

INTERJURISDICTIONAL RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT

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INTERJURISDICTIONAL RECOGNITION OF SUBSTITUTE DECISION-MAKING DOCUMENTS ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of [this province or territory], enacts as follows:

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.

I added "enactment" in response to Arthur's comment about s. 2(2). "Act or regulation" is also used in s. 5(1).

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

"person" includes [a corporation,] [a partnership or other unincorporated organization] a government or department, branch or division of a government, and [the personal or other legal representatives of a person to whom the context can apply according to law | executors, administrators and other legal representatives of a person].

Drafting comments carried forward from Draft 3:

This definition might need to be tailored to each jurisdiction, depending on its definition of "person" in its *Interpretation Act*. I think most Interpretation Acts define "person" as including a corporation, so it should not be necessary to include it here (although it does no harm to include it).

The US draft definition of "person" is very broad and includes virtually any type of legal entity. What I'm not sure of is whether the closing words "or other legal entity" infer that "legal entity" in the sense of a person at law who is capable of suing and being sued is an essential attribute. In Canada, I would not regard an "estate" or "business" as qualifying as a legal entity in that sense. We might instead capture an estate with "executor, administrator or other legal representative, and we would capture a business with "business entity" or with "partnership or other unincorporated [business] organization".

Does this definition capture an Indian band or the council of a band? Should it? Arguably "council of the band" as defined in section 1 of the *Indian Act* (Canada)

The alternative in the third set of brackets reflects the different wording found in the BC and Manitoba Interpretation Acts. The federal Interpretation Act and Part VI of Ontario's Legislation Act have a more limited definition ("person" includes a corporation.).

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In this Act, "person" is used in the following contexts.

- a decision maker is a person
- a person may accept and rely on a substitute decision-making document, and may be required to accept such a document.

I suspect a broad definition is required for the second, but not the first, of these contexts. Do you think there is a need for a definition that is tailored to the different contexts?

"personal care" means any care, arrangement, or service to provide an individual with shelter, food, clothing, transportation, education, recreation, or social contact.

"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.

Arthur asks the policy question: Should the definition embrace personal rights akin to contractual rights or licences?

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

Validity of substitute decision-making document

2(1) A substitute decision-making document executed by an individual outside of [this province or territory] is formally valid in [this province or territory] if, when it was executed, the execution complied with

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

"formally" is added here and in the opening stem of s. 3(1) at Marie's suggestion.

Marie's understanding (see her July 4 e-mail) is that the jurisdictions in 2(1) would be restricted as they are in Article 15 of the Convention. That was not my understanding of the discussion in our conference call. But if I am wrong, s. 2(1) should be changed to mirror s. 3(1).

I think Arthur's understanding accords with mine. In his July 4 e-mail, he points out how our revised 2(1) is similar to the 1992 uniform Act on advance directives and that eliminates the need to defend a significant departure from a previously adopted policy on formal validity.

Arthur asks whether "former habitual residence" should be added as a third default jurisdiction. It appears in s. 3(1) where the jurisdiction of a former habitual residence is one of the jurisdictions that the person may designate under a choice of law clause. Arthur's approach is to make the test for formal validity as broad as possible. If you agree with Arthur's suggestion, it could be done by adding a subclause (iii) or by changing "was habitually resident" in subclause (ii) to "was then or previously habitually resident".

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Copy has same effect as original

2(2) Except as otherwise provided by any other ~~enactment Act or a regulation under any other Act~~, a photocopy or electronically transmitted copy of an original substitute decision-making document has the same effect as the original.

Drafting comments carried forward from Draft 3:

Your version refers to administrative rule, rather than regulation. Should it be regulation?

- (b) Except as otherwise provided by statute or administrative rule other than this [act], a photocopy or electronically transmitted copy of an original substitute decision-making document has the same effect as the original.

Which law governs

3(1) The existence, extent, modification and extinction of the powers of the decision maker under a formally valid substitute decision-making document are governed by

- (a) the law of the jurisdiction indicated in the document, if
- (i) the individual is a national or former habitual resident of that jurisdiction, or
 - (ii) the powers in question are to be exercised in relation to the individual's property located in that jurisdiction; or
- (b) the law of the jurisdiction of which the individual was a habitual resident at the time of executing the document, if the document does not indicate a jurisdiction or the jurisdiction indicated is not a jurisdiction described in clause (a).

Same

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

Acceptance of substitute decision-making document in good faith

4(1) Except as otherwise provided by any other Act, a person who accepts a substitute decision-making document in good faith and without knowing that the document is void, invalid, or terminated, or that the purported decision maker's authority is void, invalid, or terminated, may assume without inquiry that the substitute decision-making document is genuine, valid and still in effect and the decision maker's authority is genuine, valid and still in effect.

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

4(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;

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- (b) a translation of the document if it contains, in whole or in part, language other than [English]; and
- (c) an opinion of legal counsel as to any matter of law concerning the document if the request is made in writing and includes the person's reason for the request.

Added brackets around "English" in clause (b), as suggested by Marie.

Drafting comments carried forward from Draft 3:

Here is your draft version of clause (c):

(3) an opinion of counsel as to any matter of law concerning the substitute decision-making document if the person requesting the opinion of counsel provides in a writing or other record the reason for the request.

It is not clear to whom the request is made. Normally, one would request legal advice from one's own lawyer. Is this intended to allow the person to ask the decision maker to provide a legal opinion? Does that lawyer have a conflict of interest?

If the person may request the legal opinion from his/her own lawyer, is this provision needed, or is it perhaps intended to require the decision maker to pay for the legal opinion?

Requirement to accept substitute decision-making document

5(1) Except as provided in subsection (2) or (3) or in any other Act ~~for regulation~~ enactment, a person shall accept, within a reasonable time, a substitute decision-making document that purportedly meets the formal validity requirements of ~~section 3~~ subsection 2(1) and may not require an additional or different form of substitute decision-making document for authority granted in the document presented.

Marie pointed out a problem with the reference to "validity requirements of section 3". I think it should have been a cross-reference to subsection 2(1). I added "formally" to be consistent with the changes to s. 2(1) and 3(1).

Exception — knowledge of termination

5(2) A person shall not accept a substitute decision-making document if the person has actual knowledge of the termination of the document or of the decision maker's authority.

Other exceptions

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

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

(a) the person's request under subsection 4(2) for the decision-maker's assertion of fact, a translation, or an opinion of counsel is refused;

(b) the person in good faith believes that the substitute decision-making document is not valid or that the decision maker does not have the authority to request the transaction or the act;

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

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These changes are suggested in response to Marie's comment in her July 4 e-mail. The exception in clause (a) is changed from "is not required to accept" to "shall not accept".

Liability for legal costs

5(3) A person who refuses in violation of subsection (1) to accept a substitute decision making document and is ordered by a court to accept the document is liable for reasonable legal fees and costs incurred in any proceeding to obtain that order.

Drafting comments carried forward from Draft 3:

I don't think that the Act needs to say that the person is subject to a court order. If an order is made, the person would of course be subject to it. If we provide anything more, would we not provide for an application to court for such an order?

Should the Act impose the liability for fees and costs, or should it enable or direct the court to impose the liability?

Remedies under other law

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

Application to existing documents

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

Coming into force

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

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At this point, an interpretive clause is being considered separately. The following version follows closely the version submitted by Marie (which, in turn, is modelled on the interpretive rules of the Convention).

Interpretation

1(2) For the purposes of this Act, a reference to the law of a jurisdiction in which different sets of rules or systems of law apply in the different territorial units of that jurisdiction is to be construed as follows:

- (a) a reference to the law of the jurisdiction of a habitual residence or former habitual residence of an individual shall be construed as referring to the law of the territorial unit in which that residence is or was located;
- (b) a reference to the law of the jurisdiction of which an individual is a national is to be construed as referring to the territorial unit designated by the law of that jurisdiction or, in the absence of relevant rules, to the territorial unit with which the individual has the closest connection;
- (c) a reference to the law of the jurisdiction in which a substitute decision making document was executed is to be construed as referring to the territorial unit in which the document was executed.