

D R A F T
FOR DISCUSSION ONLY

Uniform Health-Care Decisions Act (20__)

Uniform Law Commission

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April 14, 2023

Uniform Health-Care Decisions Act (20__)

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Uniform Health-Care Decisions Act (20__)

Prefatory Note

This Act enables individuals to appoint agents to make health care decisions for them should they be unable to make those decisions for themselves, provide their health-care professionals and agents with instructions about their values and priorities regarding their health care, and to indicate particular medical treatment they do or do not wish to receive. It also authorizes certain people to make health-care decisions for individuals incapable of making their own decisions but who have not appointed agents, thus avoiding the need to appoint a guardian or otherwise involve a court in most situations. In addition, it sets forth the related duties and powers of agents and health-care professionals, and provides protection in the form of immunity to both under specified circumstances.

More specifically, the Act modernizes and expands on the Uniform Health-Care Decisions Act approved by the Uniform Law Commission (“ULC”) in 1993 (“1993 Act”). The key goals of the 1993 Act, as articulated in its prefatory note, included: (1) acknowledging the right of a competent individual to make decisions about the provision, withdrawal or withholding of health care; (2) providing a single statute to govern the appointment of a health-care agent and the recording of an individual’s wishes regarding the individual’s own health care; (3) simplifying and facilitating the making of an advance health-care directive; (4) ensuring that decisions about an individual’s health care will be governed, to the extent possible, by the individual’s own desires; (5) addressing compliance with an individual’s instructions by health-care institutions and professionals; and (6) providing a procedure for resolution of disputes.

This Act shares those goals but is revised to reflect changes in how health care is delivered, increases in non-traditional familial relationships and living arrangements, the proliferation of the use of electronic documents, the growing use of separate advance directives exclusively for mental health care, and other recent developments. The Act also seeks to improve upon the 1993 Act based on decades of experience and knowledge about how people make health-care decisions and about the challenges associated with creating and using advance directives.

Some of the more important improvements to the 1993 Act are highlighted below.

First, this Act incorporates approaches designed to facilitate the use of advance directives. Although all states have enacted statutes enabling the use of advance directives, many adult Americans have never made one. Without an advance directive, individuals’ wishes are less likely to be honored. In addition, their health-care professionals, family, and friends may struggle to determine how to make health-care decisions for them and to identify what decisions to make. The Act therefore seeks to reduce the number of Americans who lack an advance directive by reducing unnecessary barriers to execution of these documents.

Second, this Act adds clarity around when an agent may act. Patients, surrogates, and health-care professionals are all disadvantaged when it is unclear whether an agent has authority to make decisions. The Act adds provisions clearly indicating when that power commences. In addition, it addresses an issue on which state statutes are typically silent: what happens if

1 patients object to a surrogate making a decision for them.

2
3 Third, this Act adds provisions to guide determinations of incapacity, which is important because
4 surrogates' authority to make health-care decisions for patients typically commences when
5 patients lack capacity to make decisions for themselves. The Act modernizes the definition of
6 capacity so that it accounts for the functional abilities of an individual and clarifies that the
7 individual may lack capacity to make one decision but retain capacity to make other decisions.
8 In addition, recognizing the growth of allied health professions, and that a variety of health-care
9 professionals may have training and expertise in assessing capacity, the Act expands the list of
10 health-care professionals who are recognized as being able to determine that an individual lacks
11 capacity.

12
13 Fourth, this Act authorizes the use of advance directives exclusively for mental health care.
14 Since the 1993 Act, many states have authorized such advance directives, sometimes called
15 "psychiatric advance directives." Among other things, these allow individuals with chronic
16 mental health challenges to provide specific instructions as to their preferences for mental health
17 care and to choose to allow those instructions to be binding in the event of an acute mental health
18 crisis.

19
20 Fifth, this Act modernizes default surrogate provisions that allow family members and certain
21 other people close to a patient to make decisions in the event the patient lacks capacity and has
22 not appointed a health-care agent. The new default surrogate provisions update the priority list
23 in the 1993 Act to reflect a broader array of relationships and family structures. They also
24 provide additional options to address disagreements among default surrogates who have equal
25 priority.

26
27 Sixth, this Act substantially updates the model form included in the 1993 Act. The revised form
28 is designed to be readily understandable and accessible to diverse populations. In addition, it
29 creates a new opportunity for individuals to share a range of information that can be used to
30 guide future health-care decisions. Many commentators have expressed concern that instructions
31 included in advance directives focus exclusively on preferences for particular treatments, and do
32 not provide health-care professionals or surrogates with the type of information about patients'
33 goals and values that could be used to make value-congruent decisions when novel or
34 unexpected situations arise. Responding to these concerns, the new form provides options for
35 individuals to indicate goals and values, in addition to specific treatment preferences.

36
37 This Act is intended to supersede the 1993 Act. A state enacting it would repeal that Act or any
38 other statute governing the issues addressed in this Act.

1 **Uniform Health-Care Decisions Act (20__)**

2 **Section 1. Title**

3 This [act] may be cited as the Uniform Health-Care Decisions Act (20__).

4 **Section 2. Definitions**

5 In this [act]:

6 (1) “Advance health-care directive” means a power of attorney for health care or
7 health-care instruction or both. The term includes an advance mental health-care directive.

8 (2) “Advance mental health-care directive” means a power of attorney for health
9 care or advance health-care directive, or both, created under Section 9.

10 (3) “Agent” means an individual appointed in a power of attorney for health care
11 to make a health-care decision for the individual who made the appointment. The term includes a
12 co-agent or alternate agent appointed under Section 20.

13 (4) “Capacity” means the ability and willingness to communicate a decision
14 independently or with appropriate services, technological assistance, supported decision making,
15 or other reasonable accommodation, and in connection with:

16 (A) making a health-care decision, means understanding the nature and
17 consequences of the decision, including the primary risks and benefits of the decision;

18 (B) making a health-care instruction, means understanding the nature and
19 consequences of the instruction, including the primary risks and benefits of the choices expressed
20 in the instruction; and

21 (C) appointing an individual as agent under a health-care power of
22 attorney or identifying a default surrogate under Section 12(b)(1), means understanding the
23 identity of the individual being appointed or identified and the general nature of the relationship

1 of the individual making the appointment with the individual being appointed or identified.

2 (5) “Cohabitant” means each of two individuals who have been living together as
3 a couple for at least one year after each became an adult or was emancipated and are not married
4 to each other[or [domestic partners] with each other].

5 (6) “Default surrogate” means an individual authorized under Section 12 to make
6 a health-care decision for another individual.

7 (7) “Electronic” means relating to technology having electrical, digital, magnetic,
8 wireless, optical, electromagnetic, or similar capabilities.

9 (8) “Guardian” means a person appointed under other law by a court to make
10 decisions regarding the personal affairs of an individual which may include health-care
11 decisions. The term does not include a guardian ad litem.

12 (9) “Health care” means care, treatment, service, or procedure to maintain,
13 monitor, diagnose, or otherwise affect an individual’s physical or mental illness, injury, or
14 condition. The term includes mental health care.

15 (10) “Health-care decision” means a decision made by an individual or the
16 individual’s surrogate regarding the individual’s health care, including:

17 (A) selection or discharge of a health-care professional or health-care
18 institution;

19 (B) approval or disapproval of a diagnostic test, surgical procedure,
20 medication, therapeutic intervention, or other health care; and

21 (C) direction to provide, withhold, or withdraw artificial nutrition or
22 hydration, mechanical ventilation, or other health care.

23 (11) “Health-care institution” means a facility or agency licensed, certified, or

1 otherwise authorized or permitted by other law to provide health care in this state in the ordinary
2 course of business.

3 (12) “Health-care instruction” means a direction, whether or not in a record, made
4 by an individual that indicates the individual’s goals, preferences, or wishes concerning the
5 provision, withholding, or withdrawal of the individual’s health care. The term includes a
6 direction intended to be effective if specified conditions arise.

7 (13) “Health-care professional” means a physician or other individual licensed,
8 certified, or otherwise authorized or permitted by other law of this state to provide health care in
9 this state in the ordinary course of business or practice of the physician’s or individual’s
10 profession.

11 (14) “Individual” means an adult or emancipated minor.

12 (15) “Mental health care” means care, treatment, service, or procedure to
13 maintain, monitor, diagnose, or otherwise affect an individual’s mental illness or other
14 psychiatric, psychological, or psychosocial condition.

15 (16) “Nursing home” means a “nursing facility” as defined in 42 U.S.C. §
16 1396r(a)[, as amended] or “skilled nursing facility” as defined in 42 U.S.C. § 1395i–3(a)[, as
17 amended].

18 (17) “Person” means an individual, estate, business or nonprofit entity,
19 government or governmental subdivision, agency or instrumentality, or other legal entity.

20 (18) “Person interested in the welfare of an individual” means:

21 (A) the individual’s surrogate;

22 (B) the spouse, child, parent, or grandparent of the individual, or a
23 descendant of the spouse, child, parent, or grandparent of the individual;

1 (C) the [domestic partner,]cohabitant[,] or friend of the individual;

2 (D) a public entity providing health care case management, or protective
3 services to the individual;

4 (E) a person appointed under other law to make decisions for the
5 individual under a power of attorney for finances; or

6 (F) a person that has an ongoing personal or professional relationship with
7 the individual, including a person that has provided educational or health-care services or
8 supported decision making to the individual.

9 (19) “Physician” means an individual authorized to practice medicine under [cite
10 to state law authorizing the practice of medicine][or osteopathy under [cite to state law
11 authorizing the practice of osteopathy]].

12 (20) “Power of attorney for health care” means a record granting an agent the
13 authority to make health-care decisions for the individual granting the power.

14 (21) “Reasonably available” means able to be contacted without undue effort and
15 willing and able to act in a timely manner considering the urgency of an individual’s health-care
16 situation. When used to refer to an agent or default surrogate, the term includes being willing and
17 able to comply with the duties under Section 17 in a timely manner considering the urgency of an
18 individual’s health-care situation.

19 (22) “Record” means information:

20 (A) inscribed on a tangible medium; or

21 (B) stored in an electronic or other medium and retrievable in perceivable
22 form.

23 (23) “Responsible health-care professional” means:

(A) a health-care professional designated by an individual or the individual's surrogate to have primary responsibility for the individual's health care or for overseeing a particular course of treatment; or

(B) in the absence of a designation under subparagraph (A), or if the professional designated under subparagraph (A) is not reasonably available, a health-care professional who has primary responsibility for overseeing the individual's health care or for overseeing a particular course of treatment.

(24) "Sign" means, with present intent to authenticate or adopt a record:

(A) execute or adopt a tangible symbol; or

(B) attach to or logically associate with the record an electronic symbol, sound, or process.

(25) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

(26) "Supported decision making" means assistance from one or more persons of an individual's choosing that helps the individual make or communicate a decision, including by helping the individual understand the nature and consequences of the decision.

(27) "Surrogate" means:

(A) an agent;

(B) a default surrogate; or

(C) a guardian authorized to make health-care decisions.

Legislative Note: *If the state recognizes domestic partnerships, insert in the bracketed text in paragraphs (5) and 18(C), and wherever the term appears in this act, the term used in the state. If the state does not recognize domestic partnerships, delete the bracketed text.*

1 *It is the intent of this act to incorporate future amendments to the federal law cited in paragraph*
2 *(16). A state in which the constitution or other law does not permit incorporation of future*
3 *amendments when a federal statute is incorporated into state law should omit the phrase “as*
4 *amended.” A state in which, in the absence of a legislative declaration, future amendments are*
5 *incorporated into state law also should omit the phrase.*

6
7 *If the state has separate terms for and laws authorizing the practice of medicine and osteopathy,*
8 *remove the brackets in paragraph (19) and cite to the appropriate statutes. However, if the*
9 *practice of osteopathy in the state is included in the term “medicine” and is authorized by the*
10 *state’s law regarding the practice of medicine, the bracketed text related to osteopathy should be*
11 *deleted.*

12 13 **Comment**

14 The Section contains definitions central to the Act’s purpose and scope.

15
16 First, it defines “advance health-care directive” as either a power of attorney for health care or a
17 health-care instruction. The first appoints an agent to make health-care decisions; the second
18 provides information about an individual’s treatment preferences, goals, values, and related
19 wishes to guide future health care decision-making. The term “health-care instruction” includes
20 oral and written directions. The instruction may relate to a particular health-care decision or to
21 health care in general. The term “health-care instruction” replaces the term “individual
22 instruction,” which was used in the 1993 Act. The change is designed to provide clarity, and to
23 indicate that an instruction may include more than one piece of information.

24
25 Second, it defines the subject matter covered by this Act with the term “health-care decisions”.
26 Consistent with the purposes of the Act, the Act defines “health-care decision” very broadly.
27 The term can include decisions about a full range of medical interventions and types of
28 providers. It is not limited to decisions about care for certain body parts, but extends to, for
29 example, dental and vision care.

30
31 The term “health-care decisions” references the definition of “health care”. The definition of
32 “health care” is to be given the broadest possible construction. It includes the types of care
33 referred to in the definition of “health-care decision” and to care, including personal and
34 custodial care, provided at a “health-care institution” or in a home-based setting. It also includes
35 alternative medical treatment.

36
37 The term “health-care institution” is likewise defined broadly. It includes a hospital, nursing
38 home, residential-care facility, home health agency or hospice.

39
40 Third, it defines an “individual” as an adult or an emancipated minor. This reflects the fact that
41 the Act only covers adults and emancipated minors, leaving other state law to govern decision-
42 making for unemancipated minors. Importantly, the Act is not intended to displace developing
43 state law regarding medical decision-making by or for “mature” minors.

44
45 Fourth, it defines surrogate to include an agent under a power of attorney for health care, a

1 default surrogate, or a guardian. It also provides definitions to help differentiate these different
2 types of surrogates. An “agent” is an individual appointed under a power of attorney for health
3 care. The definition of “agent” is not limited to a single individual because the Act permits the
4 appointment of co-agents and alternate agents. A “guardian” is a person appointed by a court
5 under other law. A “default surrogate” is an individual authorized under Section 12 to make a
6 health-care decision when there is neither an agent nor a guardian willing and able to make the
7 decision. All three types are referred to, collectively, as surrogates. Notably, this terminology
8 represents a change from the 1993 Act, which used the term “surrogate” only to refer to a default
9 surrogate. The change reflects the more common use of these terms and is designed to provide
10 clarity to users.

11
12 Fifth, core to the Act’s goal of enabling decisions for individuals unable to make decisions for
13 themselves, it defines the term “capacity”. The definition is consistent with the functional
14 approach to determining abilities and limitations found in the Uniform Guardianship,
15 Conservatorship, and Other Protective Arrangements Act (2017) (“Guardianship Act”). This
16 definition also recognizes that what an individual must be able to understand to make a health-
17 care decision or create an instruction may be different than what the individual must be able to
18 understand to appoint an agent. As a result, it is possible that the individual would be found to
19 lack capacity to do one and not the other. For example, an individual might know that they want
20 their adult child to make health-care decisions for them, and that appointing their adult child as
21 their agent would allow that to happen. At the same time, the individual might not have the
22 ability to understand the risks and benefits of particular health-care treatments. Thus, the
23 individual might be found to lack capacity to make an instruction, but to nevertheless have
24 capacity to create a health-care power of attorney. Similarly, the individual might have capacity
25 to make certain instructions and not others.

26
27 The Act also contains a variety of definitions that were not in the original Act and that help
28 update the Act to reflect modern developments. For example, reflecting a growing recognition
29 that individuals’ decisions should be respected even when they use help to reach those decisions,
30 it defines the term “supported decision-making”. Notably, this definition is consistent with the
31 definition of that term in the Guardianship Act.

32
33 Likewise, it adds several terms designed to recognize a broad array of family and interpersonal
34 arrangements. For example, reflecting the trend in the country of couples living together without
35 getting married, the Act includes a patient’s “cohabitant” in the expanded default surrogate list
36 found in Section 12 and other places in the Act where the inclusion is appropriate. The
37 definition of “cohabitant” in this Section is derived from the same definition in the Uniform
38 Cohabitants’ Economic Remedies Act, approved by the ULC in 2021, with a modification
39 requiring a living-together relationship of at least 1 year precipitated by the need to acknowledge
40 the different purposes of the two acts.

41
42 In addition, the Section includes other terms that facilitate clarity. For example, the term
43 “reasonably available” is used in the Act to accommodate the reality that individuals will
44 sometimes not be timely available. A person need not be available in-person to be considered
45 reasonably available. A person should be considered reasonably available if available in-person,
46 by phone, by videoconferencing, or by other means that allow for adequate communication.

1 Similarly, it adds the term “responsible health-care professional”. A responsible health-care
2 professional is a health-care professional with primary responsibility for an individual’s health
3 care in general, or for overseeing a particular course of treatment. Some individuals may only
4 have one responsible health-care professional. For example, a patient who lacks an existing
5 relationship with a primary care provider (sometimes called a “PCP”), may present needing
6 urgent care at an emergency department of a local hospital. During a period in which the
7 attending physician in that emergency department assumes responsibility for coordinating the
8 patient’s care, that attending physician may be the individual’s sole responsible health-care
9 professional. However, an individual also may have more than one provider who falls into this
10 category. For example, a cancer patient might have a primary care physician who coordinates
11 the patient’s health care in general, and an oncologist who oversees the patient’s cancer
12 treatment. Both physicians would be considered a “responsible health-care professional” under
13 the definition. Thus, the term accommodates the reality of modern health care systems in which
14 an individual may not have a single provider who is responsible for all care, but rather a team of
15 providers.

16 17 **Section 3. Scope**

18 (a) This [act] governs the:

19 (1) creation, revocation, interpretation and implementation of an advance health-
20 care directive; and

21 (2) selection and authority of a default surrogate for an individual who lacks
22 capacity to make a health-care decision but has not appointed an agent.

23 (b) Whether an individual creates or revokes an advance health-care directive does not
24 affect the right of an individual who has capacity to make a decision about the individual’s health
25 care.

26 **Comment**

27 The Act governs advance directives and default surrogates. It is not intended to affect the rights
28 of individuals who have capacity to make health-care decisions for themselves.

29 30 **Section 4. Presumption of Capacity; Overcoming Presumption**

31 (a) Unless determined to lack capacity to do so by a court, an individual is presumed to
32 have capacity to:

33 (1) make a health-care decision;

1 (2) make or revoke a health-care instruction; and

2 (3) make or revoke a power of attorney for health care.

3 (b) A presumption under subsection (a) may be rebutted by a finding that an individual
4 lacks capacity:

5 (1) subject to subsection (c), made on the basis of a contemporaneous
6 examination by any of the following:

7 (A) a physician;

8 (B) a psychologist licensed or otherwise authorized to practice in this
9 state; [or]

10 [(C) an individual with training and expertise in the finding of lack of
11 capacity who is licensed or otherwise authorized to practice in this state as:

12 (i) a physician assistant;

13 (ii) an advanced practice registered nurse; or

14 (iii) a social worker; or]

15 (D) a responsible health-care professional not described in subparagraph
16 (A)[,] [or] (B)[, or (C)] if:

17 (i) the individual about whom the finding is to be made is
18 experiencing a health condition requiring that a decision regarding health-care treatment be made
19 promptly to avoid loss of life or serious harm to the health of the individual; and

20 (ii) an individual listed in subparagraph (A)[,] [or] (B)[, or (C)] is
21 not reasonably available;

22 (2) made in accordance with accepted standards of medical judgment and to a
23 reasonable degree of medical certainty; and

(3) documented in a record signed by the individual making the finding that includes the maker's opinion of the cause, nature, extent and probable duration.

(c) The spouse, child, parent, grandparent,[domestic partner,] or cohabitant of the individual presumed to have capacity or of the individual's surrogate, or a descendant of the spouse, child, parent, grandparent,[domestic partner,] or cohabitant of the individual or of the surrogate may not make the finding under subsection (b).

(d) A finding under subsection (b) is not sufficient to rebut the presumption under subsection (a) if the finding was based on a condition that the individual now no longer has or a responsible health care professional has good cause to believe the individual now has capacity.

Legislative Note: *If the state decides to include physician assistants, advanced practice registered nurses, and social workers in the list of health professionals who may make a finding that an individual lacks capacity even in a non-emergency situation, it should include bracketed subsection (b)(1)(C) and include reference to paragraph (C) in subsection (b)(1)(D).*

Comment

This Section states that an individual is presumed to have capacity to make health care decisions, to create or revoke an advance directive, and to designate an agent.

This Section also governs how a determination that an individual lacks capacity is made for the purposes of this Act; it does not govern how such determinations are made for other purposes.

Unlike some states that require two persons to make the determination that a person lacks capacity, this provision only requires one. However, as set forth in Section 5, a second finding may be required for the determination to be treated as valid if the individual, their surrogate, or a person interested in the individual's welfare objects to the first determination.

The individual making the finding must contemporaneously examine the individual. This means that their finding must be based, at least in part, on their own examination of the patient in the patient's current condition. They may not simply rely on a potentially outdated examination or on the examination made by another. The examination may occur in-person or by other means (e.g., telehealth) if consistent with applicable standards of law in the enacting state.

A finding under this section that an individual lacks capacity must be according to accepted medical standards and to a reasonable degree of medical certainty. As a practical matter, this means that the individual making a finding—especially if it is based on a diagnosis of mental illness or cognitive, intellectual, or developmental disability—will need to have training and

1 expertise in the assessment of functional and cognitive abilities and limitations of persons with
2 similar disabilities.

3
4 A wide variety of types of experiences and training might give rise to the training and expertise
5 that similarly situated professionals would recognize as sufficient. As a practical matter, an
6 individual making the finding should have training as to the legal standards in this Act to be able
7 to assess whether a person's cognitive and functional limitations satisfy those standards. A
8 diagnosis, or a finding that an individual takes a particular medication or is receiving a particular
9 treatment, is not a finding that the individual lacks capacity. It may be evidence to be taken into
10 consideration as part of an evaluation; it is not a substitute for that evaluation.

11
12 Notably, consistent with the definition of "capacity" in Section 2, an individual might be
13 determined or found to lack capacity to make certain medical decisions and not others. For
14 example, an individual might be determined or found to have capacity to set goals for treatment,
15 but not to select among therapies to meet those goals. Similarly, a person might have capacity to
16 determine to accept nutrition and hydration and not have capacity to make more complex
17 decisions.

18
19 It is important to recognize that capacity may fluctuate and that a reassessment is appropriate
20 where there is reason to believe that a prior finding may not reflect the individual's current
21 abilities. Mindful of this, as set forth in subsection (d), if an individual is found to lack capacity
22 because of a particular condition that the individual has, the finding is not effective to rebut the
23 presumption of capacity if the individual no longer has that condition. For example, if an
24 individual is found to lack capacity because they are delirious due to an acute infection, and the
25 infection subsides, the finding becomes ineffective. Similarly, if a responsible health care
26 professional has good cause to believe that the individual has capacity at the current time, a prior
27 finding that the individual lacks capacity will be insufficient to rebut the presumption of capacity.
28 In such situations, a new assessment and finding will be needed if the presumption is to be
29 rebutted.

30
31 Nothing in this Section supplants the existing common law rules regarding when a medical
32 provider does or does not need informed consent. State statutory and common law recognize a
33 variety of circumstances under which a medical provider can treat without consent. In these
34 situations, treatment could be provided without consent even without a determination or finding
35 that the patient lacks capacity.

36
37 Similarly, nothing in this Section affects a court's ability to make a determination that an
38 individual lacks capacity under the Guardianship Act or similar state law.

39 40 **Section 5. Notice of Finding of Lack of Capacity; Right to Object**

41 (a) An individual who makes a finding under Section 4(b) shall inform the individual
42 about whom it was made or the individual's responsible health-care professional of the finding as
43 soon as reasonably feasible.

1 (b) A responsible health-care professional who is informed of a finding under Section
2 4(b) shall inform the individual about whom it was made, and the individual's surrogate, as soon
3 as reasonably feasible.

4 (c) An individual found under Section 4(b) to lack capacity may object to the finding in a
5 record, orally, or by another act.

6 (d) After the individual objects under subsection (c), the finding is not sufficient to rebut
7 the presumption of capacity in Section 4(a), and the individual must be treated as having
8 capacity, unless:

9 (1) the individual withdraws the objection;

10 (2) the court determines that the individual lacks the presumed capacity;

11 (3) the individual is experiencing a health condition requiring that a decision
12 regarding health-care treatment be made promptly to avoid imminent loss of life or serious harm
13 to the health of the individual; or

14 (4) the finding is:

15 (A) not used to withhold or withdraw life-sustaining treatment if the
16 individual is objecting to the withholding or withdrawal of the treatment; and

17 (B) confirmed by an individual authorized under Section 4(b)(1) who:

18 (i) did not make the first finding;

19 (ii) is not the spouse, child, parent, grandparent,[domestic partner,]
20 or cohabitant of the individual who made the first finding; and

21 (iii) is not a descendant of the spouse, child, parent, grandparent,[
22 domestic partner,] or cohabitant of the individual who made the first finding.

23 (e) A health-care professional who is informed of an objection under subsection (c)

promptly shall:

(1) communicate the objection to a responsible health-care professional; and

(2) document the objection in the individual's medical record or communicate the objection to an administrator with responsibility for medical records of the health-care institution providing health care to the individual.

Comment

This Section addresses an important question on which the earlier Act was silent: what happens if the individual does not agree with a non-judicial finding of incapacity? It provides that if an individual is found to lack capacity under Section 4(b), the individual may object to that finding. It further provides that the finding will not be effective to rebut a presumption of capacity unless the individual withdraws the objection, a court determines the individual lacks capacity, the individual needs prompt treatment to avoid dying or experiencing serious harm, or the finding is confirmed by another qualified professional.

However, there is one caveat to the provision that the finding can be deemed effective if confirmed by another professional: this is not sufficient if the finding would be used to withhold or withdraw life-sustaining treatment contrary to the current, expressed wishes of the individual. This caveat reflects a simple policy decision to disallow removal of life-sustaining treatment over the patient's contemporaneous opposition when the patient has not had the full benefit of due process provided by a court proceeding.

Section 6. Judicial Review of Finding of Lack of Capacity

(a) An individual found under Section 4(b) to lack capacity, a responsible health-care professional, the health-care institution providing health care to the individual, or a person interested in the welfare of the individual may petition the [insert name of the appropriate court in the state for capacity cases] in the [county] in which the individual resides or is located to determine whether the individual lacks capacity.

(b) The court in which a petition under subsection (a) is filed shall appoint [legal counsel to represent the individual if the individual does not have legal counsel] [a guardian ad litem] in the proceeding. The court shall hear the petition [as soon as possible but not later than [seven] days after the petition is filed]. As soon as possible[, but not later than [seven] days after the

hearing], the court shall determine whether the individual lacks capacity. The individual shall be determined to lack capacity only if the court finds by clear and convincing evidence that the individual lacks capacity.

Legislative Note: *A state that uses a different term for “county” should insert that term in the brackets in subsection (a).*

In subsection (b), the state should decide whether to require the appointment of legal counsel, if the individual does not have legal counsel, whose primary duty is to represent the individual and the individual’s wishes before the court, or a guardian ad litem, whose primary duty is to assist the court by representing the individual’s best interests.

A state in which court proceedings are solely or primarily within the purview of the state’s highest court may not wish to include the bracketed instructions to the court in subsection (b) regarding the timing of a hearing on a petition filed under subsection (a). A state in which that is not the case should include the bracketed material and insert what it believes to be an appropriate number of days.

Comment

Subsection (a) provides for standing for an individual found to lack capacity under Section 4(b), certain health care providers, and persons interested in the welfare of the individual to challenge the finding in court.

Subsection (b) requires prompt court action and requires the appointment of legal counsel or a guardian ad litem where a petition is brought under this Section. In appointing a guardian ad litem, a court should prioritize appointment of someone with training and expertise in the type of abilities and limitations alleged.

An individual may also challenge a determination of lack of capacity made by a court under Section 4(a). However, the procedure for that challenge is not covered by this Act. Rather, it would be governed by the Guardianship Act, the state’s own guardianship law, or by other state law.

Section 7. Health-Care Instruction

(a) An individual may create a health-care instruction that expresses the individual’s preferences for future health care, including preferences regarding:

(1) health-care professionals or health-care institutions;

(2) how a health-care decision will be made and communicated;

(3) persons that should or should not be consulted regarding a health-care

1 decision;

2 (4) a person to serve as guardian for the individual if one is appointed; and

3 (5) an individual to serve as a default surrogate.

4 (b) A health-care professional to whom an individual communicates or provides an
5 instruction under subsection (a) shall document the instruction and the date of the instruction in
6 the individual's medical record.

7 (c) A health-care instruction that conflicts with an earlier health-care instruction,
8 including an instruction documented in a medical order, revokes the earlier instruction to the
9 extent of the conflict.

10 (d) A health-care instruction may be in the same record as a power of attorney for health
11 care.

12 **Comment**

13 The Act distinguishes between two types of advance directives—those which are instructions,
14 i.e., an indication of an individual's preference for care, and those which appoint an agent—
15 while recognizing that both may be created by a single document. This Section covers
16 instructions but provides in subsection (d) that an instruction may be in the same record as a
17 power of attorney for health care.

18
19 This Section enables the individual to make a wide variety of instructions. These may apply
20 broadly, or may pertain to specific circumstances, such as in the event of terminal illness. Under
21 subsection (a)(4) the individual may include, as part of the instructions, a nomination of a
22 guardian. Such nomination does not provide any indication that the individual wishes to have a
23 guardian appointed and should never be construed as consent to imposition of guardianship. Nor
24 can such nomination guarantee that the nominee will be appointed. Rather, in the absence of
25 cause to appoint another, the court would likely select the nominee. Notably, by nominating an
26 agent appointed under a power of attorney for health care as a guardian, the principal may reduce
27 the likelihood that a guardianship could be used to thwart the agent's authority.

28
29 Creating an instruction under this Section does not require compliance with any particular set of
30 formalities. This reflects the fact that people make instructions in many ways—written, oral,
31 etc.—and limiting their ability to do so by adding procedural requirements could run afoul of
32 long-established rights and reduce the likelihood that they will be made at all.

33
34 Subsection (c) addresses the issue of multiple instructions. It provides that the most current

instruction governs, regardless of the location of the instruction. For example, if a medical order (including a POLST, sometimes referred to as a Physician Order for Life Sustaining Treatment) recorded a preference inconsistent with a preference stated in a previously created advance directive, the direction in the medical order would govern. Similarly, if the medical order recorded a preference, and an individual subsequently provided a different instruction, the subsequent instruction would govern.

Section 8. Power of Attorney for Health Care

(a) An individual may create a power of attorney for health care to authorize an agent to make a health-care decision for the individual.

(b) An individual is disqualified from acting as agent for an individual who lacks capacity if the court finds that the first individual poses a danger to the individual found or determined to lack capacity, even if the court does not issue a [restraining order] against the first individual.

(c) An owner, operator, employee, or contractor of a nursing home [or other residential care facility] at which an individual is receiving care is disqualified from acting as agent unless the owner, operator, employee, or contractor is the spouse, child, parent, grandparent,[domestic partner,] or cohabitant of the individual, or a descendent of the spouse, child, parent, [or] grandparent[, domestic partner], or cohabitant of the individual.

(d) A health-care decision made by an agent is effective without judicial approval.

(e) A power of attorney for health care must be in a record, signed by the individual granting the power, and an adult witness who:

(1) reasonably believes that the act of the individual to create the power of attorney is voluntary and knowing;

(2) is not:

(A) the agent appointed by the individual;

(B) the agent's spouse[, domestic partner,] or cohabitant;

(C) if the individual resides in a nursing home [or other residential care

facility], the owner, operator, employee, or contractor of the nursing home [or other residential care facility]; and

(3) is present when the individual signs the power of attorney or when the individual represents that the power of attorney reflects the individual's wishes.

(f) A witness under subsection (e) is considered present if the witness and the individual are:

(1) physically present in the same location;

(2) using an electronic means that allows for real time audio and visual transmission and able to communicate in real time to the same extent as if they were physically present in the same location; or

(3) able to speak to and hear each other in real time through audio connection if:

(A) the identity of the individual is personally known to the witness; or

(B) the witness is able to authenticate the identity of the individual by receiving accurate answers from the individual that enable the authentication.

(g) A power of attorney for health care may include a health-care instruction.

Legislative Note: A state should insert the term the state uses for protective orders in place of the bracketed material in subsection (b) and wherever it appears in the act.

The state should insert the appropriate term or terms for the types of facilities the state wishes to include in subsection (c) and wherever the bracketed phrase "other residential care facility" appears in the act. Such facilities go by various names, including assisted living facilities and board and care homes.

It is intended that a power of attorney under this act prevail over conflicting provisions in other state law. A state may need to revise its law on powers of attorney to resolve conflicts.

Comment

This Section provides for the second type of advance directive: the power of attorney for health care, which must be in a signed record. In some states, this document is currently referred to as a health care proxy.

1 Consistent with the statement in Section 7 that an instruction may be in the same record as a
2 power of attorney for health care, subsection (g) recognizes that a power of attorney for health
3 care may be in the same record as a health-care instruction. Notably, putting both in the same
4 record is typically advisable because the agent’s decision-making should be guided by such
5 instructions. Having both in the same place facilitates an agent’s compliance with their duties
6 under Section 17.

7
8 The requirement that a power of attorney be in a record must be understood in the context of the
9 definition of a “record” in Section 2. As defined, a record is information inscribed on a tangible
10 medium (e.g., paper) or stored in an electronic or other medium and retrievable in perceivable
11 form. Thus, it allows for electronic powers of attorney, including those captured on video.

12
13 The Section includes execution requirements, as states overwhelmingly have adopted such
14 requirements. However, consistent with concerns about undue barriers to execution, it aims to
15 minimize the burden of execution requirements by requiring only a single witness and allowing
16 witnessing to occur in various ways. To discourage forgery it requires a witness and identifies
17 someone who can describe what took place should a concern about the validity of the document
18 arise. By contrast, it does not require notarization. A person who is a notary, however, can serve
19 as a witness. In addition, an individual may opt to have additional witnesses beyond the required
20 single witness.

21
22 Notwithstanding the acknowledgment in subsection (a) that multiple agents may be appointed,
23 such appointment is not encouraged. Appointment of multiple agents where each can act
24 separately can result in conflicting instructions being given to health-care professionals. It
25 creates an opportunity for confusion and can frustrate the ability of agents to effectuate the
26 individual’s wishes as required under Section 17. Appointment of agents who must act together
27 also creates problems. Agents may fail to reach consensus. Obtaining consensus may also slow
28 the decision-making process, potentially delaying treatment for the individual.

29
30 Consistent with the 1993 Act, subsection (c) prohibits an owner, operator, employee, or
31 contactor of a nursing home or other residential care facility in which the individual is residing
32 from serving as agent, unless related to the individual. This prohibition is not because such
33 individuals are inherently suspicious; it is recognized that individuals working in such facilities
34 are critically important caregivers and may form strong, caring bonds with residents. Rather, it
35 reflects the nature of these institutions—institutions in which highly vulnerable individuals tend
36 to become highly dependent on the facility and its staff to meet their needs. In this environment,
37 it is important that the agent is independent of the facility.

38
39 As indicated in the legislative note, a state will need to insert its own term or terms of the types
40 of facilities the state wishes to include in subsection (c) and wherever the bracketed phrase
41 “other residential care facility” appears in this Act. Such facilities go by various names,
42 including assisted living facilities and board and care homes. To include facilities that provide
43 residential services to people with intellectual disabilities and related conditions, states might
44 include the term “Intermediate Care Facilities for Individuals with Intellectual Disability,” a term
45 used in the context of the federal Medicaid program.

1 **Section 9. Advance Mental Health-Care Directive**

2 (a) An individual may create an advance mental health-care directive that addresses only
3 mental health care for the individual.

4 (b) A health-care instruction that addresses only mental health care for an individual may
5 include:

6 (1) a statement of the individual's general philosophy and objectives regarding
7 mental health care;

8 (2) the individual's specific goals, preferences and wishes regarding the provision,
9 withholding, or withdrawal of a form of mental health care, including:

10 (A) preferences regarding professionals, programs, and facilities;

11 (B) admission to a mental facility, including duration of admission;

12 (C) preferences regarding medications;

13 (D) a refusal to accept a specific type of mental health care, including a
14 medication; and

15 (E) preferences regarding means of crisis intervention.

16 (c) A health-care instruction under this section may be in the same record as a power of
17 attorney for health care.

18 [(d) An individual may direct in an advance mental health-care directive that:

19 (1) a health-care professional follow an instruction in the directive even if the
20 individual objects and the presumption of capacity under Section 4(a) has not been rebutted; or

21 (2) the individual may not revoke the directive if the individual is experiencing a
22 psychiatric or psychological event specified by the individual in the directive.

23 (e) If an advance mental health-care directive includes the direction under subsection (d),

the advance mental health-care directive must be in a record that is separate from any other advance health-care directive created by the individual, and signed by the individual creating the advance mental health-care directive and at least 2 adult witnesses who:

(1) attest that to the best of their knowledge the individual understood the nature and consequences of the direction including its risks and benefits, and the direction is made voluntarily and without coercion or undue influence;

(2) are not:

(i) the agent appointed by the individual;

(ii) the agent's spouse[, domestic partner,] or cohabitant; and

(iii) if the individual resides in a nursing home [or other residential care facility] the owner, operator, employee, or contractor of the nursing home [or other residential care facility]; and

(3) are physically present in the same location as the individual.]

Legislative Note: A state that wishes to include an option for a Ulysses type clause in an advance health-care directive that addresses only mental health care should include subsections (d) and (e), Section 15(a)(3) and Section 23(a)(6).

Comment

This Section governs what have sometimes been called “psychiatric advance directives.” The use of the term “mental health” instead of “psychiatric” reflects the fact that an individual might wish to create an advance directive to address a wide variety of mental health-care needs and mental conditions, not simply those which stem from what are traditionally referred to as “psychiatric” conditions.

An advance mental health-care directive can be a power of attorney for only mental health care, an instruction for only mental health care, or a single record that includes both. An individual need not have a particular diagnosis to create an advance mental health-care directive. For example, an individual might wish to create one to govern in the event of an acute mental health crisis, but they might also create one to govern mental health care in the event of dementia or another cognitive disability. The list in subsection (b) of issues that can be addressed in an advance mental health-care is not exhaustive. Thus, an individual could have an advance mental health-care directive and no general advance directive, could have a general advance directive

1 and no advance mental health-care directive, or could have both.

2
3 An individual may choose to use an instruction only for mental health care to express a broad
4 range of preferences. In many cases, these preferences may be based on prior experience and be
5 a way to communicate to future health-care professionals what medication or treatments have
6 had a positive or negative impact in the past. For example, an individual may wish to avoid a
7 treatment method that had side effects that were personally intolerable, or an intervention that
8 proved effective in the past.

9
10 Since a person may designate an agent to make health-care instructions or provide an instruction
11 related to mental health care in a general power of attorney, this Section is unnecessary to
12 empower either. What it does is (1) clarify that an individual may make an appointment or
13 instruction exclusively for mental health care; (2) prevent a general advance directive from
14 mistakenly revoking the specific one, and vice versa; and (3) allow—but in no way require—an
15 individual to essentially waive their right to be treated as having capacity pending confirmation
16 of that finding of incapacity by a court or second health-care professional (a “Ulysses” type
17 provision).

18
19 The Ulysses option is created by subsection (d), which allows the individual to agree in advance
20 that an instruction made in an advance directive trumps a subsequent decision made by the
21 individual if the individual is experiencing a particular psychiatric or psychological event. It
22 does this by providing that an individual may create an advance mental health-care directive
23 requiring that health care professionals follow an instruction in the directive if the individual is
24 experiencing the particular psychiatric or psychological event specified in the directive, even
25 though the individual has not been found to lack capacity and the individual is objecting to the
26 care or treatment described in the instruction. Subsection (d) also allows an individual to include
27 in the advance directive an instruction that prevents the individual from revoking the advance
28 directive if the individual is experiencing the particular psychiatric or psychological event
29 specified in the directive.

30
31 The individual may choose the level of specificity they want in identifying the event that would
32 trigger the Ulysses clause. Some individuals might choose a broad category of event (e.g., “an
33 acute mental health crisis”). Others might choose a much narrower event (e.g., if the individual
34 is experiencing a particular type of mental health crisis or a particular symptom and is refusing a
35 particular type of medication or intervention).

36
37 This Ulysses provision is entirely optional, and thus individuals are free to create an advance
38 mental health-care directive without any such provision. Because a Ulysses clause authorizes
39 health-care professionals to disregard otherwise valid instructions or revocations, subsection (e)
40 requires additional formalities when one is included. Specifically, it requires two witnesses who
41 are physically present in the same location as the individual creating the directive. Further, these
42 witnesses must attest that, to the best of their knowledge, the individual authorizing the provision
43 understands the nature and consequences of the clause, and is making a voluntary decision (free
44 of coercion or undue influence) to include it.

45
46 The power of an agent under a power of attorney for mental health care to consent to voluntary

admission to a psychiatric facility is governed by Section 18, which governs the powers of an agent.

Section 10. Relationship of Advance Mental Health-Care Directive and Other

Advance Health-Care Directive

(a) If a direction in an advance mental health-care directive conflicts with a direction in another advance health-care directive, the later direction revokes the earlier direction to the extent of the conflict.

(b) An individual's appointment under a power of attorney for health care of an agent to make decisions only for mental health care does not revoke an earlier appointment of an agent under a power of attorney for health care to make other health-care decisions for the individual. The later appointment revokes the authority of the agent under the earlier appointment to make decisions about mental health care unless otherwise specified in an advance directive making the later appointment.

(c) An individual's appointment under a power of attorney for health care of an agent to make health-care decisions for the individual other than decisions about mental health care made after appointment of an agent authorized to make only mental health-care decisions does not revoke the appointment of the agent authorized to make only decisions about mental health care.

Comment

This section clarifies the relationship between an advance mental health-care directive and advance directives that are not limited in this way. It provides where instructions in the two differ, the later to be created governs to the extent of the conflict. It explains, however, that appointment of an agent in an advance mental health-care directive does not revoke the prior appointment of an agent under a general power-of-attorney, and vice versa. However, the appointment of an agent in an advance mental-health care directive does revoke the authority of an agent appointed under a general power of attorney for health care to make mental health care decisions for the individual, unless that later directive provides otherwise.

Section 11. Optional Form

1 The following form may be used to create an advance health-care directive.

2 **ADVANCE HEALTH-CARE DIRECTIVE**

3 **HOW YOU USE THIS FORM**

4 You can use this form if you wish to name someone to make health-care decisions for you in case
5 you cannot make them for yourself. This is called giving the person a Power of Attorney for
6 Health Care. This person is called your Agent.

7
8 You can also use this form to state your wishes, preferences, and goals for health care, and to say
9 if you want to be an organ donor after you die.

10
11 **YOUR NAME AND DATE OF BIRTH**

12
13 Name:

14
15 Date of birth:

16
17 **PART A: NAMING AN AGENT**

18 This part lets you name someone else to make health-care decisions for you. You may leave any
19 item blank.

20
21 **1. NAMING AN AGENT**

22
23 I want the following person to make health-care decisions for me if I cannot make decisions
24 for myself:

25
26 Name:

27
28 Optional contact information (it is helpful to include information such as address, phone, and
29 email):

30
31
32
33 **2. NAMING AN ALTERNATE AGENT**

34
35 I want the following person to make health-care decisions for me if I cannot and my Agent is
36 not willing, able, or reasonably available to make them for me:

37
38 Name:

39
40 Optional contact information (it is helpful to include information such as address, phone, and
41 email):

1 **3. LIMITING YOUR AGENT’S AUTHORITY**

2
3 I give my Agent the power to make all health-care decisions for me if I cannot make those
4 decisions for myself, except the following:

5
6
7
8 (If you do not add any limitations here, your Agent will be able make all health-care
9 decisions that an Agent is permitted to make under state law.)

10
11 **PART B: HEALTH CARE INSTRUCTION**

12
13 This part lets you state your priorities for health care and the types of health care you do and do
14 not want.

15
16 **1. INSTRUCTIONS ABOUT LIFE-SUSTAINING TREATMENT**

17
18 This section gives you the opportunity to say how you want your Agent to act while making
19 decisions for you. You may mark or initial each item. You also may leave any item blank.

20
21 Medical treatment needed to keep me alive but not needed for comfort or any other purpose
22 should (mark all that apply):

- 23 ☐ Always be given to me.
24 ☐ Not be given to me if I have a condition that is not curable and is expected to
25 cause my death soon, even if treated.
26 ☐ Not be given to me if I am unconscious and I am not expected to be conscious
27 again.
28 ☐ Not be given to me if I have a medical condition from which I am not
29 expected to recover that prevents me from communicating with people I care
30 about, caring for myself, and recognizing family and friends.
31 ☐ Other (write what you want or do not want):

32
33
34
35 If I can’t swallow and staying alive requires me to get liquid or food through a tube or other
36 means for the rest of my life, liquid or food should (mark all that apply):

- 37 ☐ Always be given to me.
38 ☐ Not be given to me if I have a condition that is not curable and is expected to
39 cause me to die soon, even if treated.
40 ☐ Not be given to me if I am unconscious and am not expected to be conscious
41 again.
42 ☐ Not be given to me if I have a medical condition from which I am not
43 expected to recover that prevents me from communicating with people I care
44 about, caring for myself, and recognizing family and friends.
45 ☐ Other (write what you want or do not want):
46

1 If I am in significant pain, care that will keep me comfortable but is likely to shorten my life
2 should (mark all that apply):

3 ☐ Always be given to me.

4 ☐ Never be given to me.

5 ☐ Be given to me if I have a condition that is not curable and is expected to
6 cause me to die soon, even if treated.

7 ☐ Be given to me if I am unconscious and am not expected to be conscious
8 again.

9 ☐ Be given to me if I have a medical condition from which I am not
10 expected to recover that prevents me from communicating with people I care
11 about, caring for myself, and recognizing family and friends.

12 ☐ Other (write what you want or do not want):
13
14
15

16 2. INSTRUCTIONS ABOUT PRIORITIES

17
18 You can use this section to indicate what is important to you, and what is not important to
19 you. This information can help your Agent make decisions for you if you cannot. It also helps
20 others understand your preferences.
21

22 You may mark or initial each item. You also may leave any item blank.
23

24 Staying alive as long as possible even if I have substantial physical limitations is:

25 ☐ Very important

26 ☐ Somewhat important

27 ☐ Not important
28

29 Staying alive as long as possible even if I have substantial mental limitations is:

30 ☐ Very important

31 ☐ Somewhat important

32 ☐ Not important
33

34 Being free from significant pain is:

35 ☐ Very important

36 ☐ Somewhat important

37 ☐ Not important
38

39 Being independent is:

40 ☐ Very important

41 ☐ Somewhat important

42 ☐ Not important
43

44 Having my Agent talk with my family before making decisions about my care is:

45 ☐ Very important

46 ☐ Somewhat important

- 1 () Not important
2 Having my Agent talk with my friends before making decisions about my care is:
3 () Very important
4 () Somewhat important
5 () Not important

3. OTHER INSTRUCTIONS

You can use this section to provide more information about your goals, values, and preferences for treatment, including care you want or do not want. You can also use this section to name anyone who you do not want to make decisions for you under any conditions.

PART C: OPTIONAL SPECIAL POWERS & GUIDANCE

This part allows you to give your Agent additional powers, and to provide more guidance about your wishes. You may mark or initial each item. You also may leave any item blank.

1. OPTIONAL SPECIAL POWERS

My Agent can do the following things ONLY if I have initialed or marked them below:

- () Admit me as a voluntary patient to a facility for mental health treatment for up to 7 days, or 14 days, or 30 days (circle one).
(If I do not mark or initial this, my Agent MAY NOT admit me as a voluntary patient to this type of facility.)
- () Place me in a nursing home for more than 100 days even if my needs can be met somewhere else, I am not terminally ill, and I object.
(If I do not mark or initial this, my Agent MAY NOT do this.)

2. ACCESS TO MY HEALTH INFORMATION

My Agent may obtain, examine, and share information about my health needs and health care if I am not able to make decisions for myself. If I initial or mark below, my Agent may also do that at any time they think it will help me.

- () I give my Agent permission to obtain, examine, and share information about my health needs and health care whenever they think it will help me.

3. GUIDANCE FOR MY AGENT

Initial or mark below if you want to give your Agent flexibility in following any instructions you provided in this form. If you do not, your Agent must follow the instructions even if they

1 think something else would be better for you.

2
3 () I give my Agent permission to be flexible in applying these instructions if they
4 think it would be in my best interest based on what they know about me.
5

6 **4. NOMINATION OF GUARDIAN**

7
8 Here you can say who you would want as your guardian if you needed one. A guardian is a
9 person appointed by a court to make decisions for someone who cannot make decisions.
10 Filling this out does NOT mean you want or need a guardian.
11

12 If a court appoints a guardian to make personal decisions for me, I want the court to choose:

13 () My Agent named in this form. If my Agent can't be a guardian, I want the
14 Alternate Agent named in this form.

15 () Other (write who you would want and their contact information):
16
17
18

19 **PART D: ORGAN DONATION**

20
21 This part allows you to donate your organs after you die. You may mark or initial each item. You
22 also may leave any item blank.
23

24 Even if it requires maintaining treatments that could prolong my dying process, and may be in
25 conflict with other instructions I have put in this form, after I die:

26 () I donate my organs, tissues, and other body parts, EXCEPT for those I list below
27 (list any body parts you do NOT want to donate):
28
29

30 () I do not want my organs, tissues, or body parts donated to anybody for any reason.
31
32

33 Organs, tissues, or body parts that I donate may be used for:

34 () Transplant

35 () Therapy

36 () Research

37 () Education

38 () All of the above
39

40 **PART E: SIGNATURES REQUIRED ON THIS FORM**

41 **YOUR SIGNATURE**

42
43 Sign your name:
44

45
46 Today's date:

SIGNATURE OF A WITNESS

You need a witness if you are using this form to name an Agent. The witness must be an adult and cannot be the person you are naming as Agent or the Agent's spouse,[domestic partner,] or someone the Agent lives with as a couple. If you live in a nursing home, the witness cannot be an employee or contractor of the home or someone who owns or runs the home.

Witness's name:

Witness's signature:

Date witness signed:

(Only sign as a witness if you think that the person signing above is doing it voluntarily).

PART F: INFORMATION FOR AGENTS

1. If this form names you as an Agent, you can make decisions about health care for the person who named you when they cannot make their own.
2. If you make a decision for the person, follow any instructions the person gave, including any in this form.
3. If you don't know what the person would want, make the decision that you think is in the person's best interest. To figure out what is in the person's best interest, consider the person's values, preferences, and goals if you know them or can learn them. Some of these preferences may be in this form. You should also consider any behavior or communications from the person that indicate what they currently want.
4. If this form names you as an Agent, you can also get and share the individual's health information. But unless the person has said so in this form, you can only get or share this information when the person cannot make their own decisions about their health care.

Comment

This form is not designed to be used by individuals wishing to create an advance directive exclusively for mental health care. Individuals who wish to create such an advance directive will likely want to spell out preferences that are highly specific to their individual health needs and preferences.

The form includes two sections designed to reflect a growing concern that people too often provide detailed instructions that are not well-informed, and which do not reflect evolving preferences. Specifically, it allows the individual to (1) provide information about their values (and not merely specific instructions) and (2) give the individual's agent leeway in following instructions. The latter provision is a simplified version of one previously incorporated in the State of Maryland's statutory short form.

1 The optional form provided in this Section is designed to simply be a form, not advice. This
2 helps make it simpler than many states' statutory forms. It also reduces the risk that the form
3 will provide advice that is not appropriate for a given individual or provide advice which—
4 although perhaps well-intentioned—lacks empirical support. Notably, the form could be
5 packaged with advice or other resources by providers or other actors.

7 The form consists of five parts that the individual may complete, as well as instructions. An
8 individual may complete all or any part of the form. Any part of the form left blank is not to be
9 given effect. For example, an individual may complete the instructions for health care part of the
10 form alone. Or an individual may complete the power of attorney for health care part of the form
11 alone. Or an individual may complete both the instructions and power of attorney for health care
12 parts of the form. An individual may also, but need not, complete the parts of the form
13 pertaining to donation of bodily organs and tissue.

15 Part A, the power of attorney for health care, appears first on the form in order to ensure to the
16 extent possible that it will come to the attention of a casual reader. This reflects the reality that
17 the appointment of an agent is a more comprehensive approach to the making of health-care
18 decisions than is the giving of an individual instruction, which cannot possibly anticipate all
19 future circumstances which might arise. Part 1 requires only the designation of a single agent,
20 but with opportunity given to designate a single first alternate, if the individual chooses. As in
21 the 1993 Act, no provision is made in the form for the designation of co-agents in order not to
22 encourage the practice. Designation of co-agents is discouraged because of the difficulties likely
23 to be encountered if the co-agents are not all readily available or do not agree. If co-agents are
24 appointed, the instrument should specify that either is authorized to act if the other is not
25 reasonably available. It should also specify a method for resolving disagreements.

27 Part B of the form enables the individual to provide instructions about specific forms of potential
28 future care, as well as their priorities. Indeed, a key innovation in this part is to allow the
29 individual to provide information about their goals and priorities, which can guide health-care
30 decisions. This information can help surrogates make decisions that are consistent with the
31 principal's preferences, values, goals, and wishes, recognizing that an individual cannot possibly
32 anticipate and provide specific instructions for all future circumstances that might arise. In this
33 way, the form is consistent with growing calls from the medical community for advance
34 planning to be goal-focused, not merely treatment-focused.

36 Part C.1 and C.2 enable the individual to give the agent powers that, under Section 18, require
37 express authorization. For example, under Part C.2, the individual can make the agent's power
38 to obtain and disclose medical information immediately effective. Similarly, Part C.3 allows an
39 individual to give an agent more leeway in applying instructions than would otherwise be
40 permitted under Section 17.

42 Part C.2 allows an individual to nominate a guardian. Nomination of a guardian provides no
43 indication that the individual desires or needs a guardian.

45 Part D of the form provides the individual an opportunity to express an intention to donate bodily
46 organs and tissues at death. An individual using this form to do so gives permission for the

1 donation to be made even if procedures necessary to effectuate donation run contrary to other
2 instructions in the directive (for example, they require the dying process to be prolonged). In this
3 way, it aims to remove a common barrier to successful organ donation. The form allows a
4 person to indicate purposes for which the gift is made. The option “therapy” means medical
5 treatment other than transplant. The act uses the term “therapy” recognizing that this is the term
6 used in the Uniform Organ Donation Act.

7
8 Of course, this is only one way an individual can make such a gift. Failure to complete this
9 portion does not preclude a making a gift in another way. Notably, in some cases, an individual
10 may have made a more limited gift in another form (e.g., as part of agreeing to donate for
11 transplant).

12 **Section 12. Default Surrogate**

13
14 (a) A default surrogate may make a health-care decision for an individual who lacks
15 capacity to make health-care decisions and for whom an agent, or guardian authorized to make
16 health-care decisions, has not been appointed or is not reasonably available.

17 (b) Unless the individual has an advance health-care directive that indicates otherwise, a
18 member of the following classes, in descending order of priority, who is reasonably available and
19 not disqualified under Section 14, may act as a default surrogate for the individual:

20 (1) an adult who the individual has identified, other than in a power of attorney
21 for health care, as the individual who should make a health care decision for the individual if the
22 individual cannot make the decision;

23 (2) the individual’s spouse[or domestic partner], unless:

24 (A) a petition for annulment, divorce, dissolution of marriage, legal
25 separation, or termination has been filed and not dismissed or withdrawn;

26 (B) a decree of annulment, divorce, dissolution of marriage, legal
27 separation, or termination has been issued; or

28 (C) the spouse[or domestic partner] has [abandoned] the individual for
29 more than one year;

1 (3) the individual's adult child or parent;

2 (4) the individual's cohabitant;

3 (5) the individual's adult sibling;

4 (6) the individual's adult grandchild or grandparent;

5 (7) an adult not listed in paragraphs (1) through (6) who has assisted the
6 individual with supported decision making routinely during the preceding six months;

7 (8) the individual's adult stepchild not listed in paragraphs (1) through (7) who the
8 individual actively parented during the stepchild's minor years and with whom the individual has
9 an ongoing relationship; or

10 (9) an adult not listed in paragraphs (1) through (8) who has exhibited special care
11 and concern for the individual and is familiar with the individual's personal values.

12 (c) A responsible health-care professional may require an individual who assumes
13 authority to act as a default surrogate to provide a declaration in a record under penalty of
14 perjury stating facts and circumstances reasonably sufficient to establish the authority.

15 (d) If a responsible health-care professional reasonably determines that an individual who
16 has assumed authority to act as a default surrogate is not willing or able to comply with a duty
17 under Section 17 or fails to do so in a timely manner, the professional may recognize the
18 individual next in priority under Section 12(b) as the default surrogate.

19 (e) A health-care decision made by a default surrogate is effective without judicial
20 approval.

21 **Legislative Note:** The state should insert the term used in the state for abandonment in subsection
22 (b)(2)(C) and wherever the word appears in this act.

23
24 **Comment**

25 This Section governs the recognition of default surrogates.

1 Subsection (a) authorizes a default surrogate to make a health-care decision for an individual in
2 the event the individual lacks capacity to make health-care decisions and an agent or guardian
3 has not been appointed or the agent or guardian is not reasonably available.

4
5 Subsection (b) continues the 1993 Act's use of a priority list with some important modifications.
6 At the top of the list is someone the individual has designated. This designation may be in a
7 record or it may be oral. This provision allows for an individual's preferences to be given effect
8 even though the individual has not complied with the formalities necessary to appoint an agent to
9 make health-care decisions. Subsection (b)(3) includes adult children and parents. It may be
10 necessary to consult other law of the state to determine who constitutes a "child" or a "parent".

11
12 If the individual has not designated a surrogate, or the designee is not reasonably available,
13 subsection (b) applies a default rule for selecting another to act as surrogate. Like all default
14 rules, it is not tailored to every situation, but attempts to reflect the desire of the majority of those
15 who would find themselves so situated. To reflect a broad array of families and support systems,
16 it expands the list of persons on the priority list beyond those included in the 1993 Act.
17 Similarly, it groups certain priority groups (e.g., parents and children are given equal priority),
18 recognizing that which individual may be best equipped to serve in this role will vary based on
19 the individual and family structure. An adult who has priority under (b)(7) because they have
20 provided the individual with decision-making support may have done so informally, or pursuant
21 to a formal decision-making agreement.

22
23 The priority list is designed to approximate the likely wishes of as many individuals as possible.
24 Empirical research on surrogate decision-making indicates that most Americans choose close
25 relatives as their health care agents, with spouses being the most common first choice and
26 children being the most common second choice. See Nina A. Kohn & Jeremy A. Blumenthal,
27 *Designating Health Care Decision-Makers for Patients without Advance Directives: A*
28 *Psychological Critique*, 42 GEORGIA LAW REVIEW 979, 990 (2008). Consistent with this, spouses
29 and domestic partners are given top priority in this Act's priority list, and adult children are
30 placed in the next priority group. Nevertheless, the priority list may be a poor fit for some
31 individuals, and this is yet another reason to reduce barriers to execution of powers of attorney
32 for healthcare elsewhere in this Act.

33
34 By adopting a priority list, this Act rejects an alternative approach taken by a minority of states
35 that gives a patient's physician substantial discretion to select among potential surrogates. This
36 choice reflects several considerations. First, the Act's approach appears to be more consistent
37 with the preferences of most Americans. *Id.* (reviewing empirical literature on surrogate
38 decision-making preferences and concluding that "fixed priority lists ... appear to do a
39 reasonable job of capturing the process preferences of the majority"). Second, one role of the
40 surrogate is to provide a check on health-care professionals. If health-care professionals have
41 discretion to choose among potential surrogates, they would have the ability to choose surrogates
42 whose views accord with their own, thus blunting any ability for the surrogate to serve as such a
43 check. Third, many Americans do not have a close and trusting relationship with a physician.
44 The physician treating the individual may not know the individual's values and preferences to
45 the extent that would allow the physician to select a surrogate based on more than convenience
46 or the physician's own assessment of a potential surrogate's capacities. Fourth, although it

1 adopts a clear priority list, the Act does empower a responsible health-care professional to
2 recognize a surrogate other than one with top priority under the limited circumstances set forth in
3 subsection (d).

4
5 Subsection (c) permits the professional to obtain evidence of a claimed authority to act as default
6 surrogate. The professional, however, does not have a duty to investigate the qualifications of an
7 individual claiming the authority to act.

8
9 Subsection (d) allows a health-care professional to take direction from an individual of lower
10 priority than the one who originally assumed authority to act as a default surrogate if the
11 individual who originally assumed authority fails to make decisions consistent with the default
12 surrogate's fiduciary duty and the decision-making standards set forth in Section 17. In
13 determining whether to look to an individual of lower priority to make such decisions, a
14 responsible professional working in an institution that has an Ethics Committee may wish to
15 consult that committee.

16 17 **Section 13. Disagreement Among Default Surrogates**

18 (a) A default surrogate who has assumed authority under Section 12 shall inform a
19 responsible health-care professional if two or more members of a class have assumed authority to
20 act as default surrogates and the members do not agree on a health-care decision.

21 (b) A responsible health-care professional shall comply with the decision of a majority of
22 the members of the class with highest priority under Section 12(b) who have communicated their
23 views to the professional and are acting consistent with their duties under Section 17.

24 (c) If a responsible health-care professional is informed that the members of the class
25 who have communicated their views to the professional are evenly divided concerning the
26 health-care decision, the professional shall make a reasonable effort to solicit the views of other
27 members of the class who are reasonably available but have not yet communicated their views to
28 the professional. The professional, after the solicitation, shall comply with the decision of a
29 majority of the members who have communicated their views to the professional and are acting
30 consistent with their duties under Section 17.

31 (d) If the class remains evenly divided after an effort is made under subsection (c), the

health-care decision shall be made as provided in other law of this state regarding the treatment of an individual who has been found or determined to lack capacity.

Comment

This Section addresses the situation where more than one member of the same class has assumed authority to act as surrogate and a disagreement over a health-care decision arises of which a responsible health-care professional is informed. Should that occur, a responsible health-care professional must comply with the decision of a majority of the members of that class who have communicated their views to the professional and are acting in a manner that is consistent with their duties under Section 17. If the class is divided, a responsible healthcare professional should make reasonable efforts to solicit the views of class members who have yet to weigh in. If disagreement persists, however, the decision will be made as provided by other law of the state governing incapacity issues.

Nothing in this Section requires a health-care professional to affirmatively seek out all members of a class.

Section 14. Disqualification to Act as Default Surrogate

(a) At any time, an individual for whom a health-care decision would be made may disqualify another individual from acting as default surrogate for the first individual. The disqualification may be in a record signed by the first individual or communicated verbally or nonverbally to the individual being disqualified, another individual, or a responsible health-care professional. Disqualification under this subsection is effective even if made by an individual who lacks capacity to make an advance directive if the individual clearly communicates a desire that the individual being disqualified not make health care decisions for the individual.

(b) An individual is disqualified from acting as a default surrogate for an individual who lacks capacity to make health-care decisions if:

(1) a court finds that the potential default surrogate poses a danger to the individual for whom health-care decisions would be made, even if the court does not impose a [restraining order] against the individual being disqualified;

(2) the individual is an owner, operator, employee, or contractor of a nursing

home [or other residential care facility] at which an individual is receiving care unless the owner, operator, employee, or contractor is the spouse, child, parent, grandparent[, domestic partner,] or cohabitant of the individual, or a descendant of the spouse, child, parent, [or] grandparent[, or domestic partner] of the individual; or

(3) the individual refuses to provide a timely declaration under Section 12(c).

Comment

This Section disqualifies certain people from acting as a default surrogate, either because of the individual's stated wishes or as a matter of law. Subsection (a) permits the individual to disqualify any other individual from acting as the individual's default surrogate. This ability is not conditioned on the individual having capacity; individuals without capacity may have a strong sense that they do not feel comfortable with a particular person making decisions for them, and the Act takes the position that such opinions should be respected regardless of the individual's cognitive disability. Subsection (b)(1) disqualifies an individual who has been found by a court to pose a risk to the individual, regardless of whether the court has imposed a restraining order. Subsection (b)(2) disqualifies an owner, operator, employee, or contractor of a nursing home or other residential care facility at which a patient is receiving care from acting as the patient's surrogate unless related to the patient. This disqualification is similar to that for appointed agents.

Subsection (b)(3) disqualifies an individual who has refused to provide the written declaration required under Section 12(c) in a timely manner.

Section 15. Revocation

(a) An individual may revoke the appointment of an agent under a power of attorney for health care, the designation of a default surrogate, or a health-care instruction in whole or in part, unless:

(1) the individual is determined by a court to lack capacity to do so; [or]

(2) the individual is found under Section 4 to lack capacity to do so and, if the individual objects to the finding, the finding is confirmed under Section 5[; or]

(3) the individual created an advance mental health-care directive that includes the provision under Section 9(d) regarding a specified psychiatric or psychological event, and the

individual is experiencing the specified event].

(b) The revocation under subsection (a) may be by any act clearly indicating that the individual intends to revoke the appointment, designation or instruction, including an oral statement to a health-care professional.

(c) An advance health-care directive that conflicts with an earlier advance health-care directive revokes the earlier directive to the extent of the conflict.

(d) Unless otherwise provided in the individual's advance health-care directive appointing an agent, the appointment of a spouse[or domestic partner] of an individual as agent for the individual is revoked by:

(1) a filing for annulment, divorce, dissolution of marriage, legal separation, or termination that has not been dismissed or withdrawn;

(2) a decree of annulment, divorce, dissolution of marriage, legal separation, or termination; or

(3) [abandonment] of the individual for more than one year by the individual's spouse[or domestic partner].

Legislative Note: *A state that wishes to include an option for a Ulysses type clause in an advance mental health care directive by including Section 9(d) and (e) should also include subsection (a)(3).*

Comment

This Section governs revocation of advance directives, including advance directives for mental health care. It allows a wide variety of acts to constitute revocation.

With one caveat, subsection (a) allows an individual to revoke an appointment of an agent, the designation of a default surrogate, or a health-care instruction so long as they have not been determined by a court, or found under Section 4, to lack capacity to do so. The caveat is that an individual cannot revoke an advance directive if doing so is inconsistent with their direction in an advance mental health-care directive that contains the type of "Ulysses clause" enabled by Section 9(d).

1 It is possible that an individual would lack capacity to make a particular health-care decision, but
2 retain the capacity to revoke the appointment or designation, or vice versa. For example, the
3 individual might not be able to understand a complex medical decision but know that they no
4 longer want their sister, who they previously appointed but with whom they subsequently had a
5 falling out, to make decisions for them.

6
7 Subsection (b) explains that a revocation can be accomplished by any act clearly indicating intent
8 to revoke.

9
10 Subsection (c) explains that a subsequent advance health-care directive revokes a prior advance
11 health-care directive to the extent that the two conflict. If there is no conflict, then both are
12 effective.

13
14 Subsection (d) revokes the appointment of a spouse or domestic partner under certain situations
15 in which the would-be agent's relationship to the principal has changed since the appointment
16 was made.

17 18 **Section 16. Validity of Advance Health-Care Directive; Conflict with Other Law**

19 (a) An advance health-care directive created outside this state is valid if it complies with:

20 (1) the law of the state specified in the directive or, if no state is specified, the
21 state in which the individual created the directive; or

22 (2) this [act].

23 (b) A person may assume without inquiry that an advance health-care directive is
24 genuine, valid and still in effect and may implement or rely on it if the person does not have
25 good cause to believe that the directive is invalid or has been revoked.

26 (c) An advance health-care directive or a revocation of a directive may not be denied
27 legal effect or enforceability solely because it is in electronic form. If this [act] requires a
28 signature on a directive or revocation, an electronic signature satisfies the requirement.

29 (d) Evidence relating to an advance health-care directive, revocation of a directive, or a
30 signature on a directive or revocation may not be excluded in a proceeding solely because it is in
31 electronic form.

32 (e) This [act] does not affect the validity of an electronic record or signature that is valid

under [cite to Uniform Electronic Transactions Act].

(f) If this [act] conflicts with other law of this state relating to the creation, execution, implementation or revocation of an advance health-care directive, this [act] prevails.

Comment

This Section governs the portability of advance directives, something especially important for individuals who travel, move, or live in multiple jurisdictions. The Section allows an advance directive to be valid if it complied with the procedural and substantive requirements of the state in which the individual was physically located at the time they created it or in the state in which the document is presented. It also provides for a presumption of validity so that a health-care professional is not required to look behind the document unless they have good cause to believe it is invalid or has been revoked. It also explains that an advance health-care directive or revocation of a directive cannot be denied legal effect or enforceability simply because it is in an electronic form, as such directives increasingly are. Finally, if the document contains a choice-of-law provision, that will be honored.

Section 17. Duties of Agent and Default Surrogate

(a) An agent or default surrogate has a fiduciary duty to the individual for whom the agent or default surrogate is acting when exercising or purporting to exercise a power under Section 18.

(b) An agent or default surrogate shall make a health-care decision in accordance with the direction of the individual in an advance health-care directive and other goals, preferences and wishes of the individual to the extent known to or reasonably ascertainable by the agent or default surrogate.

(c) If there is no direction in an advance health-care directive and the goals, preferences and wishes of the individual regarding a health-care decision are not known or reasonably ascertainable by the agent or default surrogate, the agent or default surrogate shall make the decision in accordance with the agent's or default surrogate's determination of the individual's best interest. In determining the individual's best interest, an agent or default surrogate shall give primary consideration to the individual's contemporaneous communications, including verbal

1 and nonverbal expressions, but shall also consider the individual's values to the extent known or
2 reasonably ascertainable and the risks and benefits of potential health-care decisions.

3 (d) An agent or default surrogate who is informed of a revocation of an advance health-
4 care directive or disqualification of an agent or default surrogate shall promptly communicate the
5 revocation or disqualification to a responsible health-care professional.

6 **Comment**

7 Once an individual begins to act as an agent or default surrogate, they assume a fiduciary duty to
8 the individual for whom they are making or purporting to make a health-care decision. This
9 means that the agent or default surrogate must exercise reasonable care, diligence, and prudence
10 in acting on behalf of that individual.

11
12 Subsections (b) and (c) provide guidance as to the factors to be considered when making a
13 health-care decision under this Act.

14
15 In subsection (b), the agent or default surrogate is instructed to make the decision the individual
16 would have made if able. This approach is often referred to as a "substituted judgment"
17 standard, in that the surrogate is substituting the preferences of the individual for the surrogate's
18 own preferences, which might be different. Notably, the preferences need not have been
19 expressed exclusively prior to the onset of lack of capacity. Contemporaneous expressions may
20 also be considered.

21
22 Subsection (c) allows an agent or default surrogate who does not know and cannot reasonably
23 ascertain an individual's preferences, to act in the individual's interest. It then spells out factors
24 to be taken into account in determining an individual's best interest. The emphasis is on
25 considering the individual's contemporaneous expressions and values.

26
27 Subsection (d) imposes a duty on an agent or default surrogate who is informed of a revocation
28 or disqualification to promptly communicate it to a responsible health-care professional.

29 30 **Section 18. Powers of Agent and Default Surrogate**

31 (a) Except as provided in subsection (c), the power of an agent or default surrogate
32 commences when the individual is found under Section 4 or determined by a court to lack
33 capacity to make a health-care decision. The power ceases if the individual later is found or
34 determined to have capacity to make a health-care decision, or the individual makes an objection
35 under Section 5 to the finding of lack of capacity under Section 4. If the power ceases because

1 an objection is made under Section 5, the power resumes if the finding of lack of capacity is
2 confirmed under Section 5(d)(4) or a court later determines that the individual lacks capacity to
3 make a health-care decision.

4 (b) An agent or default surrogate may request, receive, examine, and copy, and consent to
5 the disclosure of, medical and other health-care information about the individual if the individual
6 would have the right to request, receive, examine, copy, or disclose the information.

7 (c) The power of attorney for health care may provide that the power of an agent under
8 subsection (b) commences upon appointment.

9 (d) If no other person is authorized, an agent or default surrogate has the power to apply
10 for public or private health insurance and benefits on behalf of the individual. An agent or default
11 surrogate who has the power to apply for insurance and benefits does not, solely by reason of the
12 power, have a duty to apply for the insurance or benefits.

13 (e) An agent or default surrogate has the following powers only if specifically authorized
14 by the individual in an advance health-care directive in a record:

15 (1) consent to voluntary admission of the individual to a facility for mental health
16 treatment for not longer than the lesser of the number of days specified in the directive or [insert
17 the number of days a guardian may commit an adult subject to guardianship without using the
18 state's involuntary commitment procedure]; and

19 (2) consent to placement of the individual, if not terminally ill, in a nursing home
20 if the placement is intended to be for more than [100] days, an alternative living arrangement is
21 reasonably feasible, and the individual objects to the placement.

22 **Comment**

23 This Section governs the general powers of an agent or default surrogate. It also allows for
24 additional powers to be explicitly granted to an agent.

1 An agent under a power of attorney for health care or a default surrogate is not authorized to
2 make decisions for an individual unless the individual lacks capacity to make those decisions for
3 themselves. Thus, the power to consent to or refuse to consent to the provision of health care can
4 be said to be “springing.” The fact that the power is not immediately effective, however, does
5 not mean that the individual with capacity cannot choose to defer to the agent’s judgment in
6 making decisions. To the contrary, an individual with capacity faced with a health-care decision
7 could instruct a health-care professional to provide the care the agent thinks best in the particular
8 situation.

10 The power of an agent to obtain and disclose the individual’s health-care information, by
11 contrast, can commence upon appointment if the individual has so specified in an advance
12 directive. The rationale for allowing immediate powers in this limited context is two-fold. First,
13 making the power immediately effective allows an agent to obtain information that may be
14 needed to determine if they should act as agent (e.g., if the person lacks capacity). Second, many
15 people with capacity may wish to be supported by their agent in making decisions, even if they
16 are ultimately making those decisions themselves. Agents will be better able to provide this type
17 of decision-making support if they have the power to obtain and, where appropriate, share
18 information.

20 Subsection (d) allows the surrogate to apply for health care benefits if no other person has
21 authority to do so. This is a limited power and does not give the surrogate the power to do all
22 things that might be necessary to establish eligibility for benefits. For example, it does not give
23 the surrogate the power to spend-down assets to accelerate eligibility for Medicaid or other
24 means-tested benefits. Subsection (e), moreover, merely permits the surrogate to apply for
25 benefits; it does not create any duty for the surrogate to do so.

27 Subsection (f) sets forth powers (other than the power to immediately access and disclose
28 records) that an agent has if explicitly granted by the terms of the power of attorney for health
29 care.

31 **Section 19. Limitation on Powers**

32 (a) If an individual has a long-term disability requiring routine treatment by artificial
33 nutrition, hydration, or mechanical ventilation and a history of using the treatment without
34 objection, an agent or default surrogate may not consent to withdrawal of the treatment unless:

35 (1) the treatment is not necessary to sustain the individual’s life or maintain the
36 individual’s well-being;

37 (2) the individual has expressly authorized the withdrawal in a health-care
38 instruction that has not been revoked; or

(3) the individual has experienced a major reduction in health or functional ability from which the individual is not expected to recover, even with other appropriate treatment, and the individual has not:

- (i) given a direction inconsistent with withdrawal; or
- (ii) communicated, by verbal or nonverbal expression, a desire for artificial nutrition, hydration, or mechanical ventilation.

(b) A default surrogate may not make a health-care decision if, under other law of this state, the decision:

- (1) may not be made by a guardian; or
- (2) may be made by a guardian only if the court appointing the guardian specifically authorizes the guardian to make the decision.

Comment

The limitation on the surrogate's authority in subsection (a) recognizes that the use of artificial nutrition, hydration, and mechanical ventilation can be routine health care for some individuals with disabilities.

Subsection (b) denies a default surrogate the power to make a health-care decision if, under a state's other law, a guardian would be prohibited from making that decision or would only be able to make that decision with specific court authorization. This provision is designed to prevent the default surrogate option from becoming an end-run around protections for individuals with disabilities that can be found in state's guardianship laws. For example, if a state prohibits a guardian from consenting to sterilization of an individual without prior court approval, subsection (b) would deny a default surrogate the power to consent to sterilization. Thus, sterilization of an individual who lacks the ability to consent to it, and who has not themselves authorized that procedure by creating an advance directive, would only be legally permitted if court approval was obtained. One effect of subsection (b) may be to effectively require that a guardian be appointed, or a court order in lieu of guardianship (such as those authorized under Article 5 of the Guardianship Act) to be granted, before certain types of health care can be provided to an individual who has not appointed an agent.

Section 20. Co-Agents and Alternate Agents

(a) A power of attorney for health care may appoint two or more individuals to act as co-

agents. Unless the power of attorney provides otherwise, each co-agent may exercise independent authority.

(b) A power of attorney for health care may appoint one or more alternate agents to act if an agent resigns, dies, becomes disqualified, is not reasonably available, or is otherwise unwilling or unable to serve as agent.

(c) Unless the power of attorney provides otherwise, an alternate agent has the same authority as the original agent if:

(1) the original agent is not reasonably available or is otherwise unwilling or unable to act, for the duration of the unavailability or inability to act; or

(2) the original agent and all other predecessor agents have resigned, died, or are disqualified from acting as agent.

Comment

This section allows an individual to appoint more than one individual to serve as an agent. Where co-agents are appointed, subsection (a) establishes a default rule that each agent may act separately. An individual can opt out of this default by stating a different rule in the power of attorney for health care that appoints the co-agents. Thus, an individual naming co-agents could lawfully require co-agents to reach consensus as to any health care decision or could stipulate that the views of the majority of individuals appointed as co-agents govern.

Section 21. Duties of Health-Care Professional, Responsible Health-Care Professional, and Health-Care Institution

(a) A responsible health-care professional who is aware that an individual has been found or determined to lack capacity to make a decision shall make a reasonable effort to determine if the individual has a surrogate.

(b) If possible before implementing a health-care decision made by a surrogate for an individual, a responsible health-care professional promptly shall communicate to the individual the decision made and the identity of the person making the decision.

1 (c) A responsible health-care professional who makes or is informed of a finding or
2 determination that an individual lacks capacity to make a health-care decision or no longer lacks
3 capacity, or that other circumstances exist that affect a health-care instruction or the authority of
4 a surrogate, promptly shall:

5 (1) document the finding, determination, or circumstance in the individual's
6 medical record; and

7 (2) if possible, communicate to the individual and the individual's surrogate the
8 finding, determination, or circumstance and that the individual may object to the finding or
9 determination

10 (d) A responsible health-care professional who is informed that an individual has created
11 or revoked an advance health-care directive, or that a surrogate for an individual has been
12 appointed, designated or disqualified, shall:

13 (1) document the information promptly in the individual's medical record; and

14 (2) if evidence of the directive, revocation, appointment, designation or
15 disqualification is in a record, request a copy and, on receipt, cause the copy to be included in the
16 individual's medical record.

17 (e) Except as provided in subsections (f) and (h), a health-care professional or health-care
18 institution providing health care to an individual shall comply with:

19 (1) a health-care instruction given by the individual regarding the individual's
20 health care;

21 (2) a reasonable interpretation by the individual's surrogate of an instruction given
22 by the individual; and

23 (3) a health-care decision for the individual made by the individual's surrogate to

1 the same extent as if the decision had been made by the individual at a time when the individual
2 had capacity.

3 (f) A health-care professional or a health-care institution may refuse to provide care
4 consistent with a health-care instruction or health-care decision if:

5 (1) the instruction or decision is contrary to a policy of the health-care institution
6 providing health care to the individual that is expressly based on reasons of conscience and the
7 policy was timely communicated to the individual who gave the instruction or about whom the
8 decision was to be made or to the individual's surrogate;

9 (2) the care would require the use of a form of care or treatment that is not
10 available to the professional or institution; or

11 (3) compliance would:

12 (A) require the professional or institution to provide care that is contrary to
13 generally accepted health-care standards applicable to the professional or institution; or

14 (B) violate a court order or other law.

15 (g) A health-care professional or health-care institution that refuses care under subsection
16 (f) shall, if possible, promptly inform the individual and the individual's surrogate of the refusal.

17 (h) If the refusal is made under subsection (f)(1) or (2), the health-care professional or
18 health-care institution shall:

19 (1) immediately make a reasonable effort to transfer the individual to another
20 health-care professional or health-care institution that is willing to comply with the instruction or
21 decision; and

22 (2) provide life-sustaining care and care needed to keep or make the individual
23 comfortable consistent with accepted medical standards to the extent feasible until a transfer

under paragraph (1) is made.

(i) If the refusal is made under subsection (f)(3), the health-care professional and health-care institution must provide life-sustaining care and care needed to keep or make the individual comfortable consistent with accepted medical standards until a transfer is made or, if it reasonably appears that a transfer cannot be made, for no less than [10] days after the refusal.

Comment

This Section discusses health-care professionals' and institutions' obligations.

Subsection (a) requires a responsible health-care professional who knows that a patient has been found or determined to lack capacity to make a health-care decision to make a reasonable effort to figure out if the patient has a surrogate. This increases the likelihood that decisions will be made by the agent chosen by the patient, if the patient has appointed an agent.

Subsection (b) further reinforces the Act's respect for patient self-determination by requiring a responsible health-care professional, if possible, to promptly communicate to a patient, prior to implementation, a health-care decision made for the patient and the identity of the person making the decision.

Subsection (c) requires a responsible health-care professional who is aware of certain information related to an actual or potential change in capacity to document that knowledge and share the information with the individual and the individual's surrogate if possible. Where a finding has been made that the individual no longer lacks capacity, this helps make sure that surrogates are aware that their authority has ceased. Similarly, it is important where a finding has been made that the individual lacks capacity so that the individual can object to that finding.

Subsection (d), which requires a responsible health-care professional to reflect the existence or revocation of an advance directive in a patient's medical record, is designed to reduce the risk that a health-care professional will fail to comply with an advance directive that is in effect, or will rely on an advance directive that is no longer valid.

Subsection (e) requires health-care professionals and institutions to comply, absent an exception in subsection (f), with a patient's individual instruction and with a reasonable interpretation of that instruction made by a person then authorized to make health-care decisions for the patient. A health-care professional or institution must also comply with a health-care decision made by a person then authorized to make health-care decisions for the patient to the same extent as if the decision had been made by the patient while having capacity. These requirements help to protect the individual's right to self-determination and effectuate the surrogate decision making authorized by the Act.

Section (f) sets forth limited situations in which a responsible health-care professional may

1 lawfully refuse to comply with a health-care instruction or decision. Failure to comply is
2 permitted if the instruction or decision is contrary to a policy of the health-care institution
3 providing health care to the individual which is expressly based on reasons of conscience and the
4 policy was timely communicated to the individual who gave the instruction or about whom the
5 decision was to be made or to the individual's surrogate. It is also permitted if compliance would
6 require the provision of care that is contrary to accepted medical standards. This would include
7 care that is medically ineffective. In addition, it is permitted if compliance would require the
8 use of a form of care or treatment that is not available to the professional or institution, or violate
9 a court order or other law.

10
11 Subsections (g), (h), and (i) set forth obligations for a health-care professional or institution that
12 declines to comply with an instruction or health-care decision. Regardless of the reason for the
13 refusal, a health care-professional or institution must promptly communicate the refusal to the
14 patient, if possible, and to any person then authorized to make health-care decisions for the
15 patient. What more is required depends on the reason for the refusal. If the refusal is under
16 (f)(1) or (2)—the provisions governing refusals for reasons particular to the provider—the
17 professional or institution must immediately make all reasonable efforts to effect the transfer of
18 the patient to another health-care professional or health-care institution that is willing to comply
19 with the instruction or decision. They must also provide life-sustaining care and comfort care
20 consistent with accepted medical standards until transfer is made. If the refusal is under (f)(3),
21 by contrast, these obligations are time-limited.

22 23 **Section 22. Decision by Guardian**

24 (a) A guardian may refuse to comply with or revoke the individual's advance health-care
25 directive only if the court appointing the guardian expressly orders the noncompliance or
26 revocation.

27 (b) Unless a court orders otherwise, a health-care decision made by an agent appointed by
28 an individual subject to guardianship prevails over the decision of the guardian appointed for the
29 individual.

30 **Legislative Note:** *If necessary, a state should amend its guardianship laws to conform with this*
31 *section to avoid a conflict.*

32 33 **Comment**

34
35 This Section is consistent with the Guardianship Act. It governs the relationship between
36 guardian and health care agent.

37 38 **Section 23. Immunity**

1 (a) A health-care professional or health-care institution acting in good faith is not subject
2 to civil or criminal liability or to discipline for unprofessional conduct for:

3 (1) complying with a health-care decision made for an individual by another
4 person based on a reasonable belief that the person has authority to make the decision for the
5 individual, including a decision to withhold or withdraw health care;

6 (2) refusing to comply with a health-care decision made for an individual by
7 another person based on a reasonable belief that the person lacked authority or capacity to make
8 the decision;

9 (3) complying with an advance health-care directive based on a reasonable belief
10 that the directive is valid;

11 (4) refusing to comply with an advance health-care directive based on a
12 reasonable belief that the directive is not valid, including a reasonable belief that the advance
13 directive was not made by the individual or was substantively altered by someone other than the
14 individual after its creation; [or]

15 (5) determining that an individual who might otherwise be authorized to act as an
16 agent or default surrogate is not reasonably available[; or

17 (6) complying with an individual's direction under Section 9(d)].

18 (b) An agent or default surrogate, or an individual with a reasonable belief that they are
19 an agent or a default surrogate, is not subject to civil or criminal liability or to discipline for
20 unprofessional conduct for a health-care decision made in a good faith effort to comply with
21 Section 17.

22 **Legislative Note:** A state that wishes to include an option for a Ulysses type clause in an
23 advance mental health-care directive by including Section 9(d) and (e) should also include
24 subsection (a)(6).
25

1 **Comment**

2 This Section provides immunities for providers, agents, and default surrogates who undertake or
3 fail to take certain actions covered by this Act. It does not provide immunity from liability that
4 stems from allegedly deficient health care treatment.

5
6 Subsection (a) provides immunity to a health-care professional who complies with an instruction
7 of an individual who lacks authority to provide that instruction if the professional is acting in
8 good faith and reasonably believes the person has such authority. Similarly, it provides
9 immunity to a professional acting in good faith who refuses to comply with an instruction by an
10 individual who does have such authority if the professional reasonably believes that individual
11 does not have authority to make it, or that the directive was not made by the individual or was
12 subsequently altered by someone other than the individual. Thus, a provider who reasonably and
13 in good faith believes that an advance directive has been tampered with or is a fake, may refuse
14 to comply with it. It also provides immunity to a professional who, acting in good faith,
15 reasonably determines that an agent or would-be default surrogate is not willing or able to
16 assume the duties of an agent or default surrogate, and who therefore looks to someone else to
17 make decisions for a patient. This includes a determination made under Section 12(e).

18
19 Subsection (b) provides immunity to agents and default surrogates who make health-care
20 decisions in good faith. The underlying health-care decision need not be reasonable in order for
21 immunity to apply. This allows the agent or default surrogate confidently to make decisions
22 consistent with the individual's wishes, even if those decisions might not appear objectively
23 reasonable to others.

24
25 Subsection (b) also protects from liability individuals who mistakenly but reasonably believe
26 they have the authority to make a health-care decision for a patient. For example, an individual
27 who has been designated as agent in a power of attorney for health care might assume authority
28 unaware that the power has been revoked. Or a family member might assume authority to act as
29 a default surrogate unaware that a family member having a higher priority was reasonably
30 available and authorized to act.

31
32 **Section 24. Prohibited Conduct; Damages**

33 (a) A person may not:

34 (1) intentionally falsify, in whole or in part, an advance health-care directive;

35 (2) intentionally conceal, deface, obliterate, or delete an advance health-care

36 directive or revocation of an advance health-care directive without consent of the individual who
37 created or revoked the directive;

38 (3) coerce or fraudulently induce an individual to create, revoke, or refrain from

1 creating or revoking an advance health-care directive;

2 (4) intentionally withhold knowledge of the existence or revocation of an advance
3 health-care directive from a responsible health-care professional or health-care institution
4 providing health care to the individual who created or revoked the directive; or

5 (5) require or prohibit the creation or revocation of an advance health-care
6 directive as a condition for providing health care.

7 (b) An individual who is the subject of conduct prohibited by subsection (a), or the
8 individual's estate, has a cause of action against a person that violates subsection (a) for statutory
9 damages of \$[25,000] or actual damages resulting from the violation, whichever is greater.

10 (c) An individual who makes a health-care instruction, or the individual's estate, has a
11 cause of action against a health-care professional or health-care care institution that intentionally
12 violates Section 21 for statutory damages of \$[50,000] or actual damages resulting from the
13 violation, whichever is greater.

14 (d) In an action under this section, a prevailing plaintiff may recover reasonable
15 attorney's fees, court costs, and other reasonable litigation expenses.

16 (e) This section does not supersede or preclude another cause of action or a remedy
17 available under other law.

18 **Comment**

19 This Section prohibits certain conduct that would undermine the purpose of this Act. Unlike the
20 1993 Act, it explicitly provides a private right of action, thus enabling the provisions of this Act
21 to be directly enforced by the individual or the individual's estate.

22
23 Subsection (a) details prohibited conduct. Among other things, it prohibits coercing or
24 fraudulently inducing an individual to create, revoke, or refrain from creating or revoking an
25 advance health-care directive. It does not explicitly prohibit the use of "undue influence" as
26 what constitutes "undue influence" is highly subjective and has been heartily criticized for
27 enabling collateral attacks on individuals in non-traditional relationships or who make non-
28 normative choices. See, e.g., Carla Spivack, *Why the Testamentary Doctrine of Undue Influence*

1 *Should be Abolished*, 8 U. KAN. L. REV. 245 (2010) (summarizing prior critiques of the doctrine
2 and vigorously arguing that “As a matter of doctrine, undue influence fails to meet any standard
3 of clarity, fairness, or predictability that a legal doctrine should satisfy”). However, much of the
4 behavior that might be categorized as “undue influence” is captured by coercion and fraud.
5 Subsection (a)(4), forbidding a health-care professional or institution to condition provision of
6 health care on execution, non-execution, or revocation of an advance health-care directive, tracks
7 the provisions of the federal Patient Self-Determination Act (42 U.S.C. 1395cc(f)(1)(C)
8 (Medicare); 42 U.S.C. § 1396a(w)(1)(C) (Medicaid).

9
10 The legislature of an enacting state will have to determine the amount of damages which should
11 be authorized in order to encourage the level of potential private enforcement actions necessary
12 to effect compliance with the obligations and responsibilities imposed by the Act. The damages
13 provided by this section do not supersede but are in addition to remedies available under other
14 law.

15
16 As set forth in Subsection (e), this Act does not limit any claims that would exist under other law
17 of this state, including tort liability for medical malpractice. Thus, although subsection (b) only
18 provides for actual damages or statutory damages, punitive damages might be available under
19 other state law.

20 21 **Section 25. Effect of Copy; Certification of Physical Copy**

22 (a) A physical or electronic copy of an advance health-care directive, revocation of an
23 advance health-care directive, or appointment, designation, or disqualification of a surrogate has
24 the same effect as the original.

25 (b) An individual may create a certified physical copy of an advance health-care directive
26 in electronic form or the revocation in electronic form of a directive by affirming under penalty
27 of perjury that the physical copy is a complete and accurate copy of the directive or revocation.

28 **Comment**

29
30 The need to rely on an advance health-care directive may arise when the original is not readily
31 accessible. For example, an individual may be receiving care from several health-care
32 professionals or may be receiving care at a location distant from that where the original is kept.
33 To facilitate prompt and informed decision making, this Section provides that a copy of a health-
34 care direction, revocation of a health-care direction, or designation or disqualification of a
35 surrogate in a record has the same effect as the original. The Section also recognizes the growing
36 use of documents in electronic form.

37 38 **Section 26. Construction**

1 (a) This [act] does not authorize mercy killing, assisted suicide, or euthanasia.

2 (b) This [act] does not affect other law of this state governing treatment for mental illness
3 of an individual involuntarily committed to a [mental health-care institution] under [cite to state
4 law governing involuntary commitments].

5 (c) Death of an individual caused by withholding or withdrawing health care in
6 accordance with this [act] does not constitute a suicide or homicide or legally impair or
7 invalidate a policy of insurance or an annuity providing a death benefit, notwithstanding any
8 term of the policy or annuity to the contrary.

9 (d) This [act] does not create a presumption concerning the intention of an individual who
10 has not created or who has revoked an advance health-care directive.

11 **Legislative Note:** *In subsection (b), include in the brackets the name for a mental health facility*
12 *used in the state's law governing involuntary commitments and cite to the law.*

13
14 **Comment**

15
16 In the interest of avoiding all confusion, this Section clearly states what the Act does not do. It
17 also states that death caused by withholding or withdrawing health care in accordance with the
18 Act does not constitute suicide or homicide, nor does it impair or invalidate an insurance policy
19 or annuity providing a death benefit.

20
21 **Section 27. Judicial Relief**

22 (a) On petition of an individual, the individual's surrogate, a health-care professional or
23 health-care institution providing health care to the individual, or a person interested in the
24 welfare of the individual, the court may:

25 (1) enjoin implementation of a health-care decision made by an agent or default
26 surrogate on behalf of the individual on a finding that the decision is inconsistent with Section 17
27 or 18;

28 (2) enjoin an agent from making a health-care decision for the individual on a

1 finding that the individual's appointment of the agent has been revoked or the agent:

2 (A) is disqualified under Section 8(c);

3 (B) is unable or unwilling to comply with the Section 17; or

4 (C) poses a danger to the individual;

5 (3) enjoin another individual from acting as a default surrogate on a finding that
6 the other individual acting as a default surrogate did not comply with Section 12, or the other
7 individual:

8 (A) is disqualified under Section 14;

9 (B) is unable or unwilling to comply with Section 17; or

10 (C) poses a danger to the first individual;

11 (4) order implementation of a health-care decision made by and for the individual;

12 or

13 (5) order implementation of a health-care decision made by an agent or default
14 surrogate who is acting in compliance with the powers and duties of the agent or default
15 surrogate.

16 (b) In this [act], advocating for the withholding or withdrawal of health care or mental
17 health care from an individual is not itself an indication that an agent or default surrogate poses a
18 danger to the individual.

19 (c) A proceeding under this section is governed by [cite to the state's rules of procedure or
20 statutory provisions governing expedited proceedings and proceedings affecting persons
21 determined to lack capacity].

22 **Comment**

23
24 While the provisions of the Act are in general to be effectuated without litigation, situations will
25 arise where judicial proceedings may be appropriate. For example, a court may be called upon to

1 determine whether a particular person has authority to act as an agent or default surrogate or
2 whether an agent's or default surrogate's purported decision on behalf of a patient is consistent
3 with the agent's or default surrogate's underlying duties or powers. Decisions made by
4 guardians, however, are outside of the scope of this Act and as a result are excluded from the
5 provisions of this Section. A state's guardianship laws will govern who has authority to
6 challenge the decision of a guardian.

7
8 A court acting under this Section may grant only equitable relief. Other adequate avenues exist
9 for those who wish to pursue money damages. The class of potential petitioners is limited to
10 those with a direct interest in an individual's health care.

11 **Section 28. Transitional and Saving Provisions; Interpretation**

12
13 (a) This [act] applies to an advance health-care directive created before, on, or after [the
14 effective date of this [act]].

15 (b) An advance health-care directive created before [the effective date of this [act]] is
16 valid if it complies with this [act] or complied at the time of creation with the law of the state in
17 which it was created.

18 (c) This [act] does not affect the validity or effect of an act done before [the effective date
19 of this [act]].

20 (d) An individual who assumed authority to act as default surrogate before [the effective
21 date of this [act]] may continue to act as default surrogate until the individual for whom the
22 default surrogate is acting no longer lacks capacity or the default surrogate is disqualified,
23 whichever occurs first.

24 (e) An advance health-care directive created before, on, or after [the effective date of this
25 [act]] must be interpreted in accordance with the law of this state, excluding the state's choice-
26 of-law rules, at the time the directive is implemented.

27 **Comment**

28
29 An advance directive created before this Act became effective in a state is valid if it satisfies the
30 requirements for validity in existence at the time it was created or if it satisfies the requirements
31 for validity under this Act. The contents of the advance directive, including the powers and

1 duties of agents appointed under the advance directive, by contrast, shall be interpreted
2 according to the law after the date of enactment of this Act.

3 4 **Section 29. Uniformity of Application and Construction**

5 In applying and construing this uniform act, a court shall consider the promotion of
6 uniformity of the law among jurisdictions that enact it.

7 **[Section 30. Severability**

8 If a provision of this [act] or its application to a person or circumstance is held invalid,
9 the invalidity does not affect another provision or application that can be given effect without the
10 invalid provision.]

11 ***Legislative Note:*** *Include this section only if the state lacks a general severability statute or a*
12 *decision by the highest court of the state stating a general rule of severability.*

13 14 **Section 31. Repeals; Conforming Amendments**

15 (a) [The Uniform Health-Care Decisions Act] is repealed.

16 (b) . . .

17 ***Legislative Note:*** *A state that has enacted the Uniform Health-Care Decisions Act or*
18 *comparable statute should repeal it.*

19
20 *A state should examine its statutes to determine whether repeals or conforming revisions are*
21 *required by Section 8 {Power of Attorney for Health Care} and other provisions of this act*
22 *relating to health-care powers of attorney, Section 22 {Decision by Guardian} and other provisions*
23 *of this act relating to guardians.*

24 25 **Section 32. Effective Date**

26 This [act] takes effect . . .