substitute decision-making document may be refused without liability. Subsection 2 prohibits recognition where the person has actual knowledge or a good faith belief that the document is not valid or that the decision-maker does not have the authority to request a particular transaction or action. Subsection 3 allows a person to refuse to accept a substitute decision making document where the person would not be required to act in similar circumstances, where the person's requests for information or confirmation have not been satisfied, or where a formal complaint of abuse has been made.

The last paragraph of subsection (3) permits refusal of an otherwise valid substitute decision-making document if the person has made a report stating a belief that the individual for whom decisions will be made is subject to abuse by the decision maker or someone acting in concert with the decision maker, or has actual knowledge that such report has been made by another person. 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.

Subsection (4) provides that a person that refuses a substitute decision-making document in violation of Section 5 is subject to a court order mandating acceptance. An unreasonable refusal may be subject to other remedies provided by other law.

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Acceptance of substitute decision-making document in good faith

6(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.

Reliance on decision maker's assertion, translation, or legal opinion

6(2) A person who is asked to accept a substitute decision-making document may request, and rely upon, without further investigation,

- (a) the decision maker's assertion of any factual matter concerning
 - (i) the individual for whom decisions will be made,
 - (ii) the decision maker, or
 - (iii) the substitute decision-making document;
- (b) a translation of the document if it contains, in whole or in part, language other than [English or French or an official language of the province or territory]; and
- (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.

6(3) A person who, in good faith, acts

- (a) on an assumption referred to in subsection (1), or
- (b) in reliance on an assertion, translation or opinion referred to in subsection (2)

is not liable for the act if the assumption or reliance is based on inaccurate information concerning the relevant facts or law.

Section 6 Comment

Section 6 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 (1), "*except as otherwise provided by any other Act*," indicates that other relevant statutory provisions, such as those in the enacting province or territory's power of attorney statute or health care proxy statute, may supersede those in Section 6.

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 (2), 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 or French or an official language of the province or territory], a translation may also be requested. Subsection (2) 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 govern the document.

Remedies under other law

7 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].

Section 7 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, individuals and entities (see the Definitions (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 individuals 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.

Application to existing documents

8 This Act applies to a substitute decision-making document created before, on, or after the day this Act comes into force.

Coming into force

9 This Act comes into force [on the day this Act receives [royal] assent].