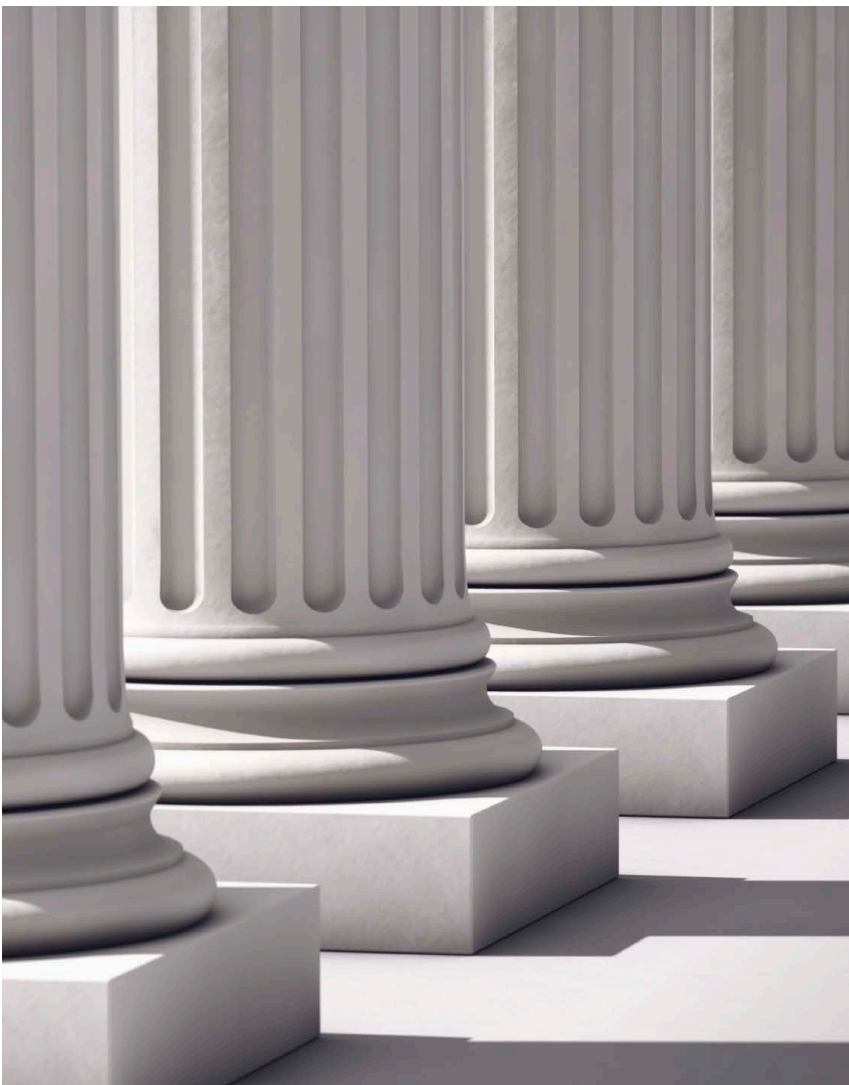




# INTER-PROVINCIAL RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS



REPORT FOR DISCUSSION

# 32

DEC 2017







## **INTER-PROVINCIAL RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS**

REPORT FOR  
DISCUSSION || **32**

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# Invitation to Comment

**Deadline for comments on the issues raised in  
this document is May 1, 2018**

This Report for Discussion by the Alberta Law Reform Institute (ALRI) reviews the *Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act* (2016) and considers whether it is suitable for implementation in Alberta.

The purpose of issuing a Report for Discussion is to allow interested persons the opportunity to consider these proposals and to make their views known to ALRI. You may respond to one, a few or all of the issues raised. Any comments sent to us will be considered when the ALRI Board makes final recommendations.

You can reach us with your comments or with questions about this document on our website, by fax, mail or e-mail to:

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# Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on November 15, 1967 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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The basis for this Report for Discussion is the *Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act* (2016) prepared by the Uniform Law Conference of Canada. The ULCC working group was chaired by Peter Lown QC, Director Emeritus. ALRI relied on the Uniform Act and its commentary in the creation of this Report.

Geneviève Tremblay-McCaig, Legal Counsel, undertook the preliminary assessment work for this project. Katherine MacKenzie, Legal Counsel, carried out the research, analysis and writing for the Report. Additional assistance was provided by Laura Buckingham, Legal Counsel, Ashley Hathorn, Student Research, and Sandra Petersson. The report was formatted for publication by Barry Chung, Communications Associate.



# Summary

An individual may use a substitute decision-making document to authorize another person to act on the individual's behalf. In Alberta, a substitute decision-making document that authorizes a person to manage property, financial, or legal affairs on behalf of another is called a power of attorney. A substitute decision-making document that authorizes a person to make personal care or health care decisions on behalf of another is called a personal directive.

A valid substitute decision-making document must comply with the formalities required under the law of the jurisdiction where it is made. The required formalities differ across Canada. Even within Alberta, the rules differ depending on the type of document. Further, Canadian jurisdictions have different rules about recognizing substitute decision-making documents made outside the jurisdiction in which the document is to be used. The lack of harmonized rules may cause problems for individuals who have assets or spend significant time in more than one place.

Harmonized rules for recognition of substitute decision-making documents would make it easier to make and use them across Canada. The Uniform Law Conference of Canada has adopted the *Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act* [the Uniform Act]. The Uniform Act is intended to provide harmonized rules that may be implemented across Canada.

This report reviews the Uniform Act and considers whether it is suitable for implementation in Alberta. ALRI proposes that the Uniform Act should be implemented in Alberta, with some minor adjustments.

## **Applicable Law: Distinguishing Between Formal Validity and Essential Validity**

The Uniform Act offers two options for choosing the applicable law. Applicable law refers to the system of law used to determine whether a substitute decision-making document is valid. There are two issues: formal validity and essential validity. Formal validity refers to the formalities required to make a valid substitute decision-making document (such as requirements about signatures, witnesses, or notarization). Essential validity relates to the existence and extent of the powers granted by the document. The Uniform Act offers one option for applicable law that would distinguish between formal validity and essential validity and another option that would not.

ALRI's preliminary recommendation is that Alberta should implement the option in the Uniform Act that would distinguish between formal validity and essential validity. Although this approach would be slightly more complex, it is consistent with the approach used to determine the validity of wills made

outside of Alberta. It would also correspond with the approach adopted by the American Uniform Law Commission.

### **Applicable Law: Formal Validity**

ALRI is seeking feedback before making a recommendation with respect to the law applicable to formal validity. Most often, the people and institutions that are asked to recognize substitute decision-making documents are non-lawyers. The decisions that must be made are often serious and emotional, and may need to be made very quickly. It is important that determining the applicable law for formal validity is relatively straightforward and easy for non-lawyers to apply. The Uniform Act includes four options for the applicable law for formal validity: the jurisdiction indicated in the document; the jurisdiction of execution; the jurisdiction of the grantor's habitual residence at the time of execution; and Alberta. ALRI would appreciate comments on the following question: Which jurisdictions should be included as options to assess formal validity when recognizing a substitute decision-making document in Alberta?

### **Applicable Law: Essential Validity**

For essential validity, ALRI's preliminary recommendation is to implement the approach in the Uniform Act. If the substitute decision-making document indicates a jurisdiction, the essential validity would be determined in accordance with the law of that jurisdiction, provided that the grantor is a national or former habitual resident of that jurisdiction, or the powers in question are to be exercised in relation to property located in that jurisdiction. If the substitute decision-making document does not indicate a jurisdiction, or if the jurisdiction indicated does not meet the stated requirements, essential validity should be governed by the law of the grantor's habitual residence at the time of execution.

Further, recognition of a substitute decision-making document should be subject to a public policy exception. The Uniform Act provides for a public policy exception, and ALRI's preliminary recommendation is to implement it in Alberta. Even if a substitute decision-making document is formally and essentially valid under the applicable law, recognition may be refused if enforcing the document would be contrary to the fundamental values of society in Alberta.

### **Other Recognition Issues**

The Uniform Act includes provisions that would fill gaps in Alberta legislation.

For example, current Alberta legislation is silent as to whether a third party may be liable for refusing a substitute decision-making document. The Uniform Act would require a third party to accept an apparently valid substitute decision-making document within a reasonable time and without

requiring an additional or different form of the document. It also states conditions under which a third party would be required or permitted to refuse a document. A third party who refuses to accept a substitute decision-making document without justification would be potentially liable for costs.

Further, current Alberta legislation does not address what kind of information a third party may request in order to confirm the validity of a substitute decision-making document, and whether a third party may be liable for accepting a document. The Uniform Act sets out information that a third party could request when asked to accept a substitute decision-making document. A third party would be protected from liability if they relied on a substitute decision-making document or the information in good faith.

ALRI proposes that these provisions be implemented in Alberta.

### **Application**

There are two issues about application of the Uniform Act that are problematic in the Alberta context. ALRI proposes departures from the Uniform Act to address these issues.

The definition of “substitute decision-making document” in the Uniform Act would restrict its application to documents that delegate authority to a decision maker. In several Canadian jurisdictions, including Alberta, it is possible to make a valid personal directive that provides advance instructions without designating an agent. ALRI’s preliminary recommendation is that the definition should be expanded to include documents that provide advance instructions, whether or not they delegate authority to a specific decision maker.

As written, the Uniform Act could be used to recognize a non-enduring power of attorney (that is, a power of attorney that ceases to have effect once the grantor loses capacity). Currently, Alberta legislation does not provide for recognition of a non-enduring power of attorney. Expanding Alberta’s approach to include recognition of non-enduring powers of attorney might require amendments to land titles policy. ALRI’s preliminary recommendation is therefore that legislation about recognition of substitute decision-making documents should not extend to non-enduring powers of attorney.

### **Miscellaneous Issues and Transition**

The remaining provisions of the Uniform Act, including its transition provisions, are uncontroversial. ALRI proposes they be implemented in Alberta.





# Issues / Recommendations

## ISSUE 1

Should the recognition of substitute decision-making documents distinguish between formal validity and essential validity when applying the choice of law rule? ..... 23

### RECOMMENDATION 1

The recognition of substitute decision-making documents should distinguish between formal validity and essential validity when applying the choice of law rule.

## ISSUE 2

Which jurisdictions should be included as options to assess formal validity when recognizing a substitute decision-making document in Alberta? ..... 29

### RECOMMENDATION 2

No recommendation

## ISSUE 3

Which jurisdiction's law should apply when determining the essential validity of a substitute decision-making document that has been recognized as formally valid in Alberta? ..... 29

### RECOMMENDATION 3A

The essential validity of a substitute decision-making document should be determined in accordance with the law of the jurisdiction indicated in the document, provided that the grantor has a connection to that jurisdiction through nationality, former habitual residency or property ownership.

### RECOMMENDATION 3B

If there is no jurisdiction indicated, or the grantor does not have the necessary connection to the jurisdiction indicated, then the essential validity of a substitute decision-making document should be determined in accordance with the law of the grantor's habitual residence at the time of execution.

## ISSUE 4

Should the recognition of substitute decision-making documents include a public policy exception? ..... 32

### RECOMMENDATION 4

The recognition of substitute decision-making documents should include a public policy exception.

**ISSUE 5**

Should there be a framework that regulates mandatory acceptance or legitimate refusals of a substitute decision-making document, including sanctions for illegitimate refusals? ..... 40

**RECOMMENDATION 5**

There should be a framework that regulates mandatory acceptance or legitimate refusals of a substitute decision-making document, including sanctions for illegitimate refusals.

**ISSUE 6**

Should there be a framework that protects third parties who rely in good faith on an apparently valid substitute decision-making document? ..... 42

**RECOMMENDATION 6A**

There should be a framework that protects third parties who rely in good faith on an apparently valid substitute decision-making document.

**RECOMMENDATION 6B**

The framework should establish that third parties are not required to investigate the validity of a substitute decision-making document.

**RECOMMENDATION 6C**

The framework should also provide methods by which a third party may, if necessary, request information that would confirm the validity of the substitute decision-making document.

**ISSUE 7**

Should the recognition of substitute decision-making documents be restricted to documents that contain an express delegation of authority to a substitute decision maker? ..... 47

**RECOMMENDATION 7**

The recognition of substitute decision-making documents should extend to documents that contain advance instructions, whether or not they contain a delegation of authority.

**ISSUE 8**

Should the recognition of substitute decision-making documents extend to non-enduring powers of attorney? ..... 49

**RECOMMENDATION 8**

The recognition of substitute decision-making documents should not extend to non-enduring powers of attorney.

**ISSUE 9**

Should photocopies or electronically transmitted copies of an original substitute decision-making document be accepted? ..... 51

**RECOMMENDATION 9**

Photocopies or electronically transmitted copies of the original substitute decision-making document should be accepted, unless another enactment requires otherwise.

**ISSUE 10**

Should the availability of other remedies that exist under Alberta law be preserved? ..... 52

**RECOMMENDATION 10**

The availability of other remedies that exist under Alberta law should be preserved.

**ISSUE 11**

Are the definitions provided by the Uniform Act appropriate? ..... 54

**RECOMMENDATION 11**

The definitions of “decision maker”, “enactment”, “health care”, “person”, “personal care”, and “property” provided by the Uniform Act are appropriate for Alberta.

**ISSUE 12**

Which substitute decision-making documents should be governed by the new recognition provisions? ..... 58

**RECOMMENDATION 12**

The new recognition provisions should apply to all substitute decision-making documents, regardless of when they were made.



# Table of Abbreviations

## LEGISLATION

Uniform Act      *Uniform Law Conference of Canada, Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act (2016)*, online:  
<[www.ulcc.ca/images/stories/2016\\_pdf\\_en/2016ulcc0008.pdf](http://www.ulcc.ca/images/stories/2016_pdf_en/2016ulcc0008.pdf)>

## OTHER PUBLICATIONS

ULCC  
Commentary      *Uniform Law Conference of Canada, Civil Section, Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act (2016) (commentary)*, online:  
<[www.ulcc.ca/images/stories/2016\\_pdf\\_en/2016ulcc0008.pdf](http://www.ulcc.ca/images/stories/2016_pdf_en/2016ulcc0008.pdf)>

# Glossary

[1] The definitions below refer to the terms that will be used throughout the body of this report. They do not necessarily reflect the meaning of terms used within a substitute decision-making document, the meaning of terms included in the *Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act*<sup>1</sup>, or the legislative definitions that may ultimately be recommended for implementation.

## Substitute decision-making

- “*Grantor*” means an individual who makes a substitute decision-making document.
- “*Decision maker*” means an individual who is given authority by the grantor under a substitute decision-making document to act with respect to property, health care, or personal care on the grantor’s behalf.
- “*Substitute decision-making document*” means a writing or other record entered into by the grantor to authorize a decision maker to act with respect to property, health care, or personal care on the grantor’s behalf.

## Powers of attorney

- *Donor* means an individual who grants a power of attorney to another.
- *Attorney* means the individual to whom the authority to manage some or all of the donor’s property and financial or legal affairs is granted under a power of attorney.
- *Enduring power of attorney* or *EPA* means a power of attorney which complies with the formal requirements in legislation and contains a statement indicating that:

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<sup>1</sup> Uniform Law Conference of Canada, *Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act (2016)*, online: <[www.ulcc.ca/images/stories/2016\\_pdf\\_en/2016ulcc0008.pdf](http://www.ulcc.ca/images/stories/2016_pdf_en/2016ulcc0008.pdf)> [Uniform Act].

- It is to continue notwithstanding any mental incapacity of the donor that occurs after the making of the power of attorney (a “continuing power of attorney”) or
- It is to take effect on the mental incapacity of the donor (a “springing power of attorney”).
- *Non-enduring power of attorney* means a power of attorney that ceases to have effect on the mental incapacity of the donor.

### **Personal directives**

- *Maker* means an individual who grants a personal directive to another.
- *Agent* means the individual to whom the authority to make personal care or health care decisions on behalf of the maker is granted under a personal directive.
- *Personal directive* means:
  - A document that meets the requirements of legislation in which the maker specifies what actions should be taken for their health if they are no longer able to make decisions for themselves because of illness or incapacity, or
  - A document that meets the requirements of legislation in which the maker authorizes an agent to make personal or health care decisions on their behalf when they are incapacitated, or
  - A document that does both.

[2] The terms “EPA”, “donor” and “attorney” will be used when referring specifically to substitute decision-making documents that deal with financial and property matters, regardless of the terminology used in other jurisdictions. Similarly, the terms “personal directive”, “maker” and “agent” will be used when referring specifically to substitute decision-making documents that deal with health care and personal care. Finally, the terms “substitute decision-making document”, “decision maker” and “grantor” will be used when referring to both types of documents, or when referring to the documents to which the Uniform Act applies.





## CHAPTER 1

# Introduction

## A. Background

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[3] An individual may delegate the authority to make certain financial or personal decisions to another, and documents containing this type of delegation may take different forms. For example, an individual may appoint a specific decision maker to act on their behalf with respect to financial, property, or legal affairs, or with respect to personal or health care matters. The names given to these substitute decision-making documents vary from one jurisdiction to another (i.e., powers of attorney, proxies, representation agreements, personal directives, advance health directives etc.).<sup>2</sup>

[4] A valid substitute decision-making document must comply with the formalities required under the law of the jurisdiction where it is executed. Those formalities, such as notarization or witness requirements, differ across Canada. Further, because execution requirements are not uniform across Canada – and, sometimes, are significantly different – a substitute decision-making document may not be recognized in places other than the jurisdiction in which it was made. This lack of harmonization becomes problematic for individuals who hold assets or spend significant time in two or more jurisdictions.

[5] For example, consider an individual who lives in Alberta and has a cabin in Ontario. She has made an incapacity plan with her lawyer and has executed an enduring power of attorney [EPA] and a personal directive in Alberta. After she retires, she begins spending a lot more time at her in cabin in Ontario. While she is there, she becomes ill and is no longer able to make health care decisions or financial decisions for herself. Unfortunately, the substitute decision-making documents that she executed in Alberta cannot automatically be used on her behalf in Ontario.

[6] Fortunately, Ontario has legislation that permits recognition of a substitute decision-making document from another jurisdiction.<sup>3</sup> Thus, if her

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<sup>2</sup> In Alberta, substitute decision-making documents dealing with property and financial affairs are generally called enduring powers of attorney, while substitute decision-making documents dealing with personal and health care matters are called personal directives.

<sup>3</sup> *Substitute Decisions Act, 1992*, SO 1992, c 30, s 85 [Ontario Act].

Alberta documents meet the recognition conditions set out in the Ontario statute, they can be used on her behalf in Ontario. If the Alberta documents do not meet Ontario's statutory test, then she will need to have a guardian and trustee appointed by the Ontario courts.<sup>4</sup>

[7] Now, imagine that she became incapacitated while travelling in New Brunswick. There are no statutory recognition provisions for either EPAs or personal directives in New Brunswick. In order to recognize the Alberta documents, a court application based on conflict of laws principles would need to be made on her behalf. If that application failed, she would need to have a guardian and trustee appointed by the New Brunswick courts.

[8] One way to avoid these types of problems is to have multiple substitute decision-making documents drafted in accordance with the formalities of every jurisdiction where an individual owns property, or intends to reside or relocate. However, the time and expense required to put in place multiple substitute decision-making documents, for both property and health care, will add up quickly and make this solution impractical for many. Moreover, in cases where an individual moves from one jurisdiction to another after losing capacity, drafting a new substitute decision-making document that conforms to the requirements of the new jurisdiction is not even an option.

[9] As described above, individuals who cannot afford this type of multi-jurisdictional planning may find themselves in situations where they have to turn to conflict of laws principles, international conventions or statutory recognition provisions.<sup>5</sup> However, not all jurisdictions have statutory rules governing the recognition of substitute decision-making documents, and those that do often differ from place to place. Even within Alberta, there are gaps and inconsistencies in the statutory recognition rules governing the different types of substitute decision-making documents. Further, Alberta legislation is generally silent on validation procedures, protection for good faith acceptance, liability for illegitimate refusal and other similar recognition-related issues.

[10] The Uniform Law Conference of Canada [ULCC] recently adopted the *Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act*

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<sup>4</sup> This can become expensive. For example, it costs \$220 just to file a notice of application in the Ontario Superior Court of Justice: *Superior Court of Justice and Court of Appeal – Fees*, O Reg 293/92, s 1. On top of this, a person applying for guardianship or trusteeship will likely have to pay legal fees and disbursements etc.

<sup>5</sup> Again, depending on the mechanism that is used, costs associated with making a court application may be involved.

[Uniform Act] as suitable for adoption across Canada.<sup>6</sup> It proposes some solutions to the problems identified above and this report will focus on whether it is suitable for implementation in Alberta. While no provinces or territories have implemented the Uniform Act yet, there are compelling reasons why Canadian law should be harmonized in this area.

## **B. Benefits of Uniformity**

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[11] Uniform recognition provisions would make it more likely that substitute decision-making documents will be recognized and enforced in jurisdictions other than where the document was made. This benefits grantors by ensuring that their advance planning wishes are observed, and it benefits decision makers by making it easier for them to discharge their powers and duties pursuant to a substitute decision-making document. It also provides comfort to family members of the grantor by ensuring that the grantor's affairs will be taken care of if he or she becomes ill or incapacitated while travelling or living in another jurisdiction.

[12] Uniformity would also provide clear rules for execution and interpretation of substitute decision-making documents, which would benefit estate planning lawyers with mobile clients. Currently, the best way for lawyers to assist clients who own property or spend significant time in multiple jurisdictions is to execute a separate substitute decision-making document for each relevant jurisdiction. This puts a heavy burden on lawyers to know and be able to apply the law of a jurisdiction in which they do not practise. It also burdens grantors and their family members by forcing them to manage multiple documents. Harmonizing the law governing recognition would allow lawyers and their clients to be confident that the documents they have executed in their home jurisdiction will be accepted across the country, without the need for multiple documents or extensive research regarding foreign requirements.

[13] In addition, the introduction of uniform safeguards for third parties who are asked to rely on substitute decision-making documents would protect individuals or institutions with whom the decision maker needs to conduct business. For example, it appears to be common practice for financial institutions to require EPAs to comply with their own in-house forms.<sup>7</sup> If uniform safeguards

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<sup>6</sup> Uniform Act.

<sup>7</sup> Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform*, Final Report (2008), online: <<https://www.alri.ualberta.ca/docs/WCLRA%20epa%20fr.pdf>> [WCLRA Report].

could assure such institutions that they would not incur liability by relying in good faith on a substitute decision-making document that appears to meet the necessary legislative requirements, it is more likely that the documents would be accepted and enforced by these institutions.

[14] Finally, uniform recognition provisions would ensure that grantors and decision makers do not have to go through the time and expense of a guardianship or trusteeship application, which is generally the outcome if a grantor loses capacity and his or her substitute decision-making document cannot be recognized.<sup>8</sup> Similarly, uniform recognition provisions enhance the mobility rights of grantors who rely on substitute decision-making documents as an integral part of their advance care and financial planning strategies.<sup>9</sup> These issues are discussed in more depth in Chapter 3.

## C. Scope and Structure of Report

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### 1. SCOPE

[15] It is important to clarify at the outset the topics that this report will not address. For example, the recognition of adult guardianship orders is outside the scope of this project. Because of how it defines “substitute decision-making document”, the Uniform Act does not currently apply to adult guardianship orders or similar protective regimes.<sup>10</sup> In addition, most provincial adult guardianship statutes already provide for applications to reseal adult guardianship orders.<sup>11</sup> Once an order is resealed, it “is treated as if it were an order made under the domestic guardianship legislation.”<sup>12</sup> In other words, an application to reseal provides a complete recognition framework for adult guardianship orders. The procedure does not need to be revisited in this report.

[16] While it is true that not every provincial adult guardianship statute permits applications to reseal, most of the provinces that do not provide for such applications have judgment recognition statutes that allow for the registration of

<sup>8</sup> Uniform Law Conference of Canada, Civil Section, *Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act (2016)* (commentary), online: <[www.ulcc.ca/images/stories/2016\\_pdf\\_en/2016ulcc0008.pdf](http://www.ulcc.ca/images/stories/2016_pdf_en/2016ulcc0008.pdf)> at 1 [ULCC Commentary].

<sup>9</sup> ULCC Commentary at 1.

<sup>10</sup> Uniform Act, s 1.

<sup>11</sup> For example, *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 73.

<sup>12</sup> British Columbia Law Institute, *Report on the Recognition of Adult Guardianship Orders from Outside the Province*, Report 36 (2005) at 9.

an adult guardianship order issued by another Canadian court.<sup>13</sup> Once registered, the foreign order is treated as if it were issued by the court of the jurisdiction in which recognition is sought. Again, this procedure provides a satisfactory recognition scheme for those provinces.

[17] Only New Brunswick, Prince Edward Island and Newfoundland and Labrador do not provide for either an application to reseal or for the registration of an out-of-province Canadian adult guardianship order.<sup>14</sup> In those provinces, a fresh guardianship application must be made. However, it is outside the scope of this report to examine solutions for recognition-related problems that do not exist within Alberta.

[18] This report will also not address the substantive law governing substitute decision-making documents. While issues such as the powers and duties of decision makers or the appropriate formalities for execution may deserve consideration, they would be best examined as part of a separate project.

## 2. STRUCTURE

[19] This report will conduct a section by section review of the Uniform Act, as opposed to a thematic review. The Uniform Act is a short statute and each provision deals with a discrete issue, so it makes the most sense to examine each provision individually. However, the report does not follow the order of the Uniform Act. For example, following an explanation of the legal background and a discussion of the reasons for reform, the analysis of the Uniform Act will begin with a discussion of Uniform Act, section 2 and the appropriate choice of law rule to implement in Alberta

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<sup>13</sup> For example, *Enforcement of Canadian Judgments and Decrees Act*, SBC 2003, c 29.

<sup>14</sup> The judgment recognition statutes in these provinces limit the registration of Canadian orders to money judgments.



## CHAPTER 2

# Legal Background

## A. Alberta Legislation

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[20] Alberta legislation does already contain provisions governing the recognition of substitute decision-making documents executed in other jurisdictions. The *Powers of Attorney Act* governs the recognition of EPAs, while the *Personal Directives Act* governs the recognition of personal directives.<sup>15</sup>

### 1. POWERS OF ATTORNEY ACT

[21] Section 2(5) of the *Powers of Attorney Act* provides:<sup>16</sup>

(5) Notwithstanding subsection (1), a power of attorney is an enduring power of attorney if, according to the law of the place where it is executed,

(a) it is a valid power of attorney, and

(b) the attorney's authority under it is not terminated by the mental incapacity or infirmity of the donor that may occur after the execution of the power of attorney.

[22] In other words, an EPA will be recognized as valid in Alberta if, according to the law of the jurisdiction where it was executed, it is formally valid and it survives the mental incapacity of the donor. If the EPA is recognized under section 2(5), it will have the same effect as if it had been an EPA executed in Alberta.

[23] It should be noted that the *Powers of Attorney Act* only applies to EPAs. Thus, section 2(5) cannot be used to recognize non-enduring powers of attorney.

### 2. PERSONAL DIRECTIVES ACT

[24] The *Personal Directives Act* governs the recognition of substitute-decision making documents that deal with personal care and health care. Specifically, section 7.3 provides:<sup>17</sup>

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<sup>15</sup> *Powers of Attorney Act*, RSA 2000, c P-20 [PoA Act]; *Personal Directives Act*, RSA 2000, c P-6 [PD Act].

<sup>16</sup> PoA Act, note 15, s 2(5).

<sup>17</sup> PD Act, note 15, s 7.3.

### Directive made outside Alberta

**7.3** A directive made outside Alberta that complies with the requirements of Part 2 has the same effect as if it were made pursuant to this Act.

[25] Thus, a personal directive will be recognized as valid in Alberta only if it complies with the formal requirements of Alberta's *Personal Directives Act*. This is true even if the personal directive was validly executed in the other jurisdiction. Clearly, the recognition approach under the *Personal Directives Act* differs from the approach taken with respect to the recognition of EPAs under the *Powers of Attorney Act*.

## **B. Legislation in Other Provinces**

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[26] The majority of Canadian provinces and territories have provisions that facilitate the recognition of substitute decision-making documents.<sup>18</sup> However, the criteria for recognition varies depending on which type of document is being recognized and in which jurisdiction recognition is sought. This legislative patchwork makes it difficult to know whether a substitute decision-making document executed in one province will be recognized in another. Uniform recognition provisions would improve the ease with which substitute decision-making documents could be recognized across Canada.

[27] A full discussion of the recognition schemes used in each province and territory is attached as an appendix to this report.

## **C. Common Law**

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[28] In the absence of statutory recognition provisions, an individual seeking to have a substitute decision-making document recognized may apply to court to ask that the validity of the document be confirmed based on conflict of laws principles. Unfortunately, there is scant literature and case law dealing with the common law requirements for recognition of substitute decision-making

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<sup>18</sup> Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador do not have statutory recognition provisions for EPAs. Similarly, New Brunswick, Newfoundland and Labrador, and Nunavut do not have statutory recognition provisions for personal directives.



documents, and what does exist generally looks to the conflict of laws principles that apply to agency relationships.<sup>19</sup>

[29] As a general rule, the formal validity of a document is determined in accordance with the law of the place of execution, while the law governing the relationship between the principal and the agent is the law of the place where the services are to be performed by the agent.<sup>20</sup> Questions of status, such as declarations of mental incapacity and appointments of those responsible for making decisions on behalf of an incapable individual, are normally governed by the law of that individual's domicile, unless practical reasons dictate otherwise.<sup>21</sup>

[30] For example, take an EPA that has been executed in Ontario, by an individual domiciled in Ontario, and which stipulates that it does not come into effect until the donor becomes mentally incompetent. If the donor visits Alberta and the EPA needs to be recognized here, the following common law choice of law rules would apply:

- Whether the donor is mentally incompetent will be determined in accordance with Ontario law;
- Whether the EPA is formally valid will be determined in accordance with Ontario law; and,
- The relationship between the donor and the attorney will be governed by Alberta law.

[31] Conflict of laws principles allowing for recognition of substitute decision-making documents are rooted in private international law and, as such, may not be particularly user-friendly. Moreover, these principles are often of little use when they conflict with the rules and practices of the jurisdiction where a

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<sup>19</sup> Margaret R O'Sullivan, "Conflict of Laws Issues in Drafting and Using Powers of Attorney for the Mobile Client" (Paper delivered at The Law Society of Upper Canada 16<sup>th</sup> Annual Estates and Trusts Summit, 12 November 2013), online: <[www.osullivanlaw.com/Events-and-Conferences/LSUC-Conflict-of-Laws-Issues-in-Drafting-and-Using-Powers-of-Attorney-for-the-Mobile-Client.pdf](http://www.osullivanlaw.com/Events-and-Conferences/LSUC-Conflict-of-Laws-Issues-in-Drafting-and-Using-Powers-of-Attorney-for-the-Mobile-Client.pdf)> at 13 [O'Sullivan Paper]; Anthea Law, "Inter and Extra-Jurisdictional Considerations for Enduring Powers of Attorneys and Personal Directives" (Paper delivered at the Legal Education Society of Alberta's Enduring Powers of Attorney and Personal Directives Seminar, April 2016) at 7-8 [LESA Paper].

<sup>20</sup> *Chatenay v Brazilian Submarine Telegraph Company Limited* (Ct of App), [1891] 1 QB 79; O'Sullivan Paper, note 19 at 13; LESA Paper, note 19 at 7-8.

<sup>21</sup> J G Castel & Janet Walker, *Canadian Conflict of Laws*, 5th ed (Markham, Ont: LexisNexis Butterworths, 2004) at 21-1 [Castel & Walker].

substitute decision is needed. As a result, courts will generally use conflict of laws principles only as a last resort.<sup>22</sup>

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<sup>22</sup> *Cariello v Parella*, 2013 ONSC 7605 [*Parella*].

## CHAPTER 3

## Reasons for Reform

### A. Gaps in Alberta Legislation

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[32] Alberta legislation only recognizes substitute decision-making documents that take effect upon the incapacity of the grantor (such as springing EPAs or personal directives), or which to continue to be effective if the grantor becomes incapacitated (such as continuing EPAs). This means that there are presently no recognition provisions for non-enduring powers of attorney executed in another jurisdiction.

[33] Under current Alberta law, the only way to have a non-enduring power of attorney recognized would be through a court application, based on the conflict of laws principles discussed in Chapter 2. The question is whether these gaps in Alberta legislation create any real problems and, if so, whether the adoption of the Uniform Act could resolve them. At the very least, the issue deserves consideration, and will be discussed further in Chapter 6.

### B. Lack of Consistency within Alberta Legislation

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[34] The *Powers of Attorney Act* provides that an EPA will be recognized in Alberta if it complies with the formal requirements of the jurisdiction of execution.<sup>23</sup> Conversely, a personal directive is required to comply with the formal requirements of Alberta's *Personal Directives Act*, regardless of where it was executed.<sup>24</sup> This inconsistency is undesirable; it is likely that the same rules should govern the recognition of all types of substitute decision-making documents. At the very least, whether it is appropriate for recognition provisions to differ based on the type of document is an issue that needs to be considered.

[35] The Uniform Act addresses this question and adopts common recognition provisions for all types of substitute decision-making documents. Whether the Uniform Act's recognition provision framework is the correct approach for Alberta is addressed further in Chapter 4.

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<sup>23</sup> PoA Act, note 15, s 2(5).

<sup>24</sup> PD Act, note 15, s 7.3.

### **C. Lack of a Complete Framework within Alberta legislation**

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[36] The current recognition provisions found in the *Powers of Attorney Act* and the *Personal Directives Act* are stand-alone provisions; they recognize the validity of substitute decision-making documents which meet the “test” they set, but they do not provide further direction with respect to recognition-related issues. For example, both statutes are silent as to what kind of information or confirmation a third party may request in order to confirm the validity of a substitute decision-making document. Further, neither statute addresses whether a third party may be found liable for refusing, or accepting, the document.

[37] It is likely that the common law would be used to resolve these issues, which injects further confusion and complexity into the situation. Thus, the lack of a comprehensive legal framework may, in itself, justify reform.

### **D. Lack of Harmonization among Canadian Provinces**

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[38] Without guaranteed recognition of substitute decision-making documents, many lawyers advise their clients to execute documents for each jurisdiction in which they live or own property.<sup>25</sup> This approach is costly and time-consuming for the client and complicated for the lawyer. It requires the lawyer to know and apply the law of multiple jurisdictions in which they do not practice. For example, the Legal Education Society of Alberta’s examination of power of attorney legislation across Canada demonstrated a discrepancy in the following categories:<sup>26</sup>

- The execution requirements for a valid power of attorney;
- How old the donor must be;
- Who may act as a witness;
- How many witnesses are required;
- Whether a Certificate of Independent Legal Advice is required;
- Whether there are any special requirements for dealing with land; and,

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<sup>25</sup> O’Sullivan Paper, note 19 at 3.

<sup>26</sup> LESA Paper, note 19 at 9.

- If two attorneys are appointed, whether there is a “tie-breaker” provision for deadlocked attorneys.

[39] As a lawyer, needing to be aware of all of these discrepancies for each Canadian province, let alone other jurisdictions where clients may travel or own property, can become an onerous burden.

[40] Further, in addition to legislative discrepancies, the lawyer must always be vigilant about the following issues:<sup>27</sup>

- Ensuring that executing a document in one jurisdiction will not revoke the documents executed in another jurisdiction, if they are intended to co-exist;
- Events, such as marriage, divorce or death of the grantor, which can automatically terminate documents in some jurisdictions; and,
- Understanding the rules that will dictate what a decision maker can or cannot do pursuant to local laws.

[41] Ultimately, a complete recognition framework would benefit grantors by eliminating the need for multiple substitute decision-making documents and reducing the time and money associated with this type of planning.

## **E. Canada’s Mobile Population**

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[42] Alberta traditionally experiences significant population growth as a result of interprovincial migration. In fact, in 2014/2015, Alberta experienced the highest net interprovincial migration in Canada.<sup>28</sup> In that same year, the Atlantic

<sup>27</sup> O’Sullivan Paper, note 19 at 4–6. According to O’Sullivan, it is also important to “...carefully review a client’s assets and understand his or her lifestyle and residence patterns. How much time is spent outside Ontario and in which jurisdictions? Does he or she have assets, in particular real estate, outside [the province]? How is title held? Solely in the client’s name, jointly or otherwise? What is his or her age and general health? Based on these inquiries, an assessment can be made for which jurisdictions powers of attorney in local form should be prepared and where one may not be necessary, for example, where it is possible to change ownership or retitle assets, such as from sole to joint ownership, taking into account all relevant considerations, including tax consequences of any transfer and the loss of control over the assets” (at 3).

<sup>28</sup> In 2014/2015, Alberta experienced a net population increase of 21,600 due to interprovincial migration. British Columbia came in second, with a net population increase of 20,400 due to interprovincial migration. However, due in large part to the recent economic downturn, Alberta did experience a net population loss of 2,900 in 2015/2016. See Statistics Canada, *Internal Migration in Canada from 2012/2013 to 2014/2015*, by François Sergerie, Catalogue No 91-209-X (Ottawa: Statistics Canada, 14 October 2016), online: <[www.statcan.gc.ca/pub/91-209-x/2016001/article/14650-eng.htm#a9](http://www.statcan.gc.ca/pub/91-209-x/2016001/article/14650-eng.htm#a9)>.

provinces had the biggest net population losses, primarily because their residents were moving to Alberta.<sup>29</sup> To put it another way, since Alberta has historically received a large influx of migrants from other parts of Canada, it is important that Alberta law has a mechanism in place that will facilitate recognition of substitute decision-making documents originating from other provinces.

[43] Further, if an individual has the foresight to plan for his or her own incapacity by executing a substitute decision-making document, the inability to enforce that document in a jurisdiction other than the jurisdiction of execution seriously undermines the individual's self-determination interests. According to the Western Canada Law Reform Agencies Report on Enduring Powers of Attorney, the objective of EPA legislation is:<sup>30</sup>

...to provide a relatively simple yet effective method by which an individual can arrange for the administration of the individual's property and affairs by one or more trusted persons in the event that the individual becomes mentally incapable of doing so sometime in the future.

[44] This applies equally to personal directives in the health care and personal care context. However, failing to recognize validly executed substitute decision-making documents undermines this important objective.

[45] Failure to recognize a substitute decision-making document also impinges on the grantor's mobility rights. In fact, section 6 of the *Canadian Charter of Rights and Freedoms* guarantees every Canadian citizen the right to enter, remain in, and leave Canada.<sup>31</sup> If travelling between Canadian provinces, or leaving Canada to travel abroad, will affect the enforceability of an individual's incapacity plan, then his or her mobility rights have been affected. By implementing provisions that facilitate the recognition of substitute decision-making documents, Alberta law will respect and enhance grantors' self-determination interests and *Charter* protected mobility rights. Updated provisions will also streamline the recognition process for both migrants to Alberta and the Albertans who are asked to recognize the out-of-province documents.

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<sup>29</sup> With the exception of Newfoundland and Labrador which, due to interprovincial migration, experienced a net population increase of 200 in 2014/2015: see Statistics Canada, *Internal Migration in Canada from 2012/2013 to 2014/2015*, by François Sergerie, Catalogue No 91-209-X (Ottawa: Statistics Canada, 14 October 2016), online: <[www.statcan.gc.ca/pub/91-209-x/2016001/article/14650-eng.htm#a9](http://www.statcan.gc.ca/pub/91-209-x/2016001/article/14650-eng.htm#a9)>.

<sup>30</sup> WCLRA Report, note 7 at para 3.

<sup>31</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 6.

## F. Canada's Aging Population

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[46] Canada is dealing with an aging population. According to the 2016 Census, seniors represented 16.9% of Canada's total population in 2016, and that number is expected to reach 23% by 2031.<sup>32</sup> Further, the population of people aged 85 years and older grew by 19.4% between 2011 and 2016, which is nearly four times the growth rate of the overall Canadian population. Those aged 100 years and older made up the fastest growing age group in Canada, with growth between 2011 and 2016 reaching 41.3%.<sup>33</sup>

[47] Unfortunately, "[t]oday's seniors face chronic, mental health and neurological conditions", which affect their ability to make decisions for themselves and handle their own affairs.<sup>34</sup> Further, the gap between the average life expectancy and the healthy life expectancy is about 9 to 11 years.<sup>35</sup> This means that older Canadians are living, on average, a decade past the time they can be considered healthy or disability-free, and there is an "increasing likelihood that [they] may need assistance with decision-making at some point".<sup>36</sup> As a result, the administration of financial and personal matters for incapacitated seniors is likely to start coming up much more frequently.

[48] Further, as the baby boomers come closer to retirement, they are likely to travel more, spend longer periods of time away from home, or invest in property abroad.<sup>37</sup> One consequence of this trend is that grantors are more likely to have assets in multiple jurisdictions, or lose capacity or require health care while they are travelling or living abroad. In other words, the recognition of substitute

<sup>32</sup> Statistics Canada, *Age and Sex, and Type of Dwelling Data: Key Results from the 2016 Census*, The Daily (Ottawa: Statistics Canada, 3 May 2017), online: <[www.statcan.gc.ca/daily-quotidien/170503/dq170503a-eng.htm](http://www.statcan.gc.ca/daily-quotidien/170503/dq170503a-eng.htm)>.

<sup>33</sup> Statistics Canada, *A Portrait of the Population Aged 85 and Older in 2016 in Canada*, Census in Brief (Ottawa: Statistics Canada, 3 May 2017), online: <[www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016004/98-200-x2016004-eng.cfm](http://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016004/98-200-x2016004-eng.cfm)>.

<sup>34</sup> Public Health Agency of Canada, *The Chief Public Health Officer's Report on the State of Public Health in Canada 2014 - Changing Demographics, Aging and Health*, (Ottawa: Public Health Agency of Canada, 8 September 2014), online: <<https://www.canada.ca/en/public-health/corporate/publications/chief-public-health-officer-reports-state-public-health-canada/chief-public-health-officer-report-on-state-public-health-canada-2014-public-health-future/changing-demographics.html>>.

<sup>35</sup> RBC Wealth Management, "Mind the Gap: Canada's baby boomers need Power of Attorney planning to protect themselves" (2013), online: <[www.rbc.com/newsroom/pdf/rbc-mind-the-gap.pdf](http://www.rbc.com/newsroom/pdf/rbc-mind-the-gap.pdf)> at 5 [RBC]. A "healthy life expectancy" refers to "the number of healthy or disability-free years that [individuals] can expect to live" (at 5).

<sup>36</sup> RBC, note 35 at 6.

<sup>37</sup> RBC, note 35 at 6. Baby boomers are "born between 1945 and 1965."

decision-making documents is going to become an even more important part of the legislative framework that governs and protects seniors.

## **G. Recognition Provisions Reduce Guardianship and Trusteeship Orders**

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[49] If a substitute decision-making document is refused recognition after the grantor has lost capacity, the only option for dealing with the grantor's affairs is to make a court application for the appointment of a guardian or trustee. This outcome is undesirable. Not only does it undermine the grantor's ability to plan for his or her own incapacity, but it burdens judicial resources and requires a costly court application. Often, the grantor specifically created a substitute decision-making document so that the information surrounding his or her personal or financial affairs would not have to be revealed and discussed in court.

[50] Thus, one of the main advantages of recognizing a substitute decision-making document is that "it avoids expensive and embarrassing court proceedings for the appointment of a guardian or trustee to look after the individual's affairs".<sup>38</sup> This may be especially important for a province like Alberta that welcomes a high number of migrants from other provinces every year. An increased number of court applications for the recognition of the substitute decision-making documents made outside Alberta could place additional, and unnecessary, demands on the civil justice system.

## **H. The Common Law and the Hague Convention are not Feasible Solutions**

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[51] The *Hague Convention on the International Protection of Adults, 1999* [the Hague Convention] was created in order to facilitate international mobility and property ownership.<sup>39</sup> It deals with the recognition of EPAs and personal directives, called powers of representation, as well as the recognition and enforcement of court orders involving guardianship or similar protective regimes. Canada is not a signatory to the Hague Convention.

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<sup>38</sup> WCLRA Report, note 7 at para 3.

<sup>39</sup> Hague Conference on Private International Law, *Convention on the International Protection of Adults*, Convention 13 January 2000, online: <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=71>> [Hague Convention].



[52] Ultimately, neither the principles of the common law (discussed in Chapter 2) nor the provisions of the Hague Convention are appropriate alternatives to legislated recognition provisions. The common law is complex and confusing and often results in different outcomes, depending on the jurisdiction. The Hague Convention would, potentially, resolve the problem, but it appears there is little to no movement towards ratifying the Hague Convention in Canada. In other words, unless it is implemented here, the principles underlying the Hague Convention can only be used by a court for guidance; they cannot dictate the outcome of a recognition issue.

[53] The insufficiency of the common law and the inapplicability of the Hague Convention are clearly demonstrated by a recent Ontario case. In *Cariello v Parella*, an Italian priest who had been working and living in Ontario retired and returned to live in Italy. Father Parella made arrangements to return to Ontario for a few weeks in order to attend to some personal matters. While he was there, he suffered a seizure and was diagnosed with Alzheimer's disease. Powers of attorney for property and personal care were executed, but it was determined that the priest was incapable at the time of execution. Ultimately, he was placed in an Ontario care facility.<sup>40</sup>

[54] Meanwhile, Father Parella's brother made an application for guardianship in Italy. The Italian court found it had jurisdiction over Father Parella, based on the fact that Italy was his permanent residence and domicile at the time the guardianship proceedings began. On an application to reseal the Italian guardianship order in Ontario, some Ontario friends of Father Parella made a cross-application to have the Italian order set aside, to determine the effect of the powers of attorney executed by Father Parella and, if necessary, to issue an Ontario guardianship order appointing guardians from Ontario.<sup>41</sup>

[55] The Ontario court relied on common law principles to conclude that the court that had proper jurisdiction over Father Parella's affairs was the court of his domicile and ordinary residence.<sup>42</sup> After a long discussion, it was determined that he was domiciled in, and ordinarily resident in, Italy.<sup>43</sup> Further, the Ontario

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<sup>40</sup> *Parella*, note 22 at paras 1, 15, 23–24.

<sup>41</sup> *Parella*, note 22 at paras 24–26, 39.

<sup>42</sup> *Parella*, note 22 at para 56.

<sup>43</sup> *Parella*, note 22 at para 77.

court determined that the Hague Convention had no application because it had not been implemented in Canada.<sup>44</sup>

[56] To avoid complicated situations like the one illustrated in *Cariello v Parella*, it is important that a simple and clear recognition framework be implemented in Alberta.<sup>45</sup> This report will now examine whether the framework proposed in the Uniform Act offers the correct solution

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<sup>44</sup> *Parella*, note 22 at paras 49–52.

<sup>45</sup> Since the *Parella* decision was based on conflict of laws principles, it is likely that the outcome would have been the same if it had been decided in Alberta.

## CHAPTER 4

# Applicable Law and the Public Policy Exception

## A. The Uniform Act

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[57] In 2016, the ULCC adopted the Uniform Act as suitable for implementation across Canada. The Uniform Act is the result of a joint project with the American Uniform Law Commission [American Commission]. The American Commission adopted its uniform legislation as suitable for implementation in the United States in 2014.<sup>46</sup>

[58] The Uniform Act proposes a three-part approach to recognition and provides two options for the choice of law. It also supplements the existing framework in most jurisdictions by providing rules governing acceptance and refusal of a substitute decision-making document and liability for good-faith reliance on a substitute decision-making document.<sup>47</sup>

[59] The provisions of the Uniform Act, and whether they are suitable for implementation in Alberta, are discussed in detail throughout the rest of this report.

## B. The Applicable Law: Uniform Act, Section 2

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[60] The most pressing policy issue to determine is under what circumstances Alberta law should recognize substitute decision-making documents. To put it another way, the first question that must be answered is what is the appropriate law to apply in order to determine whether a substitute decision-making document should be recognized in Alberta?

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<sup>46</sup> So far, Connecticut, Idaho and Alaska have enacted the American uniform legislation.

<sup>47</sup> The Law Reform Commission of Nova Scotia recommended implementation of the Uniform Act's recognition provisions, but not the associated acceptance, refusal and good faith provisions. See Law Reform Commission of Nova Scotia, *The Powers of Attorney Act*, Final Report (2015) at 94, online: <[www.lawreform.ns.ca/Downloads/Final\\_Report\\_Powers\\_of\\_Attorney\\_Act.pdf](http://www.lawreform.ns.ca/Downloads/Final_Report_Powers_of_Attorney_Act.pdf)>.

## 1. OPTION 1

[61] In section 2 of the Uniform Act, the ULCC has proposed two options for how to choose the applicable law.<sup>48</sup> Option 1 separates out formal and essential validity and applies a different choice of law rule to each.

### Formal Validity

[62] Formal validity refers to the legal requirements of execution, such as notarization or witness requirements. For example, the law applicable to formal validity will determine whether one or more medical professionals are required to establish the grantor's incapacity.

[63] Under Option 1, the substitute decision-making document will be considered formally valid if it complies with the requirements of the jurisdiction indicated in the document. If no jurisdiction is indicated, it will be considered formally valid if it complies with the legislated formalities of any one of the following jurisdictions:<sup>49</sup>

- The jurisdiction of execution;
- The jurisdiction of the grantor's habitual residence at the time of execution; or,
- Alberta.

### Essential Validity

[64] Once it is determined that the document is formally valid, essential validity must be considered. Essential validity deals with the extent, modification and extinction of the powers of the decision maker under a formally valid substitute decision-making document. For example, the law applicable to essential validity will determine whether the authority to consent to health care extends to all forms of medical treatment.

[65] Under Option 1, essential validity is determined by the law of the jurisdiction expressly indicated in the document, provided the grantor is a "national or former habitual resident of that jurisdiction," or the subject property is located in that jurisdiction. If no jurisdiction is indicated, or if the jurisdiction

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<sup>48</sup> Uniform Act, s 2.

<sup>49</sup> Uniform Act, s 2(1), Option 1.

indicated does not match one of the specified jurisdictions, then essential validity is determined by the law of the jurisdiction where the grantor was habitually resident at the time of execution.<sup>50</sup>

[66] Option 1 reads as follows:<sup>51</sup>

**Option 1**

**Applicable law**

**2(1)** A substitute decision-making document entered into by an individual outside of Alberta is formally valid in Alberta if, when it was entered into, the requirements for entering into the document 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 entered into, or

(ii) the jurisdiction in which the individual was habitually resident; or

(b) the law of Alberta.

**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 entering into the document, if the document does not indicate a jurisdiction or the jurisdiction indicated is not a jurisdiction described in clause (a).

<sup>50</sup> Uniform Act, s 2(2), Option 1.

<sup>51</sup> Uniform Act, ss 2(1)–(2), Option 1.

## 2. OPTION 2

[67] Under Option 2, both formal and essential validity are determined according to the same choice of law rule that determines essential validity under Option 1.<sup>52</sup> That is, under Option 2, both formal and essential validity are determined by the law of the jurisdiction expressly indicated in the document, provided the grantor is a national or former habitual resident of that jurisdiction, or the subject property is located in that jurisdiction. If there is no jurisdiction indicated in the document, or if the jurisdiction indicated does not match one of the specified jurisdictions, then both formal and essential validity are determined by the law of the jurisdiction where the grantor was habitually resident at the time of execution.<sup>53</sup> This mirrors the approach taken by the Hague Convention.<sup>54</sup>

[68] Option 2 reads as follows:<sup>55</sup>

### 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

(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 entering into the document, if the

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<sup>52</sup> Under Option 1, the phrase “[t]he existence, extent, modification and extinction” is used to denote only essential validity. Conversely, under Option 2, “... existence, extent, modification and extinction” encompasses both formal and essential validity. The ULCC Commentary defines those terms as follows (at 6):

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 ... 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 ... The terms “modification” and “extinction” follow their ordinary meaning.

<sup>53</sup> Uniform Act, s 2(1), Option 2.

<sup>54</sup> ULCC Commentary at 4.

<sup>55</sup> Uniform Act, s 2(1), Option 2.

document does not indicate a jurisdiction or the jurisdiction indicated is not a jurisdiction described in clause (a).

### 3. WHICH OPTION IS APPROPRIATE FOR ALBERTA?

#### a. Distinguishing between formal validity and essential validity

##### **ISSUE 1**

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Should the recognition of substitute decision-making documents distinguish between formal validity and essential validity when applying the choice of law rule?

[69] According to the ULCC, both Option 1 and Option 2 are satisfactory options because they both establish “an objective means for determining what jurisdiction’s law was intended to govern the substitute decision-making document.”<sup>56</sup> Thus, all things being equal, it could be argued that Option 2 is preferable because it simplifies the process by removing the necessity of distinguishing between formal and essential validity. The approach taken by Option 2 may also be beneficial in certain situations, such as where a particular requirement straddles both formal and essential validity, or where different jurisdictions characterize the same requirement differently.<sup>57</sup>

[70] However, the distinction approach adopted by Option 1 is actually “closer to the conventional approach used in wills and health care directives.”<sup>58</sup> Further, the body of case law governing the distinction between formal and essential validity is well developed and generally easy to apply.<sup>59</sup> And, in the vast majority of cases, the benefit of skipping the distinction step is overshadowed by the fact that both Option 1 and Option 2 “...will yield the same result, in that [the] place of entering into the document, habitual residence and nationality will be one and the same.”<sup>60</sup>

[71] Moreover, Option 1 corresponds to the approach adopted by the American Commission.<sup>61</sup> Given the prevalence with which Canadians travel to

<sup>56</sup> ULCC Commentary at 5.

<sup>57</sup> ULCC Commentary at 4.

<sup>58</sup> ULCC Commentary at 3.

<sup>59</sup> ULCC Commentary at 3–4.

<sup>60</sup> ULCC Commentary at 4.

<sup>61</sup> ULCC Commentary at 3.

the United States, uniformity with the American recognition provisions is an important consideration.

[72] The ULCC specifically notes that the language of Option 2 tracks the language of the Hague Convention. As a result, Option 2 should be chosen by those jurisdictions that have implemented the Hague Convention, or that plan to implement it in the near future. To put it another way, if Option 1 is implemented, the resulting statute will have to be revisited and amended if the Hague Convention is later implemented in that jurisdiction.<sup>62</sup>

[73] While it is generally important to consider impending legal changes that may affect proposed legislation, this particular legal change has little to no impact on the discussion. Canada has shown no indication that the Hague Convention will be implemented soon or, realistically, that it will be implemented at all. Thus, uniformity with the Hague Convention is not an especially important factor in this case.

[74] Thus, ALRI proposes that Alberta should distinguish between formal validity and essential validity when applying the choice of law rule.

[75] **We welcome all comments and feedback on this preliminary proposal.**

## **RECOMMENDATION 1**

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The recognition of substitute decision-making documents should distinguish between formal validity and essential validity when applying the choice of law rule.

### **b. Choice of law: formal validity**

[76] The main motivation underlying the development of uniform recognition requirements is to increase the likelihood that a substitute decision-making document will be recognized and used outside of its originating jurisdiction. To that end, an important factor to consider when deciding which jurisdictions should be used to determine formal validity is the fact that, most often, the people and institutions that are asked to recognize substitute decision-making documents are non-lawyers. Further, with respect to personal directives, the decisions that must be made are often serious and emotional, and may need to be made very quickly. In such cases, hospital or care facility personnel need to be able to swiftly assess whether the document can be relied upon. If the choice of

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<sup>62</sup> ULCC Commentary at 4.



law rules are too complicated for non-lawyers to apply and it cannot be determined whether the document complies with the statutory requirements for formal validity, recognition will likely be denied.

[77] If recognition is refused, the agent may be forced to make a court application to compel recognition or, failing that, for guardianship. It is probable that whatever medical emergency or treatment decision necessitated reliance upon the personal directive in the first place will have become irrelevant by the time a court order for recognition or guardianship is issued. As such, it is important that the choice of law rule for formal validity is relatively straightforward and easy for non-lawyers to apply.

[78] The ULCC proposal offers four options for the choice of law rule dealing with formal validity; namely, the jurisdiction indicated, the jurisdiction of execution, the jurisdiction of the grantor's habitual residence at the time of execution, and Alberta. Essentially, these options address the current gaps and inconsistencies in Alberta legislation. They combine the recognition provisions from the *Powers of Attorney Act* (the jurisdiction of execution) and the *Personal Directives Act* (the implementing jurisdiction), and then add two more. Again, if the goal is to increase the likelihood that a substitute decision-making document will be recognized, then it would seem that providing more jurisdiction options for determining formal validity would achieve that goal.

[79] However, the jurisdiction options suggested by the ULCC are not necessarily easy, quick, or straightforward for non-lawyers to apply. Keeping in mind that the "ease of use" of the new legislation should be paramount, Alberta could choose any one of the following approaches to implementation:<sup>63</sup>

- Implement Option 1 as written (i.e., retain all of the jurisdiction options for formal validity proposed by the ULCC);
- Implement none of the ULCC jurisdiction options and create an Alberta specific framework for determining formal validity; or,
- Implement only the ULCC jurisdiction options for formal validity that contribute to the usability of the statute.

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<sup>63</sup> There is an argument to be made that altering the ULCC's approach would undermine the goal of uniformity. While this may be true, the ULCC has already proposed two different options for the applicable law. Thus, it is already a very real possibility that recognition provisions will not be uniform, even if the Uniform Act is ultimately implemented by every province and territory. Further, while uniformity is important in this area, it is also important for Alberta to find a solution that works well with its existing legislative framework.

The advantages and disadvantages of each option for determining formal validity are discussed in detail below.

*i. The jurisdiction indicated in the substitute decision-making document*

[80] It seems fairly obvious that if the grantor indicates a clear intention for a specific jurisdiction to govern his or her substitute decision-making document, that designation should be respected and applied for the purposes of recognition. In other words, adhering to an explicit jurisdiction clause provides a concrete choice of law rule and respects the grantor's preferences and fundamental expectations.<sup>64</sup>

[81] However, it is not necessarily a quick task to determine whether a document complies with the formal requirements of a different jurisdiction. The person assessing formal validity would have to know which jurisdiction the grantor identified in the document, which statutes or regulations govern the formal validity of the document in that jurisdiction and where to access the relevant statutes and regulations. Only then can the person begin to assess whether the document conforms to that jurisdiction's requirements. This is an onerous task for non-lawyers and would not contribute to the overall usability of the statute.

[82] Further, Option 2 puts conditions on the ability to use the jurisdiction indicated in the document. Namely, the grantor must have some connection to the jurisdiction indicated, either through nationality, former habitual residency, or the fact that the powers in question are to be exercised with respect to the grantor's property located in that jurisdiction. Thus, it must also be considered whether these conditions are necessary when allowing the grantor to choose the jurisdiction that will govern formal validity.

*ii. The jurisdiction of execution*

[83] According to the ULCC, one advantage of Option 1 is that it provides "[s]lightly more generous provisions" governing formal validity.<sup>65</sup> For example, unlike Option 2, it includes the jurisdiction of execution as an available option for

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<sup>64</sup> If the document is drafted by a lawyer, this may be a situation where it would be helpful to include a lawyer's certificate indicating that the document complies with the requirements of the jurisdiction indicated. After all, if the lawyer has been instructed to include a jurisdiction clause, he or she probably knows there is a high likelihood that the grantor intends to be able to use the document elsewhere.

<sup>65</sup> ULCC Commentary at 3.

determining formal validity.<sup>66</sup> This is an important feature because it is extremely likely that the document will comply with the formal requirements of the place where it was made. In other words, if formal validity is judged according to the requirements of the jurisdiction of execution, there is a greater chance that the document will be recognized as formally valid.

[84] However, it would still be difficult for a non-lawyer to assess whether the document complies with the formalities of the jurisdiction of execution. Again, the person assessing formal validity would have to ascertain the jurisdiction of execution, identify and locate the relevant statutes and regulations, figure out the formalities required by the legislation and assess whether the document is in compliance with them. In other words, this option also does not contribute to the overall usability of the statute.

*iii. The jurisdiction of the grantor's habitual residence at the time of execution*

[85] Often, the jurisdiction of execution and the grantor's habitual residence are the same.<sup>67</sup> Thus, a lot of the same policy considerations would apply. In other words, it is very likely that a substitute decision-making document would comply with the formal requirements of the grantor's habitual residence at the time of execution. As a result, if the jurisdiction of the grantor's habitual residence is included as an option against which formal validity may be judged, there is a greater chance that the document will be recognized as formally valid.

[86] However, it would likely be even more difficult for non-lawyers to determine formal validity under the jurisdiction of habitual residence. Even before deciding whether the document is formally valid, the person assessing formal validity would have to determine where the grantor had been habitually resident at the time of execution, which statutes or regulations govern formal validity in that jurisdiction and where to access them. This is complicated even further by the fact that it is not always clear where a particular person was habitually resident at any given time.

[87] In life or death situations, this type of investigation is impractical and, as such, this option would not contribute to the usability of the statute.

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<sup>66</sup> Uniform Act, s 2(1)(a)(i), Option 1.

<sup>67</sup> ULCC Commentary at 4.

#### iv. Alberta

[88] As already mentioned, substitute decision-making documents will often need to be used quickly and interpreted by medical staff or others without legal training. Practically, these individuals will be unable to quickly determine whether a document is formally valid according to the law of a different jurisdiction. Allowing them to judge validity in accordance with Alberta law may make recognition somewhat easier. In other words, to ensure that documents have the greatest practical effect, especially in the health care context, it is probably important that Alberta be included as a jurisdiction option. This is likely why the *Personal Directives Act* only permits recognition of documents that comply with Alberta requirements.

[89] However, as discussed in Chapter 3, the formal requirements for both EPAs and personal directives differ from province to province. Thus, unless the document is specifically drafted with Alberta requirements in mind, it is unlikely that it will be recognized as formally valid under Alberta legislation. And, in any event, the necessity of drafting multiple substitute decision-making documents is one of the problems that the Uniform Act was created to avoid.

[90] Further, judging formal validity in accordance with Alberta law raises the possibility that a substitute decision-making document will be recognized as formally valid in Alberta, even if it is not formally valid according to the law of the other jurisdiction. For example, consider a substitute decision-making document that is executed in Ontario, by a grantor who is habitually resident in Ontario, and then needs to be used in Alberta. It is formally valid according to Alberta's legislation, but it is not formally valid under the Ontario legislation. Provided that the document does not have a jurisdiction clause, it would be able to be used in Alberta, but not in Ontario.

[91] Ultimately, these questions are difficult and it is important that we hear from the lawyers, medical professionals, hospital personnel, care facility personnel, banks, financial institutions and others that deal with these documents on a daily basis before making a preliminary recommendation. As such, we welcome all comments and feedback on the following issue:

## ISSUE 2

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Which jurisdictions should be included as options to assess formal validity when recognizing a substitute decision-making document in Alberta? (Choose all that apply.)

- a. The jurisdiction indicated in the document.
- b. The jurisdiction where the document was executed.
- c. The jurisdiction where the grantor was habitually resident at the time of execution.
- d. Alberta.
- e. Other (please specify).

### c. Choice of Law: Essential Validity

## ISSUE 3

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Which jurisdiction's law should apply when determining the essential validity of a substitute decision-making document that has been recognized as formally valid in Alberta?

[92] Once it has been decided that a substitute decision-making document may be recognized as formally valid in Alberta, it must be determined which law should be applied in order to interpret the meaning and effect of the document. Under both Option 1 and Option 2, the essential validity of a substitute decision-making document will be determined in accordance with the law of the jurisdiction indicated in the document, provided that the grantor is a national or former habitual resident of that jurisdiction, or the powers in question are to be exercised in relation to property located in that jurisdiction. Otherwise, essential validity is governed by the law of the grantor's habitual residence at the time of execution.

[93] Again, if the grantor communicates a clear preference for the governing law by inserting a jurisdiction clause, then this choice should be respected. However, the grantor must have also some connection to the jurisdiction indicated, either because he or she is a national there, was habitually resident there or the powers in question relate to property owned by the grantor in that jurisdiction. This qualification makes sense; the law that governs essential validity will ultimately determine the scope of the decision maker's powers under the document. The grantor should not be able to choose a system of law that is different than the one that would apply if the substitute decision-making document were being used in its originating jurisdiction.

[94] If there is no jurisdiction indicated, or if the jurisdiction indicated does not meet the other requirements, then essential validity is interpreted in accordance with the law of the grantor's habitual residence at the time of execution. This also makes sense; it provides a concrete rule against which to judge the meaning and effect of a document. Further, it respects the fundamental expectations of the grantor, who would likely assume that the law of the place where he or she was living at the time of execution would be the law that governs the document. Moreover, the authority conferred on a decision maker under a substitute decision-making document should not be enlarged or restricted from what was originally intended by the grantor simply because it needs to be used in a different jurisdiction.<sup>68</sup>

[95] Ultimately, using the grantor's habitual residence to determine essential validity is a well-accepted principle of private international law and there is no compelling reason to deviate from it here.

[96] Thus, ALRI proposes that the choice of law rule used to determine essential validity proposed by the ULCC in both Option 1 and Option 2 should be implemented in Alberta. That is, the essential validity of a formally valid substitute decision-making document should be determined in accordance with the law of the jurisdiction indicated in the document, provided that the grantor is a national or former habitual resident of that jurisdiction, or the powers in question are to be exercised in relation to property located in that jurisdiction. Otherwise, essential validity should be governed by the law of the grantor's habitual residence at the time of execution.

[97] **We welcome all comments and feedback on this preliminary proposal.**

### **RECOMMENDATION 3A**

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The essential validity of a substitute decision-making document should be determined in accordance with the law of the jurisdiction indicated in the document, provided that the grantor has a connection to that jurisdiction through nationality, former habitual residency or property ownership.

### **RECOMMENDATION 3B**

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If there is no jurisdiction indicated, or the grantor does not have the necessary connection to the jurisdiction indicated, then the

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<sup>68</sup> Of course, this is subject to the public policy exception, discussed below.

essential validity of a substitute decision-making document should be determined in accordance with the law of the grantor's habitual residence at the time of execution.

### C. The Public Policy Exception: Uniform Act, Section 4

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[98] Uniform Act, section 4 permits Alberta to refuse to apply to the law applicable to the substitute decision-making document, as determined by Uniform Act, section 2, if to do so would be "... manifestly contrary to public policy."<sup>69</sup> In other words, Uniform Act, section 4 would apply in situations where the act that is being attempted pursuant to a substitute decision-making document is "... contrary to the enacting province or territory's conception of essential justice or morality or to its fundamental public policies."<sup>70</sup> It is probable that this issue, or circumstances that would trigger the application of Uniform Act, section 4, would be more likely to arise with respect to certain medical decisions or procedures, such as the ability for a decision maker to refuse treatment, the ability to consent to artificially supplied nutrition or hydration, or the ability to access medical assistance in dying.<sup>71</sup>

[99] Uniform Act, section 4 is consistent with Article 21 of the Hague Convention.<sup>72</sup> It reads as follows:<sup>73</sup>

#### **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.

<sup>69</sup> Uniform Act, s 4.

<sup>70</sup> ULCC Commentary at 10.

<sup>71</sup> Currently, medical assistance in dying cannot be accessed by a substitute decision maker. According to section 241.2(1)(b) of the *Criminal Code*, RSC 1985, c C-46, one of the eligibility criteria for accessing medically assisted dying is that the person must be at least 18 years old and "capable of making decisions with respect to their health". Additionally, in Alberta, both of the forms required to access medical assistance in dying, as well as the Order-in-Council setting out the Medical Assistance in Dying Standards of Practice, require the patient to be capable of making decisions with respect to their own health care: *Order respecting Medical Assistance in Dying Standards of Practice*, OC 142/2016, (2016) A Gaz I, 1114 (*Health Professions Act*).

In December 2016, the Government of Canada announced that the Council of Canadian Academies would be conducting an independent review regarding, among other topics, advance consent for medically assisted dying: see Government of Canada, News Release, "Government of Canada Initiates Studies Related to Medical Assistance in Dying" (13 December 2016), online: Government of Canada <<https://www.canada.ca/en/health-canada/news/2016/12/government-canada-initiates-studies-related-medical-assistance-dying.html>>. The Council's final report will be tabled in Parliament by December 2018; however, it will not make any recommendations concerning the topics under review.

<sup>72</sup> Hague Convention, note 39, art 21.

<sup>73</sup> Uniform Act, s 4.

## ISSUE 4

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Should the recognition of substitute decision-making documents include a public policy exception?

[100] Commentators, such as Aimee Fagan, who are opposed to the inclusion of a public policy exception argue that it undermines the purpose of making a substitute decision-making document because it permits local public policy to trump the grantor's explicit instructions.<sup>74</sup> For example, with respect to personal directives, Fagan argues that "the public policies of the country where the individual becomes ill will determine whether the directive will be honoured" and, "[i]t is this very derogation of the patient's wishes that an advance medical directive is supposed to stave off."<sup>75</sup>

[101] Essentially, Fagan's argument is that permitting a public policy exception nullifies the effect of the recognition provision because it requires the applicable law to comply with local public policy, or run the risk of not being enforced.<sup>76</sup> Yet, this argument does not recognize that, if the grantor had capacity, he or she would not be able to access procedures or give instructions that were contrary to the jurisdiction's public policy. No jurisdiction should be required to recognize a document that is contrary to the fundamental values of its society.

[102] Further, the public policy exception is a well-accepted principle of private international law. It reassures the implementing jurisdiction that it will not be forced to heed instructions in a substitute decision-making document that are contrary to its essential conception of justice or morality. In other words, the public policy exception provides a measure of comfort to the implementing jurisdiction when applying the foreign law.

[103] Moreover, not recognizing the well-established public policy exception undermines the goal of harmonization. It is likely that Canadian provinces would be reluctant to implement the Uniform Act if implementation meant that they might have to enforce a document that is contrary to their local laws and policies. Finally, the public policy exception has a very narrow application; it is

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<sup>74</sup> Aimee R Fagan, "An Analysis of the Convention of the International Protection of Adults" (2002) 10 *Elder LJ* 330 at 350 [Fagan Paper].

<sup>75</sup> Fagan Paper, note 74 at 350–351.

<sup>76</sup> Fagan Paper, note 74 at 351–352.



only to be used when a jurisdiction's fundamental values are at stake.<sup>77</sup> Thus, in the vast majority of cases, it will have no effect on the recognition process.

[104] ALRI proposes that Alberta law should include a public policy exception, and Uniform Act, section 4 should be implemented in Alberta.

[105] **We welcome all comments and feedback on this preliminary proposal.**

#### **RECOMMENDATION 4**

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The recognition of substitute decision-making documents should include a public policy exception.

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<sup>77</sup> Castel & Walker, note 21 at 8-11.



## CHAPTER 5

# Other Recognition Issues: Mandatory Acceptance, Good Faith Reliance and Liability for Illegitimate Refusals

## A. Background

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[106] While provisions that establish the basis for recognizing a substitute decision-making document are necessary, they only address part of the issue. Practically, there may be limitations to actually using a substitute decision-making document in a jurisdiction other than the place where it was executed. For example, without legal training, it may be difficult for an individual or an institution to determine whether a document was validly executed in the originating jurisdiction.

[107] In order to address these issues, sections 5 and 6 of the Uniform Act introduce the concepts of mandatory acceptance, good faith reliance, and liability for illegitimate refusals of a substitute decision-making document. They are meant to provide safeguards that protect all parties involved in the recognition process; namely, grantors, decision makers, and third parties that are asked to recognize the document. Existing Alberta legislation does not have any equivalent provisions; thus, these uniform sections represent an entirely new contribution to the legislative framework governing recognition in Alberta.

## B. Acceptance, Refusal and Reliance on Substitute Decision-Making Documents: Uniform Act, Sections 5-6

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[108] According to the ULCC, “[s]ections 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”, while section 6 permits a third party “to rely in good faith on a substitute decision-making document and the decision maker’s authority”, unless the third party “has actual knowledge that the document or authority is void, invalid or terminated.”<sup>78</sup>

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<sup>78</sup> ULCC Commentary at 11–12.

## 1. ACCEPTANCE AND REFUSAL: UNIFORM ACT, SECTION 5

[109] Section 5(1) requires a third party to accept an apparently valid substitute decision-making document. Specifically, a third party is required to accept a substitute decision-making document within a reasonable time, provided that it appears to meet the requirements of the applicable law, as determined under Uniform Act, section 2. Further, the third party may not require an additional or different form of the document.

[110] However, this mandatory acceptance requirement is specifically subject to Uniform Act, sections 5(2) and 5(3), or to any other enactment. The ULCC commentary specifies that this “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.”

[111] Section 5(2) sets out the circumstances in which recognition of a document is prohibited, while section 5(3) establishes the circumstances in which a third party is permitted to reject an otherwise acceptable document. Under section 5(2), a third party is required to reject the document if he or she has actual knowledge that the decision maker’s authority under the document has been terminated or if he or she believes, in good faith, that the document is invalid or the decision maker does not have the authority he or she purports to exercise.

[112] Under section 5(3), a third party is permitted to reject a substitute decision-making document if one of the following circumstances exist:

- The third party would not be required to act if the grantor was the one making the request;
- The third party’s request, pursuant to Uniform Act, section 6(2), for the decision maker’s assertion of fact, a translation, or a legal opinion is refused; or,
- The third party makes or has actual knowledge that another person has made a report that the grantor may be subject to abuse, neglect, exploitation, or abandonment by the decision maker.

[113] Finally, section 5(4) establishes liability for legal costs. If a third party violates section 5(1) by refusing to accept a substitute decision-making document and is later compelled to do so by court order, he or she is liable for the

reasonable legal fees and costs incurred to obtain that order. In addition, “[a]n unreasonable refusal may be subject to other remedies provided by other law.”<sup>79</sup>

[114] Uniform Act, section 5 reads as follows:<sup>80</sup>

**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 for formal validity 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 entered into 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 Office of the Public Guardian and Trustee 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.

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<sup>79</sup> ULCC Commentary at 11.

<sup>80</sup> Uniform Act, s 5.

### 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.

## 2. GOOD FAITH RELIANCE: UNIFORM ACT, SECTION 6

[115] Section 6(1) establishes that a third party may rely, in good faith, on a substitute decision-making document and the decision maker's authority thereunder. It specifies that, except as otherwise provided by any other Act, a third party who accepts a substitute decision-making document in good faith may assume, without further inquiry, that both the document and the decision maker's authority under the document are genuine, valid and still in effect. In other words, absent stricter requirements imposed by a different statute, section 6(1) does not require a third party "to investigate a substitute decision-making document or the decision maker's authority."<sup>81</sup>

[116] Section 6(2) permits a third party to rely on assertions of fact, translations, or legal opinions as the basis for accepting a substitute decision-making document. Specifically, section 6(2) empowers a third party who is asked to accept a substitute decision-making document to request, and rely upon, any of the following:<sup>82</sup>

- The decision maker's assertion of fact concerning the listed matters;<sup>83</sup>
- A translation of the document, if it contains a language other than the official language spoken in the province; or,
- A legal opinion regarding any matter of law concerning the document, provided that the request is made in writing and contains the specific reason for the request.

This approach recognizes that a third party "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."<sup>84</sup>

<sup>81</sup> ULCC Commentary at 12.

<sup>82</sup> ULCC Commentary at 12.

<sup>83</sup> The listed matters include the individual for whom decisions will be made, the decision maker, or the substitute decision-making document.

<sup>84</sup> ULCC Commentary at 13.

[117] Finally, section 6(3) addresses a third party's liability for good faith reliance. It establishes that a third party who relies, in good faith, on an assumption under section 6(1), or on an assertion, translation or legal opinion under section 6(2), is not liable if it turns out that the assumption or reliance is based on inaccurate information.

[118] Uniform Act, section 6 reads as follows:<sup>85</sup>

**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 or 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; 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.

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<sup>85</sup> Uniform Act, s 6.

### 3. IMPLEMENTATION

#### a. Section 5

[119] Though Uniform Act, sections 5 and 6 work in a complementary way, it is appropriate to address their suitability for implementation in Alberta separately. Is the Uniform Act, section 5, and the framework it provides for mandatory acceptance and legitimate refusals of a substitute decision-making document suitable for implementation in Alberta?

#### **ISSUE 5**

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Should there be a framework that regulates mandatory acceptance or legitimate refusals of a substitute decision-making document, including sanctions for illegitimate refusals?

[120] There are at least three arguments that support implementation. First, a provision similar to section 5 would supplement Alberta's recognition scheme. Currently, Alberta's recognition provisions are stand-alone provisions; they do not provide a framework that governs acceptance and refusals. Thus, if section 5 were implemented, it would make Alberta's recognition approach more comprehensive.

[121] Second, implementation would address the problems associated with institutional policies that vary between jurisdictions. Generally, institutions such as banks, insurance companies, or health care facilities will have their own institutional policies regarding recognition. It may be difficult, if not impossible, for a document to comply with all of the different institutional requirements. The WCLRA described the problem with respect to EPAs, though the analysis can be extrapolated to cover all types of substitute decision-making documents:<sup>86</sup>

Some financial institutions (banks, insurance companies and the like) review EPAs in-house to determine their validity. Other institutions require an opinion from a solicitor in the originating jurisdiction regarding the validity of the EPA. Some institutions will only recognize EPAs that use their own standard in-house forms. Institutional policy may be set at a provincial level, rather than a regional or national level, leading to variations in the policy and operations from province to province.

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<sup>86</sup> WCLRA Report, note 7 at para 27.



[122] By requiring acceptance within a reasonable time, prohibiting requests for the document to comply with a different form, and preserving the ability to refuse documents in legitimate circumstances, section 5 addresses the institutional issues described by the WCLRA.

[123] Third, because section 5(1) is made expressly subject to sections 5(2), 5(3), and any other enactment, it preserves the public policy exception discussed in Chapter 4. Specifically, it permits common law or other statutes to “impose public policy limits on a decision maker’s scope of authority in certain contexts or for certain medical procedures.”<sup>87</sup>

[124] One potential issue is whether section 5(3)(b) introduces the risk that third parties will simply ask for a legal opinion from the originating jurisdiction anytime recognition is requested. It may be that, from the third party’s perspective, such a practice would protect them from liability in all circumstances. For example, if the legal opinion states that the document is valid in the originating jurisdiction, then the third party may rely on it. If the legal opinion states that the document is invalid in the originating jurisdiction, then the third party is justified in rejecting it. If the request for a legal opinion is refused, then section 5(3)(b) permits a third party to reject the document. The question, in other words, is whether section 5(3)(b) introduces a de facto requirement for a solicitor’s certificate to accompany a document in every circumstance?

[125] If the answer to that question is yes, then it may be prudent to recommend that section 5(3)(b) not be implemented. After all, there are compelling arguments against requiring a solicitor’s certificate or legal opinion as a condition of recognition. It adds unnecessary complexity to the process, which may discourage some grantors from making a substitute decision-making document. Further, according to the WCLRA, “[t]here is also a risk that the public might see a requirement for a lawyer certificate as a cash grab for lawyers.”<sup>88</sup>

[126] However, section 6(2)(c) requires a request for a legal opinion to be made in writing and to contain the reasons for the request. Thus, every third party request for a legal opinion will be accompanied by evidence of intention, which can be used if an application is ultimately made to compel acceptance of the

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<sup>87</sup> ULCC Commentary at 11.

<sup>88</sup> WCLRA Report, note 7 at para 50.

document. If the application to compel acceptance is successful then, pursuant to Uniform Act, section 5(4), the third party will be liable for all reasonable costs incurred to obtain the order. Presumably, if the request for a legal opinion is deemed unnecessary, the third party may even be liable for additional costs.

[127] In other words, requests for unnecessary legal opinions would expose a third party to liability for costs and would be done at their own peril. This should provide enough of a deterrent to prevent misuse or abuse of section 5(3)(b).

[128] Thus, ALRI proposes that Uniform Act, section 5 should be implemented in Alberta.

[129] **We welcome all comments and feedback on this preliminary proposal.**

## **RECOMMENDATION 5**

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There should be a framework that regulates mandatory acceptance or legitimate refusals of a substitute decision-making document, including sanctions for illegitimate refusals.

### **b. Section 6**

[130] As explained above, Uniform Act, section 6 permits a third party “to rely in good faith on a substitute decision-making document and the decision maker’s authority”, unless the third party “has actual knowledge that the document or authority is void, invalid or terminated.” The implementation of section 6 would supplement Alberta’s recognition framework and provide a more comprehensive scheme for the recognition of foreign substitute decision-making documents. However, it must still be considered whether the substance of section is appropriate for implementation in Alberta.

## **ISSUE 6**

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Should there be a framework that protects third parties who rely in good faith on an apparently valid substitute decision-making document?

[131] There are three ways in which section 6 facilitates recognition of substitute decision-making documents. First, it introduces safeguards for third parties who deal with a substitute decision-making document or with the decision maker. For example, it protects a third party who relies in good faith on an invalid substitute decision-making document, unless he or she had actual knowledge that the

document was invalid. This should provide a measure of comfort to third parties who are asked to act in reliance on a substitute decision-making document.

[132] Second, it does not compel the third party to investigate the validity of the substitute decision-making document. This is a sensible requirement. Insisting otherwise would put an onerous burden on the third party, forcing them to make inquiries about a document that does not originate from their own jurisdiction. The third party would likely take certain measures to protect themselves, and would also likely refuse any document that they were unsure about. By not requiring a third party to investigate the substitute decision-making document, section 6 simplifies the recognition process.

[133] Finally, although third parties are not required to investigate a document, section 6 still allows them to take steps to protect themselves by asking for confirmation under section 6(2). This provision recognizes that a third party who is asked to rely on a substitute decision-making document is probably unfamiliar with the law or the language of the jurisdiction intended to govern the document.

[134] Considering the above benefits, ALRI proposes that Uniform Act, section 6 should be implemented in Alberta.

[135] **We welcome all comments and feedback on this preliminary proposal.**

#### **RECOMMENDATION 6A**

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There should be a framework that protects third parties who rely in good faith on an apparently valid substitute decision-making document.

#### **RECOMMENDATION 6B**

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The framework should establish that third parties are not required to investigate the validity of a substitute decision-making document.

#### **RECOMMENDATION 6C**

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The framework should also provide methods by which a third party may, if necessary, request information that would confirm the validity of the substitute decision-making document.



## CHAPTER 6

## Application

A. Living Wills

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[136] In order for the Uniform Act to apply to the recognition of a substitute decision-making document, the document must contain an express delegation of authority to a decision maker. In other words, the recognition scheme provided by the Uniform Act “does not apply to documents that merely provide advance directions for future decisions such as living will declarations and do-not resuscitate orders.”

[137] This policy choice is reflected in the Uniform Act’s definition of “substitute decision-making document”:

“**substitute decision-making document**” means a writing or other record entered into by an individual to authorize a decision maker to act with respect to property, health care, or personal care on behalf of the individual.

## 1. ALBERTA’S CURRENT APPROACH

[138] The question is whether, in Alberta, it is appropriate to restrict the application of the recognition statute to documents that contain a delegation of authority. Under Alberta’s *Personal Directives Act*, it is possible to create a personal directive that both appoints an agent and provides advance instructions.<sup>89</sup> If the directive provides advance instructions that are relevant to the decision that needs to be made, the agent is required to follow them.<sup>90</sup> Further, decisions made by an agent have “the same effect as if” the decision had been made by the maker him or herself.<sup>91</sup>

[139] The *Personal Directives Act* also permits the creation of a personal directive that provides advance instructions without designating an agent.<sup>92</sup> In addition, service providers, such as doctors or health care facilities, must follow any

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<sup>89</sup> PD Act, note 15, s 7.

<sup>90</sup> PD Act, note 15, s 14(2).

<sup>91</sup> PD Act, note 15, s 11.

<sup>92</sup> PD Act, note 15, s 7.

advance instructions that are related to the decision that must be made.<sup>93</sup> Further, a service provided in accordance with the Act is as effective “as if the authority to provide the service” was given directly by the maker.<sup>94</sup> In other words, a service provider is bound to follow advance instructions contained in a personal directive, whether or not the document also contains an express delegation of authority.<sup>95</sup> If Alberta legislation were to adopt the Uniform Act’s definition of “substitute decision-making document”, it would represent a departure from the policy choices identified in the *Personal Directives Act*.

## 2. OTHER PROVINCES

[140] Most other provinces also permit the creation of a personal directive that does not contain a delegation of authority. However, none are quite as explicit as Alberta that both agents and service providers are required to follow the advance instructions indicated. For example, Nova Scotia legislation permits the creation of a personal directive that provides advance instructions, that appoints an agent, or that does both, but it does not address the effect of decisions made by agents or service providers, or the effect of the advance instructions contained in the directive.<sup>96</sup>

[141] Statutes in Saskatchewan, Manitoba, Prince Edward Island and Newfoundland and Labrador establish that a directive may provide instructions, appoint an agent, or both. While the agent must follow the maker’s advance instructions, service providers are not expressly compelled to do so. However, it

<sup>93</sup> PD Act, note 15, s 19(1)(b).

<sup>94</sup> PD Act, note 15, s 20.

<sup>95</sup> There is also a separate document called a “Goals of Care Designation” administered by Alberta Health Services, “FAQ for the Health Care Professional” (25 July 2016), online: <<https://extranet.ahsnet.ca/teams/policydocuments/1/clp-advance-care-planning-acp-gcd-faq.pdf>>. This document “is a medical order that specifies general care intentions, location of care and transfer opportunities for current and future care, and is signed by the most responsible health practitioner.” It becomes effective in a health care situation where the maker “is unable to communicate their own health care wishes.” The Goals of Care Designation is different from a personal directive in three ways. First, it does not require a finding of incapacity before it comes into effect; the maker must only be in a medical situation where he or she cannot communicate his or her health care wishes. Second, it is a medical order that specifies general care intentions and covers medical treatment only, while a personal directive is a legal document that appoints an agent and/or provides advance care instructions and applies to all personal matters. Third, it does not appoint an agent, though an agent appointed under a personal directive can use the Goals of Care Designation to inform their decisions. For more information on Goals of Care Designations see: [www.conversationsmatter.ca](http://www.conversationsmatter.ca).

<sup>96</sup> *Personal Directives Act*, SNS 2008, c 8, ss 3(1)(a), 15(2), 18(3)(b) [NS PD Act].

is explicit in each statute that a decision recorded in a directive has the same effect as if made by the maker him or herself.<sup>97</sup>

[142] In Ontario, advance instructions must be combined with the appointment of an agent.<sup>98</sup> However, wishes with respect to treatment, admission to a care facility, personal assistance services, or any other matter must be adhered to, whether or not they are found within a personal directive.<sup>99</sup>

[143] Legislation in the Northwest Territories provides that a personal directive may provide instructions, appoint an agent, or both, and the agent must follow the directive's advance instructions. A service provider must inquire into the existence of a personal directive and should make reasonable efforts to comply with any advance instructions contained therein. Further, any service provided in accordance with the Act has the same effect as if authorized by the maker.<sup>100</sup>

[144] Yukon legislation provides that a personal directive may provide advance instructions. A substitute decision maker must make reasonable efforts to determine the maker's wishes, and must give or refuse consent to treatment in accordance with those wishes.<sup>101</sup>

[145] Neither British Columbia nor New Brunswick expressly permits the creation of a document that only contains advance instructions.

### 3. POLICY DISCUSSION

#### ISSUE 7

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Should the recognition of substitute decision-making documents be restricted to documents that contain an express delegation of authority to a substitute decision maker?

[146] It is consistent with current Alberta legislation and policy to recognize substitute decision-making documents that only provide advance instructions,

<sup>97</sup> *The Health Care Directives and Substitute Health Care Decision Makers Act, 2015*, SS 2015, c H-0.002, ss 1, 5, 12 [SK PD Act]; *The Health Care Directives Act*, CCSM, c H27, ss 5, 7(1), 13 [MB PD Act]; *Consent to Treatment and Health Care Directives Act*, RSPEI 1988, c C-17.2, ss 1(e), 13, 20, 24 [PEI PD Act]; *Advance Health Care Directives Act*, SNL 1995, c A-4.1, ss 3, 5, 12(1)(a) [Nfld PD Act]. In Prince Edward Island and Newfoundland and Labrador, a provider is also required to inquire into the existence of a directive, while Manitoba specifically says there is no onus to inquire: see PEI PD Act, s 23; Nfld PD Act, s 18(2); MB PD Act, s 21.

<sup>98</sup> Ontario Act, note 3, ss 7, 46(1).

<sup>99</sup> Ontario Act, note 3, ss 66(3), 67; *Health Care Consent Act, 1996*, SO 1996, c 2, Sch A, s 1(c)(iii).

<sup>100</sup> *Personal Directives Act*, SNWT 2005, c 16, ss 5, 11(2), 15(2), 19, 20, 21 [NWT PD Act].

<sup>101</sup> *Care Consent Act*, SY 2003, c 21, Sch B, ss 19, 20, 29 [YK PD Act].

without designating a decision maker. The ULCC commentary has not provided any reasons for why a departure from the current Alberta approach is justified on this point.

[147] Further, it is unfair to recognize documents that contain both advance instructions and a delegation of authority, but not to recognize documents that contain only advance instructions. In both instances, the grantor had the foresight to provide instructions to be followed if he or she becomes incapacitated. However, under the uniform approach, those instructions would only be recognized under the former document, regardless of the fact that Alberta law permits the creation of a document similar to the latter.

[148] Similarly, most Canadian legislation permits documents that contain only advance instructions, and some even specify that advance instructions contained in a personal directive should have the same effect as a decision made by the maker. In other words, it appears that the trend across Canada is to permit documents that do not contain a delegation of authority; the ULCC has not provided a compelling argument for why the Uniform Act should deviate from this approach.

[149] In fact, recognizing documents that only contain advance instructions seems more consistent with the stated objectives of the Uniform Act; namely, to preserve the grantor's self-determination interests and to respect his or her advance planning.<sup>102</sup> Though it may be more difficult to implement advance instructions if the substitute decision-making document does not also appoint a decision maker, that does not mean that those instructions should not be given weight.

[150] Finally, jurisdictions will still be able to refuse to give effect to advance instructions contained in a substitute decision-making document that are manifestly contrary to their own public policy. Thus, recognizing documents that do not contain a delegation of authority does not put a jurisdiction at risk of having to honour advance planning requests that are not permitted under their local law.

[151] ALRI proposes that the definition of "substitute decision-making document" contained in Uniform Act, section 1 should be expanded to include documents that provide advance instructions but do not contain an express delegation of authority to an identified decision maker.

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<sup>102</sup> ULCC Commentary at 1.



[152] We welcome all comments and feedback on this preliminary proposal.

### **RECOMMENDATION 7**

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The recognition of substitute decision-making documents should extend to documents that contain advance instructions, whether or not they contain a delegation of authority.

## **B. Non-Enduring Powers of Attorney**

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[153] Currently, statutes in British Columbia, Alberta, Saskatchewan, Manitoba, the Northwest Territories, Nunavut and the Yukon all require a power of attorney to endure under the law of the jurisdiction of execution before it will be recognized.<sup>103</sup> In other words, these provinces do not currently have provisions governing the recognition of non-enduring powers of attorney.

[154] The Uniform Act does not require a power of attorney to endure in the jurisdiction of execution as a condition of recognition. Thus, as written, the Uniform Act can be used to recognize non-enduring powers of attorney. Is there a reason for Alberta to change its approach on this issue and adopt the uniform approach? Or, should Alberta deviate from the Uniform Act and restrict recognition only to powers of attorney that endure under the jurisdiction of execution?

### **ISSUE 8**

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Should the recognition of substitute decision-making documents extend to non-enduring powers of attorney?

[155] By definition, a non-enduring power of attorney ceases to have effect once the grantor loses capacity. However, one of the main objectives of the Uniform Act is to ensure grantors can rely on substitute decision-making documents after they have lost capacity. Clearly, this factor is irrelevant with respect to non-enduring powers of attorney, and may suggest that recognition provisions are not required for these types of documents.

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<sup>103</sup> *Powers of Attorney Act*, RSBC 1996, c 370, s 38(a) [BC PoA Act]; POA Act, note 15, s 2(5); *Powers of Attorney Act*, 2002, SS 2002, c P-20.3, s 13 [SK PoA Act]; *The Powers of Attorney Act*, CCSM, c P97, s 25 [MB PoA Act]; *Powers of Attorney Act*, SNWT 2001, c 15, ss 13, 25 [NWT PoA Act]; *Powers of Attorney Act*, SNu 2005, c 9, ss 10, 26 [Nu PoA Act]; *Enduring Power of Attorney Act*, RSY 2002, c 73, s 3(5) [YK PoA Act].

[156] Currently, in Alberta, land titles policy only expressly permits the registration of EPAs that originate outside of Alberta (provided the document meets the other land titles requirements). This may be a sensible approach, given that land titles registration is generally reserved for more permanent documents, like a mortgage, as opposed to revocable documents, like a non-enduring power of attorney. Nevertheless, it may be that expanding Alberta's approach to include recognition of non-enduring powers of attorney would also require amendments to land titles policy.<sup>104</sup>

[157] ALRI proposes that Alberta should retain its current approach when dealing with the recognition of powers of attorney. In other words, any legislation governing the recognition of substitute decision-making documents should be restricted to the recognition of powers of attorney that endure under the jurisdiction of execution.

[158] **We welcome all comments and feedback on this preliminary proposal.**

### **RECOMMENDATION 8**

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The recognition of substitute decision-making documents should not extend to non-enduring powers of attorney.

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<sup>104</sup> It also appears that most standard forms used by financial institutions are for enduring powers of attorney: see <<https://www.td.com/ca/document/PDF/forms/596056.pdf>>.

## CHAPTER 7

## Miscellaneous Issues

**A. Photocopies and Electronic Copies: Uniform Act, Section 3**

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[159] Uniform Act, section 3 provides that a photocopy or electronically transmitted copy of an original substitute decision-making document has the same effect as the original, unless another rule in the implementing jurisdiction provides otherwise.

[160] Uniform Act, section 3 reads as follows:

**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.

**ISSUE 9**

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Should photocopies or electronically transmitted copies of an original substitute decision-making document be accepted?

[161] If one of the goals of the Uniform Act is to simplify recognition of substitute decision-making documents, then it would seem sensible to facilitate recognition by permitting photocopies or electronically transmitted copies of the original documents. Currently, neither the *Powers of Attorney Act* nor the *Personal Directives Act* expressly requires the original document for any purpose. However, for both enduring and non-enduring powers of attorney, land titles policy requires presentation of the original document as a condition of registration.<sup>105</sup> Thus, it must be considered whether Uniform Act, section 3 can be reconciled with Alberta's existing land titles policy, or whether one, or both, will require amendment.

[162] Section 3 is expressly subject to "any other enactment". The ULCC commentary clarifies that section 3 is a default provision that would apply "unless another statute, court rule, or administrative rule in the jurisdiction

<sup>105</sup> Alberta Land Titles Office, "Powers of Attorney - Enduring" Procedures Manual POA-2 (Alberta: Land Titles, 1 September 2017); Alberta Land Titles Office, "Powers of Attorney" Procedures Manual POA-1 (Alberta: Land Titles, 16 November 2017).

requires presentation of the original substitute decision-making document”.<sup>106</sup> Land titles policy constitutes an administrative rule; therefore, it would be given precedence over the application of section 3. In other words, section 3 and land titles policy are able to co-exist with each other.

[163] Uniform Act, section 3 is otherwise uncontroversial; thus, ALRI proposes that Uniform Act, section 3 should be implemented in Alberta.

[164] **We welcome all comments and feedback on this preliminary proposal.**

### **RECOMMENDATION 9**

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Photocopies or electronically transmitted copies of the original substitute decision-making document should be accepted, unless another enactment requires otherwise.

## **B. Other Remedies: Uniform Act, Section 7**

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[165] Section 7 establishes that the remedies provided by the Uniform Act do not remove any other right or remedy already provided under the law of Alberta. Section 7 reads as follows:<sup>107</sup>

### **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 Alberta.

### **ISSUE 10**

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Should the availability of other remedies that exist under Alberta law be preserved?

[166] The Uniform Act applies to many individuals, entities and subject areas.<sup>108</sup> According to the ULCC, “[r]emedies under other laws which govern such persons and subject matters should be considered by aggrieved parties in addition to remedies available under this Act.”<sup>109</sup> Further, since the Uniform Act

<sup>106</sup> ULCC Commentary at 9.

<sup>107</sup> Uniform Act, s 7.

<sup>108</sup> Many different individuals or entities may serve as decision makers or may be asked to accept a substitute decision-making document. Similarly, the Uniform Act applies to various subject areas over which a grantor may delegate substitute decision-making authority: see ULCC Commentary at 13.

<sup>109</sup> ULCC Commentary at 13.

only deals with the limited issue of recognition, it should not be interpreted as altering existing laws or remedies.

[167] Thus, ALRI proposes that Uniform Act, section 7 should be implemented in Alberta.

[168] **We welcome all comments and feedback on this preliminary proposal.**

### **RECOMMENDATION 10**

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The availability of other remedies that exist under Alberta law should be preserved.

## **C. Definitions: Uniform Act, Section 1**

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[169] The Uniform Act specifies that its definitions apply only to the terms used within the Act, and not to the terms used in a substitute decision-making document. The meaning given to terms used within a substitute decision-making document is determined according to the law identified as the applicable law under Uniform Act, section 2. The scope of the decision maker's authority under a substitute decision-making document will also be determined in accordance with the applicable law. In other words, the definitions provided in the Uniform Act are not intended to enlarge the authority granted to the decision maker under the terms of a substitute decision-making document.<sup>110</sup>

[170] Uniform Act, section 1 reads as follows:<sup>111</sup>

#### **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.

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<sup>110</sup> ULCC Commentary at 3.

<sup>111</sup> Uniform Act, s 1.

**“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.

**“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 entered into by an individual to authorize a decision maker.

## **ISSUE 11**

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Are the definitions provided by the Uniform Act appropriate?

[171] The Uniform Act definitions provided for “decision maker”, “enactment”, “health care”, and “personal care” are uncontroversial, and this report has already recommended that the definition of “substitute decision-making document” should be expanded in Alberta. However, whether the uniform definitions of “person” and “property” are appropriate for implementation must still be considered.

### **1. PERSON**

[172] The ULCC commentary indicates that the definition of “person” may not be necessary if there is already a comparable definition in the provincial *Interpretation Act*. While Alberta’s *Interpretation Act* does contain a definition of “person”, the definition provided by the Uniform Act is broader in scope. For example, it includes a government department or branch, while the *Interpretation Act* definition does not.<sup>112</sup> This is appropriate in the context of a recognition

<sup>112</sup> Alberta’s *Interpretation Act*, RSA 2000, c I-8, s 28(1)(nn) defines “person” as follows:

statute because the definition of “person” must encompass “any person or entity to whom a substitute decision-making document is presented.”<sup>113</sup>

## 2. PROPERTY

[173] The ULCC commentary also notes that it may not be necessary in every jurisdiction to include the definition of “property”. For example, it would not be necessary in a civil law jurisdiction (i.e., Quebec).

[174] The *Powers of Attorney Act* does not currently define property. However, other Alberta statutes dealing with land and property do include similar definitions. For example, the *Land Titles Act* defines “land”, the *Personal Property Security Act* defines “personal property”, the *Adult Guardianship and Trusteeship Act* defines “property”, and the *Wills and Succession Act* defines “property”.<sup>114</sup> Thus, according to the above examples, it would not be superfluous to include a definition of “property” in this recognition statute.

[175] ALRI proposes that, with the exception of the definition of “substitute decision-making document”, Uniform Act, section 1 should be implemented in Alberta.

[176] **We welcome all comments and feedback on this preliminary proposal.**

### **RECOMMENDATION 11**

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The definitions of “decision maker”, “enactment”, “health care”, “person”, “personal care”, and “property” provided by the Uniform Act are appropriate for Alberta.

(nn) “person” includes a corporation and the heirs, executors, administrators or other legal representatives of a person;

Also note that the ULCC’s *Model Interpretation Act* only says that a “‘person’ includes a corporation”: see Uniform Law Conference of Canada, *Model Interpretation Act*, s 34, online:

<[https://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwivlKvxnbLXAhUNymMKHWhSDZQQFggsMAE&url=http%3A%2F%2Fwww.ulcc.ca%2Fimages%2Fstories%2F2015\\_pdf\\_en%2F2015ulcc0011.pdf&usg=AOvVaw3IznE1itBL4VO9zeVQu4HS](https://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwivlKvxnbLXAhUNymMKHWhSDZQQFggsMAE&url=http%3A%2F%2Fwww.ulcc.ca%2Fimages%2Fstories%2F2015_pdf_en%2F2015ulcc0011.pdf&usg=AOvVaw3IznE1itBL4VO9zeVQu4HS)>.

<sup>113</sup> ULCC Commentary at 3.

<sup>114</sup> *Land Titles Act*, RSA 2000, c L-4, s 1(m); *Personal Property Security Act*, RSA 2000, c P-7, s 1(gg); *Adult Guardianship and Trusteeship Act*, note 11, s 1(cc); *Wills and Succession Act*, SA 2010, c W-12.2, s 1(i).





## CHAPTER 8

## Transition: Uniform Act, Sections 8-9

[177] Uniform Act, sections 8 and 9 govern how the Uniform Act would apply to existing substitute decision-making documents and when the Uniform Act, if implemented, should come into force. Specifically, section 8 provides that the Uniform Act applies to a substitute decision-making document created before, on, or after the day on which the Act comes into force, and section 9 establishes that the Uniform Act comes into force on Royal Assent. The ULCC materials did not provide any commentary on these provisions.

### A. Application to Existing Documents: Uniform Act, Section 8

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[178] Section 8 reads as follows:

**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.

**ISSUE 12**

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Which substitute decision-making documents should be governed by the new recognition provisions?

[179] Uniform Act, section 8 is a sensible approach to implementation and transition. Broad application of the recognition provisions facilitates travel and mobility and respects grantors' advance planning. A different transition scheme would require a grantor to execute a new substitute decision-making document once the Uniform Act is implemented in order to have the document recognized. This is undesirable and the ULCC was correct in rejecting that approach.

[180] In addition, Uniform Act, section 8 would only apply to refusals of a substitute decision-making document on a prospective basis. In other words, it does not expose third parties who refused to recognize a document before the Act came into force to liability for the refusal.

[181] Finally, and most importantly, it avoids a dual regime. If, for example, the Uniform Act specified that it only applied to substitute decision-making documents that were executed after the Act came into force, there would be one set of recognition rules for documents executed before implementation and one set of rules for documents executed after. This is undesirable and undermines the

Uniform Act's objectives of uniformity and harmonization. It is simpler to provide that, once implemented, the Uniform Act will apply to all substitute decision-making documents, regardless of the date on which they were made.

[182] ALRI proposes that Uniform Act, section 8 should be implemented in Alberta.

[183] **We welcome all comments and feedback on this preliminary proposal.**

## **RECOMMENDATION 12**

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The new recognition provisions should apply to all substitute decision-making documents, regardless of when they were made.

## **B. Coming into Force: Uniform Act, Section 9**

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[184] Section 9 reads as follows:

### **Coming into force**

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

[185] The Uniform Act only provides a framework for the recognition of substitute decision-making documents; it does not alter the substantive law governing substitute decision-making documents. Further, the current recommendation is for the Uniform Act to apply to all substitute decision-making documents, regardless of the date of creation. As a result, there is no need for a gap in order to allow time for individuals to conclude their matters under the old law before the new law is activated.

[186] However, there are many different factors that the government may need to consider before bringing new legislation into force. For example, it may be necessary to build in some time to provide education about the impending changes to the law. It is ALRI's opinion that this type of transition decision is best left to government.

## Appendix: Statutory Recognition Provisions in Other Provinces

### A. Provincial Recognition Requirements for EPAs

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[187] With the exception of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador, all of the Canadian common law provinces and territories contain provisions for recognizing EPAs.

[188] Saskatchewan, Manitoba, the Northwest Territories, Nunavut and the Yukon follow the same approach to recognition as Alberta's *Powers of Attorney Act*. That is, an EPA will be recognized as valid in each of those jurisdictions if, according to the law of the jurisdiction of execution, the EPA is formally valid and survives the mental incapacity of the donor.<sup>115</sup>

[189] Under Ontario's *Substitute Decisions Act, 1992*, an EPA will be recognized as valid in Ontario if, at the time of execution, it complied with the internal law of one of the following jurisdictions:<sup>116</sup>

- The place where it was executed;
- The place where the donor was domiciled; or,
- The place where the donor had his/her habitual residence.

[190] British Columbia's *Power of Attorney Act* and regulations contain the most comprehensive recognition scheme. An EPA will be recognized as valid in British Columbia only if it meets the following requirements:<sup>117</sup>

- It is formally valid according to the jurisdiction of execution or according to the jurisdiction where the donor was ordinarily resident at the time of execution;
- It endures in the jurisdiction of execution;
- It continues to be effective in the jurisdiction of execution;

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<sup>115</sup> SK PoA Act, note 103, s 13; MB PoA Act, note 103, s 25; NWT PoA Act, note 103, ss 13, 25; Nu PoA Act, note 103, ss 10, 26; YK PoA Act, note 103, s 3(5).

<sup>116</sup> Ontario Act, note 3, s 85.

<sup>117</sup> BC PoA Act, note 103, s 38; *Power of Attorney Regulation*, BC Reg 20/2011, s 4.

- At the time of execution, the donor was ordinarily resident outside of British Columbia, but within Canada, the United States, the United Kingdom, Australia or New Zealand; and,
- It is accompanied by a solicitor's certificate, completed by a lawyer entitled to practice in the jurisdiction of execution, indicating that it meets all of the above requirements.

[191] In all cases, if the EPA complies with the legislated recognition requirements, it will have the same effect as if it had been executed under the legislation of the jurisdiction where recognition is sought.<sup>118</sup>

## **B. Provincial Recognition Requirements for Personal Directives**

[192] With the exception of New Brunswick, Newfoundland and Labrador and Nunavut, all Canadian common law provinces and territories have enacted provisions governing the recognition of personal directives. Saskatchewan, Manitoba and the Yukon follow the same approach as Alberta and require personal directives to comply with the formal requirements of their own legislation before the directive will be recognized.<sup>119</sup>

[193] Ontario follows the same approach for the recognition of personal directives as it does for the recognition of EPAs. That is, if, at the time execution, the personal directive complied with the internal law of the place of execution, the place where the maker was domiciled, or the place where the maker had his/her habitual residence, it will be recognized as valid in Ontario.<sup>120</sup>

[194] Nova Scotia and Prince Edward Island adopted the uniform recognition provision recommended by the ULCC in 1996.<sup>121</sup> In each of those provinces, a personal directive will be recognized as valid if it complies with the formal requirements of:<sup>122</sup>

- The jurisdiction where recognition is sought;

<sup>118</sup> BC PoA Act, note 103, s 38; PoA Act, note 15, s 2(5); SK PoA Act, note 103, s 13; MB PoA Act, note 103, s 25; Ontario Act, note 3, s 85; NWT PoA Act, note 103, s 25; Nu PoA Act, note 103, s 26; YK PoA Act, note 103, s 3(5).

<sup>119</sup> SK PD Act, note 97, s 8; MB PD Act, note 97, s 10; YK PD Act, note 101, s 34.

<sup>120</sup> Ontario Act, note 3, s 85.

<sup>121</sup> Uniform Law Conference of Canada, *Advance Directives in Health Care* (April 1996).

<sup>122</sup> NS PD Act, note 96, s 24; PEI PD Act, note 97, s 34.

- The jurisdiction of execution; or,
- The jurisdiction where the maker was habitually resident at the time of execution.

[195] Further, in Prince Edward Island, a person implementing a personal directive may rely on a lawyer or notary's certificate indicating that the directive complies with the proper formalities.<sup>123</sup>

[196] The Northwest Territories' *Personal Directives Act* stipulates that a personal directive will be recognized if it complies with the formal requirements of the Act, or if a lawyer entitled to practice in the jurisdiction of execution certifies, in writing, that the directive complies with the formal requirements of the place of execution.<sup>124</sup>

[197] Once again, British Columbia has the most comprehensive recognition scheme. According to the *Representation Agreements Act* and regulations, a personal directive will be recognized in British Columbia if it performs the function of a representation agreement and complies with the prescribed requirements. Those requirements include:<sup>125</sup>

- The document authorizes an agent to make, or assist in making, personal or health care decisions for the maker;
- The document is formally valid according to the jurisdiction of execution or according to the jurisdiction where the donor was ordinarily resident at the time of execution;
- The document continues to be effective in the jurisdiction of execution;
- At the time of execution, the donor was ordinarily resident outside of British Columbia, but within Canada, the United States, the United Kingdom, Australia or New Zealand; and,
- It is accompanied by a solicitor's certificate, completed by a lawyer entitled to practice in the jurisdiction of execution, indicating that it meets all of the above requirements.

<sup>123</sup> PEI PD Act, note 97, s 34(3).

<sup>124</sup> NWT PD Act, note 100, s 3.

<sup>125</sup> *Representation Agreement Act*, RSBC 1996, c 405, s 41 [BC PD Act]. *Representation Agreement Regulation*, BC Reg 199/2001, s 9 [BC PD Reg]. The function of a representation agreement is to designate a substitute decision maker for personal and health care decisions.

[198] Again, there is no uniform approach to recognition of personal directives. Recognition options include compliance with the formal requirements of the jurisdiction of execution, the jurisdiction where recognition is sought, the maker's habitual residence at the time of execution, and so on. However, if the personal directive does ultimately comply with the legislated recognition requirements, it will have the same effect as if it had been executed under the legislation of the jurisdiction where recognition is sought.<sup>126</sup>

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<sup>126</sup> BC PD Act, note 125, s 41; PD Act, note 15, s 7.3; SK PD Act, note 97, s 8; MB PD Act, note 97, s 10; Ontario Act, note 3, s 85; NS PD Act, note 96, s 24; PEI PD Act, note 97, s 34; NWT PD Act, note 100, s 3(2); YK PD Act, note 101, s 34.



**Deadline for comments on the issues raised in  
this document is May 1, 2018**



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