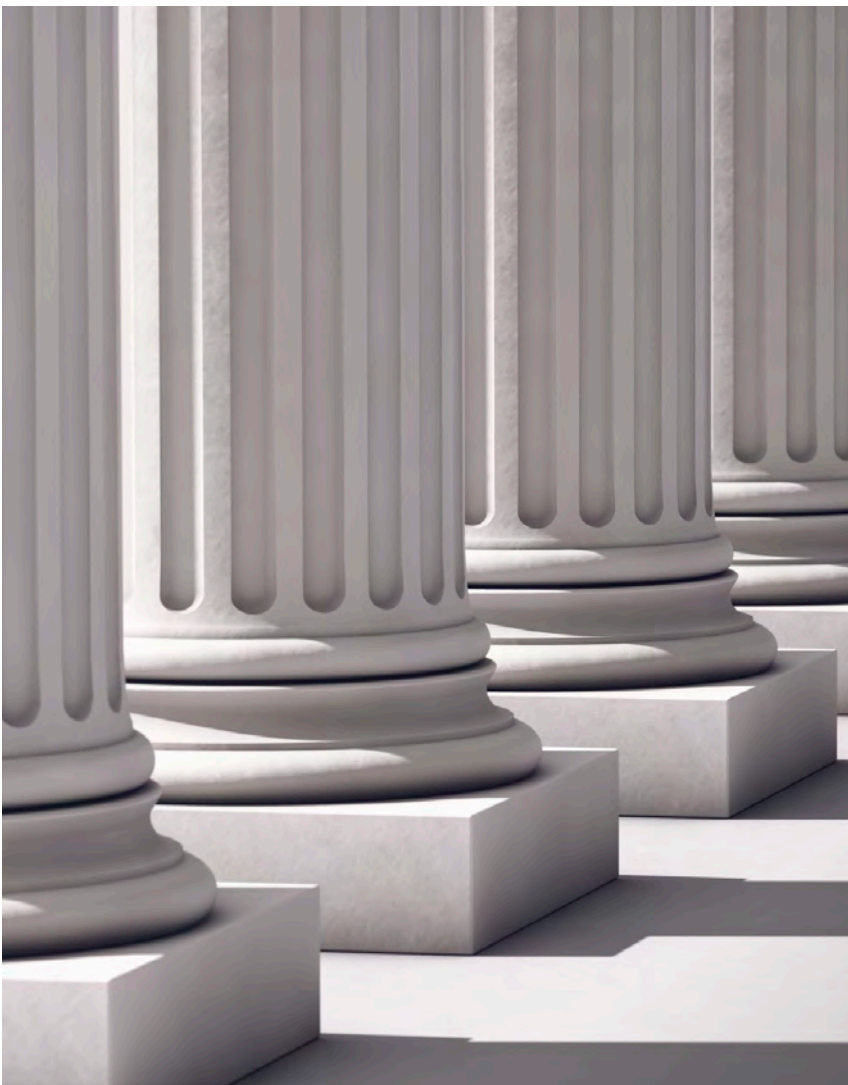




# ALBERTA LAW REFORM INSTITUTE INTER-PROVINCIAL RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS: PERSONAL DIRECTIVES



FINAL REPORT  
**113**  
MARCH 2019







**INTER-PROVINCIAL RECOGNITION OF  
SUBSTITUTE DECISION-MAKING DOCUMENTS:  
PERSONAL DIRECTIVES**

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REPORT || **113**

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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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ALRI expresses its thanks to those who participated in the consultation. We appreciate your insight regarding how the proposals would work in practice.

Katherine MacKenzie, legal counsel, undertook the research and consultation for this project. She was assisted by fellow counsel Geneviève Tremblay-McCaig and Jennifer Taylor in various roles. Student research assistance was provided by Ashley Hathorn and Joseph Sellman. Project and publication support was provided by Barry Chung.

ALRI's work would not be possible without the commitment of our Board members or the financial and in-kind support of the Alberta Law Foundation, Alberta Justice & Solicitor General, the University of Alberta and the University of Calgary.



# Summary

In 2016, the Uniform Law Conference of Canada adopted the Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act as suitable for implementation across Canada. The Uniform Act seeks to provide harmonized rules for recognizing substitute decision-making documents (like enduring powers of attorney and personal directives) that are prepared outside of the jurisdiction in which they are sought to be used.

In Report for Discussion 32, published in December 2017, ALRI proposed that the Uniform Act should be adopted in Alberta, with some minor adjustments.

ALRI's consultation did not support adopting the Uniform Act.

This final report reviews ALRI's consultation process and the feedback ALRI received in response to the Report for Discussion. It explains that:

- there was a low response rate to ALRI's consultations, with no meaningful engagement from the financial sector;
- the consultation feedback ALRI received was limited and generally unsupportive of the Uniform Act;
- the consultation raised new issues and alternatives that were outside the scope of ALRI's project; and, consequently,

The modest consultation feedback ALRI received suggests that, while there is general support for a harmonized scheme governing the recognition of substitute decision-making documents, there is little support for the Uniform Act itself. Consultation participants found the Uniform Act confusing and unnecessarily complicated, and were concerned that it imposes unreasonable expectations on third parties (that is, those who are asked to accept substitute decision-making documents that were prepared outside of Alberta).

Consultation participants generally agreed with ALRI's preliminary recommendation that Alberta should distinguish between formal validity and essential validity when deciding whether to accept a non-Alberta substitute decision-making document. However, they did not agree with the choice of law rules governing formal validity and essential validity that were proposed by the Uniform Act.

This report also deals with ALRI's preliminary recommendation that the recognition of non-Alberta substitute decision-making documents should be subject to the Uniform Act's public policy exception. It notes that, while most

consultation participants agreed with ALRI's recommendation, they raised concerns about how the exception might work in practice.

The Uniform Act's liability and good faith provisions also received mixed support. Consultation participants generally agreed that Alberta should have legislative provisions limiting the liability of third parties who are asked to accept or reject non-Alberta substitute decision-making documents in good faith. However, there were concerns about the type of validating information the Uniform Act permits third parties to request and rely on when considering whether to accept or reject a document. There were also concerns about the Uniform Act's costs provision, which makes a third party who has unreasonably rejected a substitute decision-making document automatically liable for the legal fees and costs of any court proceedings required in order to compel acceptance of that document.

This report also briefly reviews the consultation feedback ALRI received on its remaining preliminary recommendations. Those recommendations proved uncontroversial and did not generate much discussion. For example, a large majority of survey respondents agreed with ALRI's recommendation that recognition rules should not extend to non-enduring powers of attorney (that is, powers of attorney that cease to have effect when the grantor loses capacity), but only one individual offered any related commentary.

In closing, this report outlines some issues raised during ALRI's consultation that were beyond the scope of this project, but which may be worth further investigation. At some point hopefully, this report will provide a starting point if the recognition of substitute decision-making documents is studied in the future.

# Table of Abbreviations

## LEGISLATION

Uniform Act	<i>Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act</i> (2016), online (pdf): < <a href="http://ulcc.ca/images/stories/2016_pdf_en/2016ulcc0008.pdf">http://ulcc.ca/images/stories/2016_pdf_en/2016ulcc0008.pdf</a> >
Convention	Hague Conference on Private International Law, 35: <i>Convention of 13 January 2000 on the International Protection of Adults</i> (2000), online: < <a href="https://www.hcch.net/en/instruments/conventions/full-text/?cid=71">https://www.hcch.net/en/instruments/conventions/full-text/?cid=71</a> >
Explanatory Report	Hague Conference on Private International Law, <i>Explanatory Report on the 2000 Hague Protection of Adults Convention</i> , Revised Edition (The Hague: The Hague Conference on Private International Law Permanent Bureau, 2017), online (pdf): < <a href="https://assets.hcch.net/docs/1509ab33-c2fe-4532-981c-7aa4dad9ba45.pdf">https://assets.hcch.net/docs/1509ab33-c2fe-4532-981c-7aa4dad9ba45.pdf</a> >

## LAW REFORM PUBLICATIONS

RFD 32	Alberta Law Reform Institute, <i>Inter-Provincial Recognition of Substitute Decision-Making Documents</i> , Report for Discussion 32 (2017), online (pdf): < <a href="https://www.alri.ualberta.ca/images/stories/docs/RFD32">https://www.alri.ualberta.ca/images/stories/docs/RFD32</a> >
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## CHAPTER 1

# Introduction

## A. Background

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[1] 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.<sup>1</sup> 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.<sup>2</sup> These documents may have different names, depending on where in Canada they are created (i.e., representation agreements, advance health directives etc.).

[2] A valid substitute decision-making document must comply with the formalities required under the law of the jurisdiction where it is created. These 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.

[3] One way to avoid 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

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<sup>1</sup> There are two different types of powers of attorney: enduring and non-enduring. An enduring power of attorney [EPA] means a power of attorney which complies with the formal requirements in legislation and contains a statement indicating that it is to continue notwithstanding any mental incapacity of the donor that occurs after the maker of the power of attorney or it is to take effect on the mental incapacity of the donor. A non-enduring power of attorney means a power of attorney that ceases to have effect on the mental incapacity of the donor. An EPA is governed by Alberta's *Powers of Attorney Act*, RSA 2000, c P-20 [POA Act].

<sup>2</sup> In Alberta, personal directives are governed by the *Personal Directives Act*, RSA 2000, c P-6 [PD Act].

decision-making document that conforms to the requirements of the new jurisdiction is not even an option.

[4] 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. 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.

[5] For example, a non-Alberta enduring power of attorney [EPA] will be recognized as valid in Alberta if, according to the law of the jurisdiction where it was created, it is formally valid and it survives the mental incapacity of the donor.<sup>3</sup> In contrast, a non-Alberta personal directive will be recognized in Alberta only if it complies with the formal requirements of Alberta's *Personal Directives Act*.<sup>4</sup> This is true even if the personal directive was validly executed in the other jurisdiction.<sup>5</sup>

[6] Clearly, the recognition approach taken under the *Personal Directives Act* differs from the approach taken with respect to the recognition of EPAs under the *Powers of Attorney Act*. In addition, Alberta legislation is generally silent on validation procedures, protection for good faith acceptance, liability for illegitimate refusal and other similar recognition-related issues.

## B. The Uniform Act

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[7] In 2016, the Uniform Law Conference of Canada [ULCC] adopted the Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act (2016) [Uniform Act] as suitable for implementation across

<sup>3</sup> POA Act, note 1, s 2(5). 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. It should also be noted that the POA Act only applies to EPAs. Thus, section 2(5) cannot be used to recognize non-enduring powers of attorney.

<sup>4</sup> PD Act, note 2, s 7.1.

<sup>5</sup> ALRI considered whether to create a list of provinces whose EPAs would be recognized under Alberta's POA Act and a list of provinces whose personal directives would be recognized under Alberta's PD Act. Unfortunately, there are numerous differences between the formal requirements of each province so such a list would be of limited utility.



Canada.<sup>6</sup> It is the result of a joint project with the American Uniform Law Commission. The American Commission adopted its uniform legislation as suitable for implementation in the United States in 2014.<sup>7</sup>

[8] 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. The Uniform Act is attached as Appendix A.

[9] ALRI decided to review the Uniform Act in order to determine whether it is suitable for implementation in Alberta. After publishing a report for discussion, ALRI conducted a broad consultation with multiple legal, government and health care stakeholders. The consultation focused on the provisions of the Uniform Act and whether they are preferable to Alberta's current recognition scheme.

### C. Project Results

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[10] The consultation results did not support implementation of the Uniform Act in Alberta. As will be discussed in more detail later in this publication, the response rate during consultation was low, with almost no engagement from the financial sector. Thus, any consultation feedback that ALRI did receive was limited and can only be applied to personal directives.

[11] Further, many of the healthcare stakeholders consulted indicated that Alberta's current recognition scheme works fairly well in practice and that they have not been in a position where they had to reject an out-of-province document. In other words, the issues may not be as problematic as originally thought.

[12] Finally, new issues came up during consultation that have not had the benefit of widespread consultation. During certain consultation events, the individuals in attendance brainstormed policy alternatives that they believe would improve the current recognition system. However, those alternatives did

<sup>6</sup> Uniform Law Conference of Canada, *Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act (2016)*, online: <[http://ulcc.ca/images/stories/2016\\_pdf\\_en/2016ulcc0008.pdf](http://ulcc.ca/images/stories/2016_pdf_en/2016ulcc0008.pdf)>.

<sup>7</sup> As of January 30, 2019, Alaska, Idaho and Connecticut have enacted the American uniform legislation.

not form a part of ALRI's formal consultation process or receive feedback from stakeholders outside of the meetings where the brainstorming took place. As a result, ALRI cannot formally recommend these policy alternatives.

[13] Considering the low response rate, the limited feedback regarding the policy alternatives suggested by stakeholders, and the lack of support for the solutions proposed by the Uniform Act, this publication will not make any final recommendations regarding reform or implementation. A full analysis of the Uniform Act and ALRI's preliminary recommendations that formed the basis of the consultation are contained in the report for discussion and are not repeated here.<sup>8</sup> Rather, the balance of this publication will document the project's consultation process, summarize the consultation results and communicate any additional issues or reform alternatives that were raised during consultation. It will hopefully provide a starting point should the issue be studied again in the future.

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<sup>8</sup> Alberta Law Reform Institute, *Inter-Provincial Recognition of Substitute Decision-Making Documents*, Report for Discussion 32 (2017), online (pdf): <<https://www.alri.ualberta.ca/images/stories/docs/RFD32>>.

## CHAPTER 2

## Consultation Process

[14] ALRI published the *Inter-Provincial Recognition of Substitute Decision-Making Documents*, Report for Discussion 32 [RFD 32] on December 12, 2017. It analyzed the Uniform Act and recommended that it was suitable for implementation in Alberta, with some minor adjustments.

[15] RFD 32 asked for comments by May 1, 2018. During the consultation period, ALRI staff completed multiple consultation events and activities.

### A. Surveys

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[16] This project dealt with a very narrow issue and, as such, ALRI questioned whether to prepare an online survey. Ultimately, ALRI decided to proceed and created two online surveys, which went live on April 6, 2018. The following surveys were available on ALRI's website until May 1, 2018:

- A general survey about the good faith framework proposed by the Uniform Act. This survey was intended for non-lawyers who may have to deal with the recognition of substitute decision-making documents and who would be most impacted by the good faith recommendations. It could be accessed directly from our website from April 6, 2018 to May 1, 2018. No new responses were accepted after May 1, 2018. There were eight respondents.
- A technical survey about the choice of law rules for formal and essential validity, the public policy exception, the recognition of advance instruction documents and other technical issues. This survey was designed for lawyers and did not repeat the questions in the general survey. It could be accessed directly from our website from April 6, 2018 to May 1, 2018. No new responses were accepted after May 1, 2018. There were twenty respondents.

[17] The surveys allowed respondents to skip questions. Many respondents took advantage of this option, so the number of total responses varied between questions.

## B. Presentations

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[18] ALRI legal counsel gave two presentations to lawyers' groups. We estimate nearly one hundred lawyers attended these presentations:

- CBA Wills & Estates Section (North) – This presentation was given before RFD 32 was published and, due to time constraints, focused solely on the choice of law rules. We estimate about forty lawyers attended this presentation.
- CBA Wills & Estates (South) – This presentation coincided with the publication of RFD 32 and focused on the choice of law rules and the public policy exception. We estimate nearly sixty lawyers attended this presentation.

[19] Attempts were made to schedule additional presentations with other stakeholders. Unfortunately, the organizations contacted were unable to accommodate ALRI's presentation requests.

## C. Social Media and Media Coverage

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[20] ALRI provided information about our consultation through social media and received some coverage from traditional media organizations.

[21] Our social media included:

- Twitter – ALRI tweeted regularly about the consultation. The British Columbia Law Institute (BCLI) and the University of Alberta, Faculty of Law also tweeted or retweeted information about our project or consultation.
- ABlawg – ALRI counsel wrote a post about the project, which was published on December 22, 2017. The post included information about how to participate in the consultation.<sup>9</sup>
- Other blog posts – blog posts summarizing RFD 32 were published by BCLI, the Library Boy and Manulife Tax, Retirement & Estate Planning Services.<sup>10</sup>

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<sup>9</sup> Katherine MacKenzie "Inter-Provincial Recognition of Substitute Decision-Making Documents" (22 December 2017), online (blog): *ABlawg* <[http://ablawg.ca/wp-content/uploads/2017/12/Blog\\_KM\\_ALRI\\_RFD32.pdf](http://ablawg.ca/wp-content/uploads/2017/12/Blog_KM_ALRI_RFD32.pdf)>.

[22] With respect to traditional media coverage, The Lawyer's Daily published an article about the project on February 5, 2018.<sup>11</sup> ALRI counsel was interviewed for the article.

[23] Finally, ALRI estimates that RFD 32 was downloaded approximately 336 times. This includes downloads directly from our website or through an email link, but does not account for downloads where individuals have shared the email link with others.

## D. Other Contacts

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[24] A key consultation strategy was to reach out to specific stakeholders in the healthcare and financial sectors. ALRI wrote directly to forty-two different stakeholders in government, the health care sector, the financial sector and the academic sector to inform them of our consultation.

[25] In each instance, ALRI either offered to make a presentation to the group or requested feedback on RFD 32. Two organizations took ALRI up on its offer to present and seven organizations provided feedback.

## E. Roundtable Events

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[26] ALRI conducted three roundtable events with groups from the legal and healthcare sectors. Approximately twenty healthcare professionals attended these three consultation events.

<sup>10</sup> Emily Amirkhani, "Alberta Law Reform Institute Publishes Report for Discussion on Interprovincial Recognition of Substitute Decision-Making Documents" (29 January 2018), online (blog): *British Columbia Law Institute* <<https://www.bcli.org/alberta-law-reform-institute-publishes-report-for-discussion-on-interprovincial-recognition-of-substitute-decision-making-documents>>; Michel Adrien, "Alberta Law Reform Institute Report on Inter-provincial Recognition of Substitute Decision-Making Documents" (20 January 2018), online (blog): *Library Boy* <<http://micheladrien.blogspot.com/2018/01/alberta-law-reform-institute-report-on.html>>; Dianna Flannery, "Alberta moves to a uniform approach on substitute decision-making legislation" (March 2018), online (blog): *Manulife Tax, Retirement & Estate Planning Services, As a Matter of Law* <[https://repsourcepublic.manulife.com/wps/wcm/connect/0505949b-8c67-401e-ad98-55b037a244dc/ins\\_tepg\\_aamolabsubdecisionmaking.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-0505949b-8c67-401e-ad98-55b037a244dc-m8aarly](https://repsourcepublic.manulife.com/wps/wcm/connect/0505949b-8c67-401e-ad98-55b037a244dc/ins_tepg_aamolabsubdecisionmaking.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-0505949b-8c67-401e-ad98-55b037a244dc-m8aarly)>.

<sup>11</sup> Ian Burns, "Think tank recommends Alberta adopt uniform rules on decision-making documents", *Lawyer's Daily* (5 February 2018), online: <<https://www.thelawyersdaily.ca/articles/5775/think-tank-recommends-alberta-adopt-uniform-rules-on-decision-making-documents?category=news2/February>>.

## 1. FIRST ROUNDTABLE

[27] The first roundtable was only scheduled for an hour and, due to the previous meeting running long, there was only forty-five minutes available for feedback and discussion. As a result, most of the time was spent having an informal conversation about current recognition practices and what improvements the group would like to see if the law is changed.

[28] The participants at the first roundtable work with individuals accessing continuing care facilities; thus, they indicated that they frequently deal with personal directives from outside Alberta. They often see documents originating from British Columbia and Ontario, rarely see American documents and have never seen a document originating from somewhere other than Canada or the United States. They also indicated that the current approach works well; no participant had ever been in a position where they had to reject a non-Alberta document. However, they did support including more jurisdictions by which to determine formal validity, provided that Alberta was retained as an option.

## 2. SECOND ROUNDTABLE

[29] Attendees at the second roundtable included two palliative medicine physicians, a lawyer from a healthcare organization, a wills and estates lawyer, and a palliative care registered nurse. The doctors in the group indicated that, in the context of their palliative practices, they rarely see non-Alberta personal directives. The ones that do come up are generally from British Columbia, Saskatchewan or Ontario.

[30] There was strong support for the idea that there should be uniform rules governing recognition but no conclusive endorsement of the Uniform Act. In fact, most participants seemed to support retention of Alberta's current scheme, with a few minor adjustments.

## 3. THIRD ROUNDTABLE

[31] Attendees at the third roundtable included a palliative care physician, two wills and estates lawyers, a policy analyst with a stakeholder organization that specializes in guardianship, and two lawyers whose focus includes health law and adult guardianship.

[32] The consensus among this group was that non-Alberta documents are rarely seen, but those that do arise come from British Columbia, Saskatchewan

and Ontario. In fact, participants were more concerned about whether Alberta documents would be recognized in American states like Arizona, California or Florida. The palliative care physician indicated that, in the hospital setting, if there is ever any question about a non-Alberta document, it is immediately referred to a social worker or the clinical legal team for investigation.

[33] Again, there was strong support for the goal of uniformity, but most participants did not support the Uniform Act.

## **F. Consultation Trends**

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[34] After reviewing the consultation results, a few main trends were identified. They are discussed below.

### **1. RESPONSE RATE**

[35] There were twenty-eight combined respondents to the two surveys (eight people completed the general survey and twenty people completed the technical survey). Due to the fact that respondents were permitted to skip survey questions, not every question was answered by each respondent. Though most of the survey questions seemed to attract positive responses, the response rates do not allow the assumption that this would translate to general support from the wider population.

[36] ALRI wrote directly to approximately forty-two stakeholder individuals or organizations. Only nine responses were received, either as a written submission or as an invitation to present on RFD 32. This translates into an engagement rate of 21%. However, we did receive responses from several key healthcare stakeholders.

[37] In addition, the three roundtable events had fairly low attendance (between five and ten participants at each event).

[38] The only sessions that attracted higher numbers were the CBA Wills & Estates section presentations. However, both presentations were given before the audience would have had a chance to review RFD 32, so feedback on the content of the uniform legislation and ALRI's preliminary recommendations was minimal.

## 2. NO ENGAGEMENT FROM FINANCIAL SECTOR

[39] Despite attempts to contact multiple financial organizations and individual financial advisers, ALRI received almost no engagement from the financial sector. For example, a response received from a local credit union only indicated that there was no set policy for dealing with non-Alberta EPAs and the branches do not track how often the issue comes up.

[40] As a result, it is impossible to conclude that there is support from this sector for the recommendations as they relate to EPAs. It would be inappropriate to recommend changes to the recognition scheme governing EPAs without the benefit of meaningful consultation.

## G. Overview of Results

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### 1. SOME AGREEMENT THAT UNIFORM RECOGNITION PROVISIONS WOULD BE USEFUL

[41] There was general agreement that a uniform recognition scheme would be a good idea. For example, 100% of respondents to the general survey and 90% of respondents to the technical survey agreed that there should be provisions governing the recognition of Canadian documents.

[42] However, there was disagreement over whether rules are required for non-Canadian documents. For example, 25% of respondents to the general survey and 37% of respondents to the technical survey thought that rules are not required for American documents, while 29% of respondents to the general survey and 50% of respondents to the technical survey thought that rules for documents that originate outside of either Canada or the United States are unnecessary.

[43] Most comments received on the survey and during consultation events indicated that the bigger problem is whether Alberta documents are being recognized in the United States. That is not a problem that can be addressed by Alberta legislation.

### 2. LOW SUPPORT FOR THE UNIFORM ACT

[44] There was not enough support on consultation to recommend implementation of the Uniform Act in Alberta. The specific problems are



highlighted in more detail in Chapter 3, but the general attitude was that the Uniform Act is confusing and unnecessarily complicates the recognition process. Respondents also thought that the Uniform Act imposes unreasonable expectations on non-lawyers to know and apply legislation from different jurisdictions.

[45] There were alternatives to the Uniform Act that were brainstormed during some of the consultation sessions. For example, participants at the second roundtable event discussed a different approach to formal validity that had support from those in attendance. However, based on the feedback we received, it would be inappropriate to recommend implementation of the Uniform Act.



## CHAPTER 3

# Consultation Comments and Issues

[46] As previously explained, this publication does not make any final recommendations for reform. However, multiple issues and alternative policy options were raised during consultation. In order to close out this project, these issues and policy alternatives are discussed below.

## A. Formal Validity

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[47] There were two issues in RFD 32 tied to formal 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?

### ISSUE 2

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

## 1. CONSULTATION FEEDBACK

[48] With respect to Issue 1, RFD 32 recommended that a distinction should be drawn between formal validity and essential validity when applying the choice of law rule. This approach reflects what is generally done in the context of wills and health care directives and corresponds to the approach adopted by the American Uniform Law Commission. It also reflects Alberta's current approach to the recognition of personal directives and received widespread support on consultation.<sup>12</sup>

[49] There was no preliminary recommendation made with respect to Issue 2. The ULCC proposed two options for dealing with formal validity and, within those two options, there were four potential jurisdictions by which to determine formal validity:

- The jurisdiction indicated in the document;

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<sup>12</sup> 79% of respondents to the technical survey agreed with the distinction approach.

- The jurisdiction of execution;
- The jurisdiction of the grantor's habitual residence at the time of execution; and,<sup>13</sup>
- Alberta.

ALRI consulted on each jurisdiction to see which ones should be included as options for formal validity.

[50] Both the jurisdiction of execution and Alberta received fairly high support on the technical survey, with 80% of respondents agreeing that these should be available options. This corresponds to Alberta's current recognition scheme – the formal validity of EPAs are currently determined according to the jurisdiction of execution, while the formal validity of personal directives are currently determined according to Alberta law.

[51] The other two jurisdictions received slightly less support. For example, 77% of technical survey respondents agreed with including the jurisdiction indicated in the document, while 62% agreed with including the jurisdiction of the grantor's habitual residence at the time of execution.

[52] Consultation participants had the biggest issue with the order in which the jurisdictions could be used. For example, the Uniform Act establishes that if there is a jurisdiction indicated in the document, it must be used to establish formal validity. However, the majority of roundtable participants thought that it was unreasonable to expect non-lawyers to conduct this type of analysis. During the third roundtable, a palliative care physician made the following remark:

As a physician, that's not my job. If I saw a document that specified a jurisdiction, it would go directly to the social worker.

[53] Similarly, a written submission received from a healthcare organization made the following observation:

In our view, it is unreasonable to expect someone without legal training to identify the governing jurisdiction indicated within the PD [personal directive] and then to interpret the legislation of that jurisdiction to determine the validity of the PD.

[54] There was also some confusion about the way the ULCC provision was drafted. It is unclear whether the document is automatically invalid if it fails to

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<sup>13</sup> "Grantor" refers to the individual who makes a substitute decision-making document.

meet the requirements of the jurisdiction indicated, or if the other jurisdictions can still be used to assess formal validity in that circumstance. Finally, some participants indicated that the ability to choose a governing jurisdiction should be restricted to Canadian jurisdictions.

[55] In contrast, some consultation participants felt that if the grantor has a reason for choosing a specific governing jurisdiction, the law should respect that choice. A lawyer at the third roundtable gave the example of a document originating from Quebec. There are very stringent formal requirements in Quebec; in fact, a document has to be validated by the court in a process called homologation before it comes into effect. According to the lawyer, if a person specifically chooses Quebec as the jurisdiction governing formal validity because he or she wants court oversight to apply to the document, that type of choice should be respected.

[56] Further, a technical survey respondent observed that with electronic communication and electronic access to the legal resources of other jurisdictions, it should not be a problem to determine whether a document meets the formal requirements of a different jurisdiction.

[57] Ultimately, the takeaway from consultation was that it would be helpful to have more than just Alberta as an option by which to determine formal validity and that the jurisdiction options proposed by the ULCC make sense. However, consultation participants did not agree with the structure of the ULCC's formal validity provision and came up with alternative approaches.

## **2. ALTERNATIVES SUGGESTED DURING CONSULTATION**

[58] There were five alternative approaches to formal validity suggested during consultation. Since these approaches did not form the basis of our consultation, ALRI cannot appropriately recommend them in our final publication. However, they represent valid policy alternatives and may benefit from further exploration and analysis.

### **a. Saving provision**

[59] The “saving provision” approach would designate Alberta as the default jurisdiction for determining formal validity. If the document complies with Alberta requirements, it will be considered formally valid. If the document does not comply with Alberta requirements, any of the other jurisdictions proposed

by the ULCC could be used to assess formal validity. If the document complies with any of these remaining jurisdictions, it will be considered formally valid.

[60] This approach was suggested at the second roundtable event and received support from participants at the second and third roundtables. A lawyer at the third roundtable made the following observation:

Saving provisions are important. A lot of people are drafting these without a lawyer (copying documents that a relative had done, copying documents that they get off the Internet, copying documents that might have come from another province).

**b. Alberta only**

[61] In a written submission, one healthcare organization indicated that Alberta should be the only option by which to determine formal validity. A representative from the organization was present at one of the roundtable events and was aware of the discussion surrounding the saving provision approach. As a result, the submission made the following comments with respect to a saving provision:

From a health care perspective, the proposed amendments create additional difficulty where informed consent is concerned, as currently, when a health care provider determines that a PD [personal directive] does not meet Alberta requirements, the health care provider can appoint a Specific Decision Maker (SDM) in order to obtain valid informed consent for a health care treatment or procedure. Unfortunately, a SDM appointed in accordance with the *Adult Guardianship and Trusteeship Act* has no authority to make a decision where an adult has a personal directive. The inclusion of saving provisions could prevent the appointment of a SDM until it is determined whether or not the PD can be saved through compliance with out of province legislation.<sup>14</sup>

[62] There was also concern that requiring non-lawyers to determine the requirements of another jurisdiction, even as a saving mechanism, would add time and complexity to the recognition process. In other words, consultation participants were concerned that adding more jurisdiction options would simply

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<sup>14</sup> A specific decision maker may be appointed pursuant to section 87 of the *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2 [AGTA]. However, section 88(1)(a) of the AGTA expressly prohibits the appointment of a specific decision maker where there is a personal directive. The AGTA does not address whether there can be an interim appointment of a specific decision maker while the validity of a personal directive is being determined.

add to confusion and disagreement about who makes the decision of which jurisdiction to use.

[63] Finally, it may be unnecessary to change Alberta's current approach. In a written submission, the College of Physicians & Surgeons of Alberta stated that they "...cannot recall ever seeing a complaint to the College about an Alberta physician's acceptance or rejection of a substitute decision-making document created outside of Alberta."

### **c. Other suggestions**

[64] Three other alternatives were suggested during consultation, but they either were not fully explored by roundtable participants or they did not receive widespread support.

[65] The first suggestion is that the jurisdiction of execution should be the only option by which to determine formal validity. This corresponds to Alberta's current recognition approach for EPAs.

[66] The second suggestion is that if there is a jurisdiction indicated in the document, it should be used to determine formal validity. If there is no jurisdiction indicated in the document, then the document should have to comply with Alberta requirements. Essentially, this suggestion eliminates the jurisdiction of execution and the jurisdiction of the grantor's habitual residence at the time of execution as options by which to determine formal validity.

[67] The third suggestion is that Alberta should implement the same approach as British Columbia and introduce a Certificate of Extra-Jurisdictional Solicitor.<sup>15</sup> The certificate is a prescribed form completed by a solicitor who is entitled to practice law in the jurisdiction where the document was made. It must accompany any out of province substitute decision-making document and requires the solicitor to state the following:

- The date the instrument was made;
- The names of the grantor and the persons appointed;
- The powers granted;
- The jurisdiction the solicitor is entitled to practice law in;

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<sup>15</sup> *Power of Attorney Regulation*, BC Reg 20/2011, s 4, Sched; *Representation Agreement Regulation*, BC Reg 199/2001, s 9, Sched.

- The solicitor's contact information; and,
- The contact information for the regulatory body that governs the practice of law in the solicitor's jurisdiction.

[68] This suggestion was raised by a lawyer at the CBA Wills & Estates South section presentation and by a lawyer present at the third roundtable.

## **B. Essential Validity**

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[69] There were two recommendations in RFD 32 tied to essential validity:

### **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 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.

## **1. CONSULTATION FEEDBACK**

[70] Again, these recommendations received mixed support on consultation. Each recommendation had a corresponding question on the technical survey. The results demonstrate that 50% of respondents agreed with Recommendation 3A and 80% of respondents agreed with Recommendation 3B.

[71] With respect to Recommendation 3A, some roundtable participants indicated that if the grantor has a specific reason for choosing the jurisdiction indicated in the document, that choice should be respected. In a written submission received by ALRI, a nursing organization indicated that it agreed with both recommendations, though it did not elaborate on its reasons.

[72] The opposition to these recommendations centers on the wisdom of allowing a grantor to specify the jurisdiction governing validity. A running theme is that it is unreasonable to expect non-lawyers to conduct this type of investigation. These concerns were especially strong with respect to essential



validity because, not only are non-lawyers being asked to determine the meaning and effect of a document according to the law of a different jurisdiction, they are also being asked to investigate whether the grantor has the necessary connection to the jurisdiction indicated in the document.

**a. Multiple habitual residences**

[73] One of the ways a grantor can demonstrate a connection to the jurisdiction indicated in the document is by proving that he or she was, at one time, habitually resident in that jurisdiction. Multiple problems are associated with the concept of habitual residence. First, lawyers at both CBA presentations indicated that it might be possible to have more than one habitual residence at the same time.

[74] It is unclear whether it is possible under Alberta law to have multiple habitual residences at once. In fact, there is no test for habitual residence. The meaning of the term differs depending on the context and jurisdiction. In Alberta, it seems likely that the term “habitual residence” is interchangeable with the term “ordinary residence”. Both habitual residence and ordinary residence are questions of fact and the courts appear to be intentionally reluctant to create legal tests for these terms.<sup>16</sup>

**i. Alberta case law in the family law context**

[75] For example, Alberta’s *Matrimonial Property Act* requires a spouse to have or have had habitual residence in Alberta in order to apply for a matrimonial property order.<sup>17</sup> In *Nafie v Badawy*, the Court of Queen’s Bench indicated that habitual residence is effectively the same as ordinary residence but did not discuss the concept of multiple habitual residences.<sup>18</sup> In equating habitual residence with ordinary residence, the court adopted the reasoning of Professor James G. McLeod:<sup>19</sup>

Professor McLeod shows that, over time, courts have equated “habitual residence” with “ordinary residence” and vice versa in

<sup>16</sup> For example, in *Office of the Children’s Lawyer v Balev*, 2018 SCC 16 at para 47, the Supreme Court of Canada said the following:

[T]here is no legal test for habitual residence and the list of potentially relevant factors is not closed. The temptation ‘to overlay the factual concept of habitual residence with legal constructs’ must be resisted.

<sup>17</sup> *Matrimonial Property Act*, RSA 2000, c M-8, s 3.

<sup>18</sup> *Nafie v Badawy*, 2014 ABQB 262 [*Nafie QB*].

<sup>19</sup> *Nafie QB*, note 18, at para 16.

family law cases. He notes that a brief sojourn or temporary presence in a place is insufficient to establish a habitual residence in that place. He maintains that intention is a critical consideration in deciding a person's habitual residence, in the sense that a person does not acquire a habitual residence in a place unless he or she intends to reside there indefinitely. He notes that, unlike actual residence, ordinary residence does not require continued physical presence in a place during the currency of a period of ordinary residence. That a person has a fixed place of residence in a jurisdiction is an important consideration but not a requirement of law to establish and maintain ordinary residence in a place. A person does not lose his or her ordinary residence in a place by leaving for a temporary purpose. However, a person will lose his or her ordinary residence in a place if he or she travels to another place to live and work indefinitely even if he or she intends ultimately to return to the prior home. He notes that most courts have stopped short of holding that a person may not have more than one place of ordinary residence as a matter of law.

[76] When discussing habitual residence for the purposes of the *Matrimonial Property Act*, the court stated:<sup>20</sup>

It is to be noted that the requirement here is “habitual residence” rather than “ordinary residence”. As indicated above, as extracted from Professor McLeod’s article, the two concepts have grown to be considered to be similar if not in fact identical.

[77] The court later goes on to say that the concepts of habitual residence and ordinary residence are “synonymous”.<sup>21</sup> On appeal, the Alberta Court of Appeal determined that, based on the grounds of appeal being argued, it did not need to decide whether ordinary residence and habitual residence are synonymous terms.<sup>22</sup>

[78] In *Proia v Proia*, the court dealt with the term habitual residence as it is used in the *International Child Abduction Act* and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. The court referred

<sup>20</sup> *Nafie QB*, note 18, at para 27.

<sup>21</sup> *Nafie QB*, note 18, at para 30.

<sup>22</sup> In *Nafie v Badawy*, 2015 ABCA 36 at para 75, the court said the following:

Some cases have put “habitually” and “ordinarily” resident on the same legal footing. However, since corollary relief was not severed from the divorce action in *Nafie* and *Badawy*’s case, only “ordinarily resident” is relevant.

to American case law that establishes a person can only have one habitual residence but gave no indication whether it accepted or rejected this position.<sup>23</sup>

[79] In *Kaniuch v Pontes*, the court conclusively stated that, with respect to habitual residence, "...you can't have two and you can't have none."<sup>24</sup> This comment was made in relation to the term habitual residence as it used in the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. It should also be noted that this was an oral decision given in chambers.

## **ii. Materials interpreting the Hague Convention on the International Protection of Adults**

[1] The ULCC specifically states that parts of the Uniform Act were modelled after the *Hague Convention of 13 January 2000 on the International Protection of Adults* [Convention].<sup>25</sup> In the Convention's Explanatory Report, it is implied that a person may have only one habitual residence at a time:<sup>26</sup>

Principal jurisdiction is attributed to the authorities of the State of the adult's habitual residence.

[80] There is also at least one academic journal article interpreting the Convention that specifically states that, for the purposes of the Convention, a person may only have one habitual residence at a time:<sup>27</sup>

...an adult can only have (at most) one habitual residence for the purposes of the 2000 Convention.

<sup>23</sup> *Proia v Proia*, 2003 ABQB 576, at para 23; *International Child Abduction Act*, RSA 2000, c I-4; Hague Conference on Private International Law, 28: *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (1980), online (pdf): <<https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf>>, being Schedule of the *International Child Abduction Act*, SA 2000, c I-4.

<sup>24</sup> *Kaniuch v Pontes*, [2004] AJ No 1581, 2004 CarswellAlta 1922, at para 14.

<sup>25</sup> Uniform Law Conference of Canada, Civil Section, *Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act* (2016) (commentary) at 4, online: <[www.ulcc.ca/images/stories/2016\\_pdf\\_en/2016ulcc0008.pdf](http://www.ulcc.ca/images/stories/2016_pdf_en/2016ulcc0008.pdf)> [ULCC Commentary]; Hague Conference on Private International Law, 35: *Convention of 13 January 2000 on the International Protection of Adults* (2000), online: <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=71>>.

<sup>26</sup> Hague Conference on Private International Law, *Explanatory Report on the 2000 Hague Protection of Adults Convention, Revised Edition* (The Hague: The Hague Conference on Private International Law Permanent Bureau, 2017), at para 48, online: <<https://assets.hcch.net/docs/1509ab33-c2fe-4532-981c-7aa4dad9ba45.pdf>> [Explanatory Report on Protection of Adults].

<sup>27</sup> Anderson, J. & Ruck Keen, A., "The 2000 Hague Convention on the International Protection of Adults: Five Years On" (2014) 2 Intl Family L 91 at para 30.1.

[81] These documents are probably more helpful than Alberta family case law when it comes to interpreting the concept of habitual residence as it is used in the Uniform Act.

*iii. Conclusion on multiple habitual residences*

[82] Based on the above sources, it is unlikely that a person in Alberta could be found to have multiple habitual residences for the purposes of recognition of a substitute decision-making document. The Alberta case law strongly suggests that a person may only have one habitual residence at a time. However, the cases were decided in the context of family law and, as such, the reasoning may not be directly applicable to the recognition of substitute decision-making documents.

[83] The Convention's supporting documentation also states that a person may only have one habitual residence at a time. However, the Convention deals with more than just the recognition of substitute decision-making documents. And, in any event, the Convention and its related commentary are interpretive aids only and do not have the force of law in Alberta.

[84] Ultimately, the law is unsettled in this area and, as a result, it is at least arguable that a person could have multiple habitual residences at once. This complicates the recognition process and adds confusion over which of the grantor's habitual residences may be relevant for the purposes of determining essential validity.

**b. Defining habitual residence**

*i. Domicile versus habitual residence*

[85] Many consultation participants indicated that if the concept of habitual residence is used, it is important that it is very clearly defined in ALRI's final publication and any potential legislation. Several lawyers initially thought RFD 32 was referring to the concept of domicile and suggested making it clear in the final publication that habitual residence is a different concept. They also mentioned that such a discussion would be helpful as evidence of legislative intent if the meaning of the term "habitual residence" is ever argued in court. For the sake of clarity, the difference between domicile and habitual residence is discussed briefly, below.

[86] Domicile is the connecting factor between an individual and a system or rule of law.<sup>28</sup> Both domicile and habitual residence are concerned with a person's residence and intentions. Dicey & Morris indicate the difference is that domicile is concerned with a future intention whereas habitual residence is concerned with a current intention.<sup>29</sup> In Alberta, this difference has been described as a scale from "resident" to "domicile", and on this scale "habitual residence" is somewhere in the middle.<sup>30</sup>

[87] It is well established that a person must have a domicile and cannot have more than one domicile.<sup>31</sup> As discussed above, there is uncertainty as to whether a person can have more than one habitual residence. Another potential difference is that domicile is considered a question of law, whereas habitual residence is often considered a question of fact.<sup>32</sup>

**ii. Possibility of legislative definition**

[88] Other consultation participants thought that using the concept of habitual residence will lead to conflict. There are cases where it may be unclear where a grantor was habitually resident at any given time and, without clear direction on what is meant by the term, they could foresee these issues developing into court battles. In their view, it is necessary to define the term "habitual residence" in the legislation or, at the very least, provide some legislative factors that could be used to determine it.

[89] However, international conventions tend to avoid an exact description of the phrase:<sup>33</sup>

The term is commonly used in international conventions covering a variety of subjects, the drafters of the conventions deliberately avoided seeking to impose a precise, fixed definition.

<sup>28</sup> Albert Venn Dicey, JHC Morris & Lawrence Anthony Collins, *The Conflict of Laws*, 15th ed Volume 1 (London: Sweet & Maxwell/Thomson Reuters, 2012) at 133 [*Dicey & Morris* 2012].

<sup>29</sup> Albert Dicey & John Morris, *The Conflict of Laws*, 10th ed Volume 1 (London: Stevens, 1980) at 144, cited in *PA v KA*, 36 DLR (4th) 631, 1987 ABCA 52 at para 8.

<sup>30</sup> *Adderson v Adderson* (1987), 77 AR 256, 51 Alta LR (2d) 193 at para 18 (CA).

<sup>31</sup> *Dicey & Morris* 2012, note 28 at 135-136.

<sup>32</sup> James G McLeod, Department of Justice Canada, *The Meaning of Ordinary Residence and Habitual Residence in the Common Law Provinces in a Family Law Context: Family, Children and Youth Section Research Report*, September 2006 at 4, 9, 22, online (pdf): <[https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/rhro\\_cl/pdf/rhro\\_cl.pdf](https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/rhro_cl/pdf/rhro_cl.pdf)>.

<sup>33</sup> Jeff Atkinson, "The Meaning of 'Habitual Residence' Under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children" (2011) 63:4 Okla L Rev 647 at 648-649.

[90] In fact, the Explanatory Report that accompanies the Convention specifically resisted defining habitual residence:<sup>34</sup>

No definition was given of habitual residence, which despite the important legal consequences attaching to it, should remain a factual concept.

Given that parts of the Uniform Act are based on the Convention, the absence of a definition for the term “habitual residence” in the Uniform Act was likely intentional.

**c. Former habitual residence**

[91] There may also be difficulty confirming the existence of the connecting factors. For example, the ULCC proposes that a grantor should be able to choose the jurisdiction governing essential validity, provided that he or she is a national or former habitual resident of that jurisdiction, or the power in question relates to property located in that jurisdiction.

[92] Many consultation participants expressed concern about requiring investigation into the former habitual residence of the grantor. In their view, it would be extremely onerous to expect a person assessing the validity of a document to gather the type of information that would be necessary to determine where a stranger had been habitually resident at some point in the past. Similarly, RFD 32 recommends that a non-Alberta personal directive that provides advance instructions but does not appoint an agent should be recognized in the same manner as a document that does appoint an agent. This raises some practical problems because the agent would be best situated to communicate the facts relevant to the determination of habitual residence. In other words, if there is no agent available to assist the person being asked to validate the document, determining the grantor’s former habitual residence would be virtually impossible. Similar concerns arise with respect to determining the nationality of the grantor.

**d. Monitoring essential validity**

[93] A related issue is how to monitor the essential validity of a particular document. Again, it is probably unreasonable to expect a non-lawyer to use the law of a different jurisdiction in order to determine the scope of the powers

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<sup>34</sup> Explanatory Report on Protection of Adults, note 26, at para 49.

under a document. In other words, if the oversight is not coming from the person conducting the recognition inquiry, then we are assuming that agents will police themselves and be able to identify when a particular action or decision is outside the scope of their authority. These are complicated issues that are not addressed by the Uniform Act.

## 2. ALTERNATIVES SUGGESTED DURING CONSULTATION

[94] There were four alternative approaches to essential validity suggested during consultation. Again, since these approaches did not form the basis of our consultation, ALRI cannot appropriately recommend them in our final publication.

### a. Alberta only

[95] Most of the roundtable participants thought that Alberta should be the only option by which to determine essential validity. They argued that it streamlines the process and makes it easier for physicians. Further, the prevailing opinion was that if the grantor is being treated in Alberta, then Alberta law should apply.

### b. Governing law determines agent's broad authority

[96] In one written submission, a healthcare stakeholder indicated that the broad authority of an agent appointed under a personal directive should be determined in accordance with the law of the directive's governing jurisdiction. Once it has been identified that the agent has the authority to make health care or treatment decisions, then Alberta's definition of "health care" should apply.

[97] The organization explains their position as follows:

The discussion around essential validity is a bit more difficult for PDs, as similar to our recommendations for formal validity, it would be [our] preference to establish a process for essential validity that requires only the application of the *Personal Directives Act*, in order to avoid individuals without legal training from having to interpret out of province legislation to confirm the authority of an agent or proxy appointed under a PD.

However, we also understand that in Alberta, a PD may contain information and instructions regarding any personal matter, including health care, accommodation, with whom the maker may live and associate, participation in social, educational and employment

activities and legal matters of a non-financial nature, and an agent appointed under an Alberta PD may be granted the authority to make decisions about any or all of these personal matters. While in other jurisdictions, the application of a PD may not extend so broadly...

We believe it is important to be cognizant of the differences that exist between jurisdictions and recognize that applying Alberta's broad definition of "personal matters" to an agent or proxy appointed under a PD from another jurisdiction may not be an accurate reflection of the maker's wishes.

With this in mind, it is our recommendation that where essential validity is concerned, it may be necessary to look at the governing law for direction where the broad authority of the agent or proxy is concerned, particularly in situations where the authority granted by the maker is not clearly set out in the document...

That said, where a PD from another jurisdiction clearly establishes an agent or proxy's authority to consent to health, it is our recommendation that it should not be necessary in these cases for an individual interpreting the document to have to look to the governing jurisdiction of the document for clarification as to what is considered health care treatment, rather Alberta's definition of "health care" within the *Personal Directives Act* should apply.

[98] Though it is not explicitly stated, the submission implies that "governing law" should be interpreted as the jurisdiction of execution. It should also be noted that this suggestion was brought up for the first time in the written submission, which was received on May 15, 2018. As such, it was not an area of discussion at any of the consultation events.

### **c. Moving target provision**

[99] A lawyer at the third roundtable suggested the creation of a "moving target" provision to govern the choice of law for essential validity. Under this suggestion, the law governing essential validity would be the law of the jurisdiction where the grantor is resident at the date the document comes into effect. In other words, the law governing essential validity would be the law of the jurisdiction where the grantor is resident at the date he or she loses capacity.<sup>35</sup>

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<sup>35</sup> This is how personal directives are brought into effect in Alberta. See PD Act, note 2, s 9(1).



[100] This suggestion was brought up at the end of the roundtable session, so there was not enough time for the group to have a fulsome discussion about it. However, it appears that this type of provision would attract the same type of issues that are currently associated with using the concept of habitual residence.

**d. Alberta, unless there is an objection**

[101] The last alternative suggested is that, unless there is an objection, there should be a presumption that Alberta law applies to determine the essential validity of the document. Again, this option was not discussed in depth. For example, it was not determined who would have the ability to object to the application of Alberta law. The two main motivations behind this option was that it would be easier for physicians and that Alberta law should apply to patients who are being treated in Alberta.

## **C. Public Policy Exception**

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[102] In RFD 32, Recommendation 4 stated that the recognition of substitute decision-making documents should include a public policy exception. Most consultation participants agreed with this recommendation. A nursing organization indicated that it strongly supports this proposal, and 93% of respondents to the technical survey indicated that they agreed with this recommendation.

[103] Most lawyers who attended the consultation events were in favour of a public policy exception, but some wondered whether it was workable in practice. For example, there was a concern that non-lawyers would not know when or how to use the exception and the doctors indicated that it would not be a feasible solution in the emergency context. Notably, one healthcare stakeholder was against the inclusion of a public policy exception because they were "...unsure how to expect someone to interpret this type of a decision in the moment."

[104] A related issue brought up at the CBA Wills & Estates North section presentation is what would happen if a portion of the document is found void due to public policy. Would the entire document be invalid or could the person interpreting the document simply refuse to enforce the offensive sections? This issue is not addressed in the Uniform Act.

[105] It is probably unreasonable to expect a person interpreting a non-Alberta document to not only determine its meaning and effect and whether portions of it violate public policy, but to also keep an inventory of which parts of the

document are valid under the governing law and which parts are void due to public policy. At the very least, allowing partial invalidity due to a public policy violation would inject enormous complexity into the recognition process.

## D. Good Faith Framework

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[106] Sections 5 and 6 of the Uniform Act set out the liability and good faith framework proposed by the ULCC:

### **Requirement to accept substitute decision-making document**

**5(1)** Except as provided in subsection (2) or (3) or in any other enactment, a person shall accept, within a reasonable time, a substitute decision-making document that purportedly meets the requirements of the governing law [OPTION 1: for formal validity OPTION 2: for existence] as established under section 2 and may not require an additional or different form of substitute decision-making document for authority granted in the document presented.

### **Requirement to reject substitute decision-making document**

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

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

### **Authority to reject substitute decision-making document**

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

- (a) the person otherwise would not be required in the same circumstances to act if requested by the individual who 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 [local office of adult protective services] stating a belief that the individual for whom a decision will be made may be subject to abuse, neglect, exploitation, or abandonment by the decision maker or a person acting for or with the decision maker.

### **Liability for legal costs**

**5(4)** A person who refuses in violation of subsection (1) to accept a substitute decision making document and is ordered by a court to

accept the document is liable for reasonable legal fees and costs incurred in any proceeding to obtain that order.

**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 or French or an official language of the province or territory]; and
- (c) an opinion of legal counsel as to any matter of law concerning the document if the request is made in writing and includes the person's reason for the request.

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

- (a) on an assumption referred to in subsection (1), or
- (b) in reliance on an assertion, translation or opinion referred to in subsection (2) is not liable for the act if the assumption or reliance is based on inaccurate information concerning the relevant facts or law.

[107] Generally, consultation participants agreed that there should be a framework governing liability and good faith reliance, but the Uniform Act provisions received mixed support. For example, 100% of the general survey respondents thought that recognition legislation should address good faith reliance. But, when asked about the details of the ULCC proposal, only 50% of respondents agreed that a person asked to interpret a substitute decision-making document should be able to rely in good faith on the decision maker's authority under the document.

[108] One nursing organization thought that the ULCC framework did a good job of respecting the grantor's wishes, "...without unduly exposing healthcare professionals to legal risk". Similarly, a national medical organization agreed that

a good faith framework is a necessary safeguard for healthcare professionals who are required to execute appropriate treatment plans. A healthcare stakeholder from Alberta agreed with certain aspects of the ULCC proposal:

Inclusion of a framework that protects third parties who rely in good faith on an apparently valid substitute decision-making document and clearly establishing that third parties should not be required to investigate the validity of a substitute decision-making document would be extremely beneficial. Requiring investigation would be onerous and difficult for non-lawyers and could potentially delay health care treatment.

[109] However, the Alberta organization's approval of the framework was not universal:

We have concerns that including a framework by which a third party may request information to confirm the validity of a substitute decision-making document may in effect create an informal expectation to obtain this information. Third parties may feel compelled to request this information and may be unclear about when it is necessary to do so.

[110] Lawyers who attended the third roundtable echoed this concern. They indicated that they would already request this type of information as part of their due diligence investigation into a document and questioned whether it was necessary to spell out this practice in legislation.

[111] Participants at the second and third roundtables indicated that they interpreted the Uniform Act as saying that a person being asked to accept a non-Alberta document would *always* have to request the type of information listed in section 6, even when they were convinced of the document's validity. In their view, it should only be necessary to request additional information if the person is unsure about an aspect of the document and, if that is what the ULCC intended, then the drafting of the provision should be made clearer.

[112] There were also questions about who is responsible for providing the validating information and whether the ability to request such information would unreasonably delay the recognition process. For example, if a legal opinion is required, whose responsibility is it to obtain and pay for the legal opinion? Most participants at the third roundtable were of the view that it would be up to the agent to prove the document, which would include obtaining and paying for the validating information that is requested. That, in turn, raises the question of where the money to pay for the legal opinion comes from. If it is to be paid for by the grantor, the decision to release that money would be made by the

attorney under the EPA, who may not be the same as the person appointed as the grantor's agent in the personal directive. This could delay the recognition process substantially because the agent would have to communicate with the attorney and obtain authorization for payment even before contacting and retaining a lawyer to provide the legal opinion requested.<sup>36</sup>

[113] On the other hand, it is unfair to expect the agent to pay for validating information out of his or her own pocket. And, in any event, imposing the financial burden of obtaining a legal opinion on an agent would likely grind the recognition process to a halt.

## **E. Liability for Legal Costs**

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[114] Section 5(4) of the Uniform Act specifies that if a third party refuses to recognize a substitute decision-making document and then is later compelled by court order to accept it, he or she is liable for the reasonable legal costs incurred to obtain the order. While RFD 32 did not make a separate recommendation on this issue, it forms part of the good faith framework, which RFD 32 recommended as a whole (see Recommendations 5, 6A, 6B, 6C).

[115] Survey participants had difficulty with this provision, with only 50% of the general survey respondents agreeing that the imposition of legal costs was an appropriate penalty for rejecting a valid substitute decision-making document. Some respondents to the general survey were of the opinion that costs are a discretionary decision that should be left up to the courts. For example, one survey respondent indicated that, if the issue of costs was going to be included in the recognition statute, it would be better to craft a discretionary provision that sets out factors to guide the court in its decision (such as the reasonableness of the initial refusal, efforts to make alternative arrangements, the urgency of the decision etc.).

[116] The automatic imposition of costs may also put physicians and other healthcare workers at undue risk. At the roundtable events, many healthcare professionals indicated that if they have any doubt about the validity of a document it is immediately referred to a social worker or to the clinical legal team for further investigation. At that point, the time spent determining whether the document is valid is out of their hands, but they may still be liable for costs.

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<sup>36</sup> Of course, this assumes that the non-Alberta EPA has already met Alberta's EPA recognition requirements.

Similarly, it could be argued that immediately passing the document off to be investigated by a different individual or department is unnecessary and delays the process which, again, would put them at risk of having costs awarded against them.

[117] A few consultation participants indicated that the test should be “reasonable efforts” rather than acceptance within a “reasonable time”. In other words, costs should only be a possibility if the person did not use reasonable efforts to determine whether the non-Alberta document was valid. While this may be a more appropriate test, it was not an option canvassed during consultation and, as such, it cannot be used as a recommendation in ALRI’s final publication.

## **F. Remaining Recommendations**

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[118] RFD 32 contained twelve preliminary recommendations. The consultation results and policy alternatives for Recommendations 1-6 are discussed above.

[119] Recommendations 7-12 were generally uncontroversial and did not generate much discussion during the consultation events. A brief overview of the consultation results for the remaining recommendations is provided below:

- Recommendation 7 suggested that the recognition rules should extend to documents that contain advance instructions, whether or not the document delegates authority to a specific decision maker. Though consultation participants acknowledged that, without an appointed decision maker, it would be operationally difficult to recognize the document, they also agreed that such a document contains an expression of the grantor’s wishes and should be recognized and respected. On the technical survey, 62% of respondents agreed with this recommendation.
- Recommendation 8 indicated that recognition rules should not extend to non-enduring powers of attorney. Eighty-six percent of survey respondents agreed with this recommendation. One survey respondent emphasized that non-enduring powers of attorney are “very different in nature and purpose and effect” from EPAs and extending recognition rules to such documents would be a mistake.
- Recommendation 9 suggested that photocopies or electronically transmitted copies of the original substitute decision-making

document should be accepted, unless another enactment requires otherwise. Eighty-six percent of survey respondents agreed with this recommendation, though some respondents warned that electronic copies can be easily altered or manipulated.

- Recommendation 10 dealt with the preservation of remedies that already exist under Alberta law and Recommendation 11 suggested adoption of certain definitions from the Uniform Act. There were no survey questions corresponding to these recommendations, but they received support in some of the written submissions that ALRI received.
- Recommendation 12 deals with transition and suggests that any new recognition provisions should apply to all substitute decision-making documents, regardless of when they were made. Ninety-three percent of survey respondents agreed with this recommendation.

## G. Issues Outside the Scope

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[120] The following issues were brought up for the first time during consultation. They are outside the scope of this project, but may be worth further investigation:

- Advance instructions and informed consent. Pursuant to section 20 of the *Personal Directives Act*, a service provider (i.e., a doctor) is required to follow the instructions contained in a personal directive.<sup>37</sup> Participants in the second and third roundtables indicated that this becomes problematic if the personal directive contains explicit advance care instructions. For example, if a personal directive specifies that the maker does not want a feeding tube under any circumstances, a doctor must follow that instruction. However, it is possible that the feeding tube would only be required for a short period of time (i.e., two weeks post-operatively), in order to help the maker heal from an injury or procedure. It is questionable whether the maker intended the feeding tube restriction to apply in this circumstance, or whether it was intended for situations where the feeding tube would sustain the maker in hospital and contribute to a poor quality of life. However,

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<sup>37</sup> PD Act, note 2, s 20.

because the general prohibition against a feeding tube is expressly included in the personal directive, the doctor's hands are tied. This raises issues of informed consent and the healthcare professionals indicated that it was an area requiring further analysis and possible reform.

- Expansion of the liability protection found in the *Personal Directives Act*. In its written submission, a national medical organization made the following suggestion:

While section 28 of the *Personal Directives Act* currently extends liability protection to “service providers” (defined to include persons providing health care) for “anything done or omitted to be done in good faith in acting or purporting to act in accordance with this Act”, it is limited to situations where the maker of the personal directive has changed or revoked the personal directive or authority of the agent without the knowledge of the agent or service provider. It would be preferable if this liability protection was expanded to protect service providers who rely in good faith on an apparently valid out-of-province personal directive.

Because it applies to the *Personal Directives Act* as a whole, the change suggested is broader than the framework proposed in the Uniform Act. As such, it would be more appropriate to consider it separately.

- Finally, an issue that came up several times during consultation is whether Albertans should be able to access medical assistance in dying (“MAID”) via personal directive. This is not currently allowed under either the federal legislation or Alberta’s MAID framework.<sup>38</sup>

However, both the Canadian Council of Academies and various provincial committees have been asked to conduct independent reviews regarding advance consent for MAID.<sup>39</sup> The report prepared by the Canadian Council of Academies was tabled in Parliament on 12

<sup>38</sup> *Criminal Code*, RSC 1985, c C-46, s 241.2(1)(b); *Order respecting Medical Assistance in Dying Standards of Practice*, OC 142/2016, (2016) 1 A Gaz I, 1114 (*Health Professions Act*).

<sup>39</sup> 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>>.



December 2018.<sup>40</sup> At this time, it is appropriate to wait and see how the federal government responds to the report.

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<sup>40</sup> Canadian Council of Academies, News Release, “Independent Expert Panel on Medical Assistance in Dying Releases Three Reports” (12 December 2018), online: Canadian Council of Academies <<https://www.scienceadvice.ca/reports/medical-assistance-in-dying/>>. The issues addressed by the Canadian Council of Academies were released in three separate reports: The State of Knowledge on Medical Assistance in Dying for Mature Minors; The State of Knowledge on Advance Requests for Medical Assistance in Dying; and The State of Knowledge on Medical Assistance in Dying Where Mental Disorder is the Sole Underlying Medical Condition; Department of Justice Canada, News Release, “Minister Jody Wilson-Raybould and Minister Ginette Petitpas Taylor Table in Parliament the Independent Reviews Related to Medical Assistance in Dying” (12 December 2018), online: Government of Canada <<https://www.canada.ca/en/department-justice/news/2018/12/minister-jody-wilson-raybould-and-minister-ginette-petitpas-taylor-table-in-parliament-the-independent-reviews-related-to-medical-assistance-in-dying.html>>.





**UNIFORM LAW CONFERENCE OF CANADA**

***UNIFORM INTERJURISDICTIONAL RECOGNITION OF  
SUBSTITUTE DECISION-MAKING DOCUMENTS ACT (2016)***

**As adopted - August 2016**

This document is a publication of  
the Uniform Law Conference of Canada.  
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*Uniform Interjurisdictional Recognition of Substitute Decision-Making Documents Act (2016)*

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

The term substitute decision-making document is intended to be an omnibus designation for a document created by an individual to delegate authority over the individual's property, health care, or personal care to a substitute decision maker. Jurisdictions use different nomenclature for substitute decision-making documents. Common terms include power of attorney, proxy, and representation agreement. In some jurisdictions, delegated authority over property, health care, and personal care may be granted in one document. More commonly, separate delegations are made, and in some jurisdictions are required to be made, with respect to property decisions and those affecting health care and personal care. In Québec, the protection mandate has as its object the performance of acts intended to ensure the personal protection of the mandator, the administration, in whole or in part, of his patrimony and, generally, his moral and material well-being, should he become incapable of taking care of himself or administering his property (art. 2131 and 2166 and following C.c.Q.). Article 15 of the Civil Code of Québec provides that « Where it is ascertained that a person of full age is incapable of giving consent to care required by his or her state of health and in the absence of advance medical directives, consent is given by his or her mandatary, tutor or curator. If the person of full age is not so represented, consent is given by his or her married, civil union or de facto spouse or, if the person has no spouse or his or her spouse is prevented from giving consent, it is given by a close relative or a person who shows a special interest in the person of full age ». Section 62 of an Act respecting End-of-life Care, CQLR, chapter S-32.0001, provides that « Instructions relating to care expressed in a protection mandate do not constitute advance medical directives within the meaning of this Act and remain subject to articles 2166 and following of the Civil Code. In case of inconsistency between those instructions for care and the instructions contained in advance medical directives, the latter prevail».

The Act does not apply to documents that merely provide advance directions for future decisions such as living will declarations and do-not-resuscitate orders. The critical distinction for purposes of this Act is that the document must contain a delegation of authority to a specific decision maker.

The Act embodies a three-part approach to portability modelled after the Uniform Law Commission's Uniform Power of Attorney Act (2006) (the "UPOAA"). First, similar to Section 106 of the UPOAA, Section 2 of the Act recognizes the validity of substitute decision-making documents created under the law of another jurisdiction. The term "jurisdiction" is

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intended to be read in its broadest sense to include any country or governmental subdivision.

Second, Section 2 creates two options. Option 1 separates out formal validity, whereas Option 2 applies the same law to all aspects of validity, i.e., the existence, extent, modification and extinction of the document (including formal validity). Section 4 explicitly recognises the concept of public policy. Option 2 should be adopted by those jurisdictions where the Hague Convention on the Protection of Adults has already been implemented and by those jurisdictions contemplating its implementation in the near future.

Third, Sections 5 and 6 of the Act protect good faith refusal or acceptance of a substitute decision-making document without regard to whether the document was created under the law of another jurisdiction or the law of the enacting jurisdiction. Under Section 5(4) refusals in violation of the Act are subject to a court order mandating acceptance.

The remedies under this Act are not exclusive and do not abrogate any other right or remedy in the adopting jurisdiction. The Act is designed to complement existing statutes by providing portability features where none exist and by supplementing provisions that lack desirable features of the Act.

## ***UNIFORM INTERJURISDICTIONAL RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT (2016)***

### **Definitions**

**1** The following definitions apply in this Act.

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

(a) is granted authority under a substitute decision-making document to act for an individual, whether as a sole decision maker or co-decision maker, or as an original decision maker or a successor decision maker; or

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

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

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

**“person”** includes [a corporation,] [a partnership or other unincorporated organization] a government or department, branch or division of a government, and [the personal or other legal representatives of a person to whom the context can apply according to law]

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**“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 to act with respect to property, health care, or personal care on behalf of the individual.

### Section 1 Comments

The Definitions explain the meaning of terms used in the Act and should not be read to define the meaning of terms used in a substitute decision-making document. The meaning of a term used in a substitute decision-making document is determined by the law applicable to the existence, extent, modification and extinction of a document. See Section 2 Comment.

The definitions of “health care,” “personal care,” and “property” in this section are intended to be read in their broadest sense to include any substitute decision-making document created by an individual to authorize decisions with respect to that individual’s property, health care, or personal care. The scope of the decision-maker’s authority under such a document, however, is to be determined by the applicable law. For example, authority with respect to “health care” may include authority to withhold or withdraw life prolonging procedures in some jurisdictions and not in others.

Note: Jurisdictions should review the definitions to determine whether all are required or appropriate for their own jurisdiction. “ In a civil law context, there is no need to define “property”. Some Interpretation Acts already define “person”. The definition aims to cover any person or entity to whom a substitute decision-making document is presented. Therefore, in civil law, the liquidator of a succession, and, in common law, the executors and administrators are included.

### Applicable Law

The Conference has put forward two options for how to deal with the question of applicable law. The first option is closer to the conventional approach in wills and health care directives. In this approach, a distinction is made between formal and essential validity. Slightly more generous provisions govern formal validity and include the place where the document is created. This is also in line with the approach taken by the ULC which distinguishes between “validity” and “meaning and effect.” Formal requirements are designed to ensure that the

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creator of the document understands its nature and consents to create it. The jurisprudence around the distinction between formal and essential validity is well developed, but there may be situations where a particular requirement straddles the two, or even where different jurisdictions characterize the requirement differently.

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

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

## Option 1

### Applicable law

**2(1)** A substitute decision-making document entered into by an individual outside of [this province or territory] is formally valid in [this province or territory] 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 [this province or territory].

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

- (a) the law of the jurisdiction expressly indicated in the document, if
  - (i) the individual is a national or former habitual resident of that jurisdiction, or
  - (ii) the powers in question are to be exercised in relation to the individual's property located in that jurisdiction; or



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- (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).

**Same**

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

**Section 2 – Option 1 Comment**

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

Subsection 2(1) provides that a substitute decision-making document for property, health care or personal care decisions entered into in another jurisdiction will be recognized as formally valid if the requirements for entering into the document complied with: the law indicated in the document; in the absence of a choice, the law of the place of habitual residence of the grantor at the time of entering into the document or the place of entering into the document; or the law of the enacting province or territory. This approach provides some consistent elements with Quebec civil law where, as a rule, the formal validity of a juridical act, such as a substitute decision-making document, is governed by the law of the place where it was entered into. The juridical act may nevertheless be valid if it is in the form prescribed by: the law applicable to its content – i.e. the law expressly designated or whose designation may be inferred or, in the absence, the law of the State with which the act is most closely connected; the law of the place where the property which is the object of the juridical act is situated at the time of its conclusion; or the law of the domicile of one of the parties at the time the juridical act is concluded.

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

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

Subsection 2(2) is generally consistent with Article 15 of the Hague *Convention on the*

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*Protection of Adults*, except in that the latter also covers formal validity, which is dealt with separately under subsection 2(1) of the Uniform Act. The policy reasons for this limited “carve-out” are explained above. See the Uniform International Protection of Adults (Hague Convention) Implementation Act, recommended for adoption by the Conference in 2001.

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

The term “extent” refers to the decision-maker’s powers as the grantor’s designated representative and any limitations thereto. For example, the governing law will determine whether the authority to manage property on behalf of the grantor includes the power to dispose of such property and/or whether judicial authorization may be necessary before doing so. It will also determine whether a decision-maker with authority over insurance transactions has the authority to change beneficiary designations. As a final example, the governing law will determine whether the authority to consent to health care on behalf of the grantor extends to all forms of treatment or is limited to certain forms of treatments. In effect therefore, this provision clarifies that an individual’s intended grant of authority will not be enlarged by virtue of the decision maker using the substitute decision-making document in a different jurisdiction. See also section 5(3)(a).

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

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

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

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In the context of substitute decision-making documents, mandatory rules are more likely to exist in regard to health and personal care matters. For example, they may include specific rules and procedures for legal representation or authorization for certain forms of medical treatment, e.g. admission to a psychiatric hospital or *inter vivos* organ donation. The requirements of the Quebec Code relating to “homologation” of the protection mandate would be similarly treated. Thus, a protection mandate must be homologated in Québec if the individual has property in Québec, no matter where he /she is habitually resident or was habitually resident when the document was entered into. If the individual has property outside Quebec, the protection mandate must also be homologated in Québec if it was entered into when he/she was habitually resident in Québec and he/she is currently habitually resident in Québec.

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

## **Option 2**

### **Applicable law**

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

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

### **Same**

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

## **Section 2 – Option 2 - Comment**

Subsection 2(1) provides that the existence, extent, modification and extinction of a

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substitute decision-making document are determined by the law expressly indicated in the document if the chosen law is that of the grantor's nationality or former place of habitual residence, or, with respect to property, the place where such property is located. In the absence of an indication or of a valid choice of law, the default applicable law is that of the grantor's place of habitual residence at the time of entering into the document. Subsection 2(1) is consistent with article 15 of the *Hague Convention on the Protection of Adults*. See the Uniform International Protection of Adults (Hague Convention) Implementation Act, recommended for adoption by the Conference in 2001.

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

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

The term "extent" refers to the decision-maker's powers as the grantor's designated representative and any limitations thereto. For example, the governing law will determine whether the authority to manage property on behalf of the grantor includes the power to dispose of such property and/or whether judicial authorization may be necessary before doing so. It will also determine whether a decision-maker with authority over insurance transactions has the authority to change beneficiary designations. As a final example, the governing law will determine whether the authority to consent to health care on behalf of the grantor extends to all forms of treatment or is limited to certain forms of treatments. In effect therefore, this provision clarifies that an individual's intended grant of authority will not be enlarged by virtue of the decision maker using the substitute decision-making document in a different jurisdiction. See also section 5(3)(a).

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

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

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

In the context of substitute decision-making documents, mandatory rules are more likely to exist in regard to health and personal care matters. For example, they may include specific rules and procedures for legal representation or authorization for certain forms of medical treatment, e.g. admission to a psychiatric hospital or *inter vivos* organ donation. The requirements of the Quebec Code relating to “homologation” of the protection mandate would be similarly treated. Thus a protection mandate must be homologated in Québec if the individual has property in Québec, no matter where he /she is habitually resident or was habitually resident when the document was entered into. If the individual has property outside Quebec, the protection mandate must also be homologated in Québec if it was entered into when he/she was habitually resident in Québec and he/she is currently habitually resident in Québec.

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

### **Copy has same effect as original**

**3** Except as otherwise provided by any other enactment, a photocopy or electronically transmitted copy of an original substitute decision-making document has the same effect as the original.

### **Section 3 Comment**

This section also provides that unless another statute, court rule, or administrative rule in the jurisdiction requires presentation of the original substitute decision-making document, a photocopy or electronically transmitted copy has the same effect as the original. An example of other law that might require presentation of the original substitute decision-making document is the requirement in some jurisdictions for presentation of an original power of attorney in conjunction with the recording of documents in Registries like Land Titles where the document is entered into by an agent. Some practitioners accommodate this type of

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requirement by creating a document specifically intended for Land Titles or by creating more than one “original” document.

### **Manifestly contrary to public policy**

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

### **Section 4 Comments**

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

### **Requirement to accept substitute decision-making document**

**5(1)** Except as provided in subsection (2) or (3) or in any other enactment, a person shall accept, within a reasonable time, a substitute decision-making document that purportedly meets the requirements of the governing law [OPTION 1: for formal validity OPTION 2: for existence] as established under section 2 and may not require an additional or different form of substitute decision-making document for authority granted in the document presented.

### **Requirement to reject substitute decision-making document**

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

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

### **Authority to reject substitute decision-making document**

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

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

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

**Liability for legal costs**

**5(4)** A person who refuses in violation of subsection (1) to accept a substitute decision making document and is ordered by a court to accept the document is liable for reasonable legal fees and costs incurred in any proceeding to obtain that order.

**Section 5 Comment**

Sections 5 and 6 work in a complementary way. Section 5 enumerates the bases for acceptance or legitimate refusals of a substitute decision-making document and the sanctions for refusals that violate the Act. The introductory phrase of subsection 1, “*except as provided in subsection (2) or (3) or in any other enactment,*” allows a jurisdiction through common law and other statutes to impose stricter or different requirements for accepting a substitute decision-making document and the authority of the decision maker. With respect to substitute health care decisions, other statutes or the common law in a jurisdiction may impose public policy limits on a decision maker’s scope of authority in certain contexts or for certain medical procedures. See Section 4 Comment.

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

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

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

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**Acceptance of substitute decision-making document in good faith**

**6(1)** Except as otherwise provided by any other Act, a person who accepts a substitute decision-making document in good faith and without knowing that the document 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 or French or an official language of the province or territory]; and
- (c) an opinion of legal counsel as to any matter of law concerning the document if the request is made in writing and includes the person's reason for the request.

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

- (a) on an assumption referred to in subsection (1), or
  - (b) in reliance on an assertion, translation or opinion referred to in subsection (2)
- is not liable for the act if the assumption or reliance is based on inaccurate information concerning the relevant facts or law.

**Section 6 Comment**

Section 6 permits a person to rely in good faith on a substitute decision-making document and the decision maker's authority unless the person has actual knowledge that the document or authority is void, invalid or terminated. The introductory phrase to subsection (1), "*except as otherwise provided by any other Act,*" indicates that other relevant statutory provisions, such as those in the enacting province or territory's power of attorney statute or health care proxy statute, may supersede those in Section 6.

Absent stricter requirements emanating from another statute in the jurisdiction, the Act does not require a person to investigate a substitute decision-making document or the decision maker's authority. Although a person that is asked to accept a substitute decision-making



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document is not required to investigate the document, the person may, under subsection (2), request a decision maker's assertion of any factual matter related to the substitute decision-making document and may request an opinion of counsel as to any matter of law. If the substitute decision-making document contains, in whole or part, language other than [English or French or an official language of the province or territory], a translation may also be requested. Subsection (2) recognizes that a person that is asked to accept a substitute decision-making document may be unfamiliar with the law or the language of the jurisdiction intended to govern the document.

**Remedies under other law**

**7** The remedies under this Act are not exclusive and do not abrogate any other right or remedy under the law of [this province or territory].

**Section 7 Comment**

The remedies under the Act are not intended to be exclusive with respect to causes of action that may accrue in relation to a substitute decision-making document. The Act applies to many persons, individuals and entities (see the Definitions (defining "person" for purposes of the Act)), that may serve as decision makers or that may be asked to accept a substitute decision-making document. Likewise, the Act applies to many subject areas over which individuals may delegate decision-making authority. Remedies under other laws which govern such persons and subject matters should be considered by aggrieved parties in addition to remedies available under this Act.

**Application to existing documents**

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

**Coming into force**

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



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