UNIFORM PROBATE CODE

CONFORMING AND TECHNICAL AMENDMENTS

Approved by the Executive Committee of the
National Conference of Commissioners on Uniform State Laws

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TABLE OF SECTIONS AFFECTED

ARTICLE I

GENERAL PROVISIONS, DEFINITIONS AND PROBATE JURISDICTION OF COURT

PART 2

DEFINITIONS

Section
1-201 **General Definitions.**

ARTICLE II

INTESTACY, WILLS, AND DONATIVE TRANSFERS

PART 3

SPOUSE AND CHILDREN UNPROVIDED FOR IN WILLS

Section
2-302. **Omitted Children.**

PART 5

WILLS, WILL CONTRACTS, AND CUSTODY AND DEPOSIT OF WILLS

Section
2-514. **Contracts Concerning Succession**

PART 7

RULES OF CONSTRUCTION APPLICABLE TO WILLS AND OTHER GOVERNING INSTRUMENTS

Section
2-705. **Class Gifts Construed to Accord with Intestate Succession; Exceptions**

PART 8

GENERAL PROVISIONS CONCERNING PROBATE AND NONPROBATE TRANSFERS

PART 11

UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT (1999)

ARTICLE III

PROBATE OF WILLS AND ADMINISTRATION

PART 6

PERSONAL REPRESENTATIVE; APPOINTMENT, CONTROL AND TERMINATION OF AUTHORITY

PART 7

DUTIES AND POWERS OF PERSONAL REPRESENTATIVES

PART 9

SPECIAL PROVISIONS RELATING TO DISTRIBUTION

ARTICLE V

~~PROTECTION OF PERSONS UNDER DISABILITY AND THEIR PROPERTY~~

UNIFORM GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT

PART 1

GENERAL PROVISIONS

PART 3

GUARDIANSHIP OF INCAPACITATED PERSON

PART 4

PROTECTION OF PROPERTY OF PROTECTED PERSON

~~PART 5~~

~~DURABLE POWER OF ATTORNEY~~

~~Section~~

ARTICLE 5A

UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS

JURISDICTION ACT (2007)

[Part] 1

GENERAL PROVISIONS

Section

[Part] 2

JURISDICTION

Section

[Part] 3

TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP

Section

[Part] 4

REGISTRATION AND RECOGNITION OF ORDERS FROM OTHER STATES

ARTICLE 5B

UNIFORM POWER OF ATTORNEY ACT

[Part] 1

GENERAL PROVISIONS

[Part] 2

AUTHORITY

Section

[Part] 3

STATUTORY FORMS

Section

5B-302. Agent's Certification

ARTICLE VI

NONPROBATE TRANSFERS ON DEATH ~~(1989)~~

Prefatory Note

PART 4

UNIFORM REALPROPERTY TRANSFER ON DEATH ACT

Prefatory Note

Section

~~ARTICLE VII~~

~~TRUST ADMINISTRATION~~

~~PART 1~~

~~TRUST REGISTRATION~~

~~Section~~

~~PART 2~~

~~JURISDICTION OF COURT CONCERNING TRUSTS~~

~~Section~~

~~PART 3~~

~~DUTIES AND LIABILITIES OF TRUSTEES~~

~~Section~~

~~**PART 4**~~

~~**POWERS OF TRUSTEES**~~

~~**[GENERAL COMMENT ONLY]**~~

UNIFORM PROBATE CODE

ARTICLE I

GENERAL PROVISIONS, DEFINITIONS AND PROBATE JURISDICTION OF COURT

PART 2

DEFINITIONS

SECTION 1-201. GENERAL DEFINITIONS. Subject to additional definitions contained in the subsequent articles that are applicable to specific articles, parts, or sections, and unless the context otherwise requires, in this Code:

(1) "Agent" includes an attorney-in-fact under a durable or nondurable power of attorney, an individual authorized to make decisions concerning another's health care, and an individual authorized to make decisions for another under a natural death act.

(2) "Application" means a written request to the Registrar for an order of informal probate or appointment under Part 3 of Article III.

(3) "Beneficiary," as it relates to a trust beneficiary, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer; as it relates to a charitable trust, includes any person entitled to enforce the trust; as it relates to a "beneficiary of a beneficiary designation," refers to a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death; and, as it relates to a "beneficiary designated in a governing ," includes a grantee of a deed, a devisee, a trust beneficiary, a beneficiary of a

beneficiary designation, a donee, appointee, or taker in default of a power of appointment, or a person in whose favor a power of attorney or a power held in any individual, fiduciary, or representative capacity is exercised.

(4) "Beneficiary designation" refers to a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death.

(5) "Child" includes an individual entitled to take as a child under this Code by intestate succession from the parent whose relationship is involved and excludes a person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.

(6) "Claims," in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person, whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

(7) "Conservator" as defined in Section 5-102.

(8) "Court" means the [… Court] or branch in this State having jurisdiction in matters relating to the affairs of decedents.

(9) "Descendant" of an individual means all of his [or her] descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this Code.

(10) "Devise," when used as a noun, means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will.

(11) “Devisee” means a person designated in a will to receive a devise. For the purposes of Article III, in the case of a devise to an existing trust or trustee, or to a trustee or trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

(12) “Distributee” means any person who has received property of a decedent from his [or her] personal representative other than as a creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in his [or her] hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For the purposes of this provision, “testamentary trustee” includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

(13) “Estate” includes the property of the decedent, trust, or other person whose affairs are subject to this Code as originally constituted and as it exists from time to time during administration.

(14) “Exempt property” means that property of a decedent's estate which is described in Section 2-403.

(15) “Fiduciary” includes a personal representative, guardian, conservator, and trustee.

(16) “Foreign personal representative” means a personal representative appointed by another jurisdiction.

(17) “Formal proceedings” means proceedings conducted before a judge with notice to interested persons.

(18) “Governing instrument” means a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), transfer on death (TOD) deed, pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or

nominative instrument of any similar type.

(19) “Guardian” is as defined in Section 5-102.

(20) “Heirs,” except as controlled by Section 2-711, means persons, including the surviving spouse and the state, who are entitled under the statutes of intestate succession to the property of a decedent.

(21) “Incapacitated person” means an individual described in Section 5-102.

(22) “Informal proceedings” means those conducted without notice to interested persons by an officer of the Court acting as a registrar for probate of a will or appointment of a personal representative.

(23) “Interested person” includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

(24) “Issue” of an individual means descendant.

(25) “Joint tenants with the right of survivorship” and “community property with the right of survivorship” includes co-owners of property held under circumstances that entitle one or more to the whole of the property on the death of the other or others, but excludes forms of co-ownership registration in which the underlying ownership of each party is in proportion to that party's contribution.

(26) “Lease” includes an oil, gas, or other mineral lease.

(27) “Letters” includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(28) “Minor” has the meaning described in Section 5-102.

(29) “Mortgage” means any conveyance, agreement, or arrangement in which property is encumbered or used as security.

(30) “Nonresident decedent” means a decedent who was domiciled in another jurisdiction at the time of his [or her] death.

(31) “Organization” means a corporation, business trust, estate, trust, partnership, joint venture, association, government or governmental subdivision or agency, or any other legal or commercial entity.

(32) “Parent” includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this Code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

(33) “Payor” means a trustee, insurer, business entity, employer, government, governmental agency or subdivision, or any other person authorized or obligated by law or a governing instrument to make payments.

(34) “Person” means an individual or an organization.

(35) “Personal representative” includes executor administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. “General personal representative” excludes special administrator.

(36) “Petition” means a written request to the Court for an order after notice.

(37) “Proceeding” includes action at law and suit in equity.

(38) “Property” includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(39) “Protected person” is as defined in Section 5-102.

(40) “Protective proceeding” means a proceeding under Part 4 of Article V.

(41) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(42) “Registrar” refers to the official of the Court designated to perform the functions of Registrar as provided in Section 1-307.

(43) “Security” includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt, or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

(44) “Settlement,” in reference to a decedent's estate, includes the full process of administration, distribution, and closing.

(45) “Sign” means, with present intent to authenticate or adopt a record other than a will:

(A) to execute or adopt a tangible symbol; or

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

(46) “Special administrator” means a personal representative as described by Sections 3-614 through 3-618.

(47) “State” means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

(48) "Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

(49) "Successors" means persons, other than creditors, who are entitled to property of a decedent under his [or her] will or this Code.

(50) "Supervised administration" refers to the proceedings described in Article III, Part 5.

(51) "Survive" means that an individual has neither predeceased an event, including the death of another individual, nor is deemed to have predeceased an event under Section 2-104 or 2-702. The term includes its derivatives, such as "survives," "survived," "survivor," "surviving."

(52) "Testacy proceeding" means a proceeding to establish a will or determine intestacy.

(53) "Testator" includes an individual of either sex.

(54) "Trust" includes an express trust, private or charitable, with additions thereto, wherever and however created. The term also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. The term excludes other constructive trusts and excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in Article VI, custodial arrangements pursuant to [each state should list its legislation, including that relating to [gifts][transfers] to minors, dealing with special custodial situations], business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

(55) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.

(56) "Ward" means an individual described in Section 5-102.

(57) "Will" includes codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.

[FOR ADOPTION IN COMMUNITY PROPERTY STATES]

[(58) "Separate property" (if necessary, to be defined locally in accordance with existing concept in adopting state.)

(59) "Community property" (if necessary, to be defined locally in accordance with exciting concept in adopting state.)]

Comment

Special definitions for Articles V, 5A, 5B and VI are contained in Sections 5-103, 5A-102, 5B-102, 6-201, and 6-301. Except as controlled by special definitions applicable to these particular Articles, or applicable to particular sections, the definitions in Section 1-201 apply to the entire Code.

ARTICLE II

INTESTACY, WILLS, AND DONATIVE TRANSFERS

PART 3

Section
2-302. Omitted Children.

SECTION 2-302. OMITTED CHILDREN.

(a) Except as provided in subsection (b), if a testator fails to provide in his [or her] will

for any of his [or her] children born or adopted after the execution of the will, the omitted after-born or after-adopted child receives a share in the estate as follows:

(1) If the testator had no child living when he [or she] executed the will, an omitted after-born or after-adopted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate, unless the will devised all or substantially all of the estate to the other parent of the omitted child and that other parent survives the testator and is entitled to take under the will.

(2) If the testator had one or more children living when he [or she] executed the will, and the will devised property or an interest in property to one or more of the then-living children, an omitted after-born or after-adopted child is entitled to share in the testator's estate as follows:

(A) The portion of the testator's estate in which the omitted after-born or after-adopted child is entitled to share is limited to devises made to the testator's then-living children under the will.

(B) The omitted after-born or after-adopted child is entitled to receive the share of the testator's estate, as limited in subparagraph (i), that the child would have received had the testator included all omitted after-born and after-adopted children with the children to whom devises were made under the will and had given an equal share of the estate to each child.

(C) To the extent feasible, the interest granted an omitted after-born or after-adopted child under this section must be of the same character, whether equitable or legal, present or future, as that devised to the testator's then-living children under the will.

(D) In satisfying a share provided by this paragraph, devises to the testator's children who were living when the will was executed abate ratably. In abating the devises of the then-living children, the court shall preserve to the maximum extent possible the

character of the testamentary plan adopted by the testator.

(b) Neither subsection (a)(1) nor subsection (a)(2) applies if:

(1) it appears from the will that the omission was intentional; or

(2) the testator provided for the omitted after-born or after-adopted child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(c) If at the time of execution of the will the testator fails to provide in his [or her] will for a living child solely because he [or she] believes the child to be dead, the child is entitled to share in the estate as if the child were an omitted after-born or after-adopted child.

(d) In satisfying a share provided by subsection (a)(1), devises made by the will abate under Section 3-902.

Comment

This section provides for both the case where a child was born or adopted after the execution of the will and not foreseen at the time and thus not provided for in the will, and the rare case where a testator omits one of his or her children because of the mistaken belief that the child is dead. For the purpose of this section, the term "child" refers to a child who would take under a class gift created in the testator's will. See Section 2-705.

Basic Purposes and Scope of 1990 Revisions. This section ~~is~~ was substantially revised in 1990. The revisions ~~have~~ had two basic objectives. The first ~~basic objective is~~ was to provide that a will that devised, under trust or not, all or substantially all of the testator's estate to the other parent of the omitted child prevents an after-born or after-adopted child from taking an intestate share if none of the testator's children was living when he or she executed the will. (Under this rule, the other parent must survive the testator and be entitled to take under the will.)

Under the pre-1990 Code, such a will prevented the omitted child's entitlement only if the testator had one or more children living when he or she executed the will. The rationale for the revised rule is found in the empirical evidence (cited in the Comment to Section 2-102) that suggests that even testators with children tend to devise their entire estates to their surviving spouses, especially in smaller estates. The testator's purpose is not to disinherit the children; rather, such a will evidences a purpose to trust the surviving parent to use the property for the benefit of the children, as appropriate. This attitude of trust of the surviving parent carries over to the case where none of the children have been born when the will is executed.

The second basic objective of the 1990 revisions ~~is~~ was to provide that if the testator had children when he or she executed the will, and if the will made provision for one or more of the then-living children, an omitted after-born or after-adopted child does not take a full intestate share (which might be substantially larger or substantially smaller than given to the living children). Rather, the omitted after-born or after-adopted child participates on a pro rata basis in the property devised, under trust or not, to the then-living children.

A more detailed description of the revised rules follows.

No Child Living When Will Executed. If the testator had no child living when he or she executed the will, subsection (a)(1) provides that an omitted after-born or after-adopted child receives the share he or she would have received had the testator died intestate, unless the will devised, under trust or not, all or substantially all of the estate to the other parent of the omitted child. If the will did devise, under trust or not, all or substantially all of the estate to the other parent of the omitted child, and if that other parent survives the testator and is entitled to take under the will, the omitted after-born or after-adopted child receives no share of the estate. In the case of an after-adopted child, the term "other parent" refers to the other adopting parent. (The other parent of the omitted child might survive the testator, but not be entitled to take under the will because, for example, that devise, under trust or not, to the other parent was revoked under Section 2-803 or 2-804.)

One or More Children Living When Will Executed. If the testator had one or more children living when the will was executed, subsection (a)(2), which implements the second basic objective stated above, provides that an omitted after-born or after-adopted child only receives a share of the testator's estate if the testator's will devised property or an equitable or legal interest in property to one or more of the children living at the time the will was executed; if not, the omitted after-born or after-adopted child receives nothing.

Subsection (a)(2) is modelled on N.Y. Est. Powers & Trusts Law § 5-3.2. Subsection (a)(2) is illustrated by the following example.

Example. When G executed her will, she had two living children, A and B. Her will devised $7,500 to each child. After G executed her will, she had another child, C.

C is entitled to $5,000. $2,500 (1/3 of $7,500) of C's entitlement comes from A's $7,500 devise (reducing it to $5,000); and $2,500 (1/3 of $7,500) comes from B's $7,500 devise (reducing it to $5,000).

Variation. If G's will had devised $10,000 to A and $5,000 to B, C would be entitled to $5,000. $3,333 (1/3 of $10,000) of C's entitlement comes from A's $10,000 devise (reducing it to $6,667); and $1,667 (1/3 of $5,000) comes from B's $5,000 devise (reducing it to $3,333).

Subsection (b) Exceptions. To preclude operation of subsection (a)(1) or (a)(2), the testator's will need not make any provision, even nominal in amount, for a testator's present or future children; under subsection (b)(1), a simple recital in the will that the testator intends to make no provision for then living children or any the testator thereafter may have would be sufficient.

For a case applying the language of subsection (b)(2), in the context of the omitted spouse provision, see Estate of Bartell, 776 P.2d 885 (Utah 1989).

The moving party has the burden of proof on the elements of subsections (b)(1) and (b)(2).

Subsection (c). Subsection (c) addresses the problem that arises if at the time of execution of the will the testator fails to provide in his or her will for a living child solely because he or she believes the child to be dead. Extrinsic evidence is admissible to determine whether the testator omitted the living child solely because he or she believed the child to be dead. Cf. Section 2-601, Comment. If the child was omitted solely because of that belief, the child is entitled to share in the estate as if the child were an omitted after-born or after-adopted child.

Abatement Under Subsection (d). Under subsection (d) and Section 3-902, any intestate estate would first be applied to satisfy the intestate share of an omitted after-born or after-adopted child under subsection (a)(1).

Historical Note. This Comment was revised in 1993 and 2010. ~~For the prior version, see 8 U.L.A. 103 (Supp.1992).~~

PART 5

WILLS, WILL CONTRACTS, AND CUSTODY AND DEPOSIT OF WILLS

SECTION 2-514. CONTRACTS CONCERNING SUCCESSION. A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this Article, may be established only by (i) provisions of a will stating material provisions of the contract, (ii) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or (iii) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

Comment

Section Relocated. In the 1969 Code, Section 2-514 appeared as Section 2-701. The 1990 amendments relocated this section to make room for Part 7, which was added in 1990. No substantive revision ~~of this section is~~ was made ~~, but the section is relocated and renumbered to make room for new Part 7~~.

The purpose of this section is to tighten the methods by which contracts concerning succession may be proved. Oral contracts not to revoke wills have given rise to must litigation in a number of states; and in many states if two persons execute a single document as their joint will, this gives rise to a presumption that the parties had contracted not to revoke the will except by consent of both.

This section requires that either the will must set forth the material provisions of the contract, or the will must make express reference to the contract and extrinsic evidence prove the terms of the contract, or there must be a separate writing signed by the decedent evidencing the contract. Oral testimony regarding the contract is permitted if the will makes reference to the contract, but this provision of the statute is not intended to affect normal rules regarding admissibility of evidence.

This section does not preclude recovery in quantum meruit for the value of services rendered the testator.

Historical Note. This Comment was revised in 2010.

PART 7

RULES OF CONSTRUCTION APPLICABLE TO WILLS AND OTHER GOVERNING INSTRUMENTS

SECTION 2-705. CLASS GIFTS CONSTRUED TO ACCORD WITH INTESTATE SUCCESSION; EXCEPTIONS.

(a) [Definitions.] In this section:

(1) "Adoptee" has the meaning set forth in Section 2-115.

(2) "Child of assisted reproduction" has the meaning set forth in Section 2-120.

(3) "Distribution date" means the time when an immediate or a postponed class gift is to take effect in possession or enjoyment.

(4) "Functioned as a parent of the adoptee" has the meaning set forth in Section 2-115, substituting "adoptee" for "child" in that definition.

(5) "Functioned as a parent of the child" has the meaning set forth in Section 2-115.

(6) "Genetic parent" has the meaning set forth in Section 2-115.

(7) "Gestational child" has the meaning set forth in Section 2-121.

(8) "Relative" has the meaning set forth in Section 2-115.

(b) [Terms of Relationship.] A class gift that uses a term of relationship to identify the class members includes a child of assisted reproduction, a gestational child, and, except as otherwise provided in subsections (e) and (f), an adoptee and a child born to parents who are not married to each other, and their respective descendants if appropriate to the class, in accordance with the rules for intestate succession regarding parent-child relationships. A provision in a governing instrument that uses a term of relationship that does not specifically refer to a child of assisted reproduction or a gestational child does not apply to a child of assisted reproduction or a gestational child.

(c) [Relatives by Marriage.] Terms of relationship in a governing instrument that do not differentiate relationships by blood from those by marriage, such as uncles, aunts, nieces, or nephews, are construed to exclude relatives by marriage, unless:

(1) when the governing instrument was executed, the class was then and foreseeably would be empty; or

(2) the language or circumstances otherwise establish that relatives by marriage were intended to be included.

(d) [Half-Blood Relatives.] Terms of relationship in a governing instrument that do not differentiate relationships by the half blood from those by the whole blood, such as brothers, sisters, nieces, or nephews, are construed to include both types of relationships.

(e) [Transferor Not Genetic Parent.] In construing a dispositive provision of a transferor who is not the genetic parent, a child of a genetic parent is not considered the child of the genetic parent unless the genetic parent, a relative of the genetic parent, or the spouse or surviving spouse of the genetic parent or of a relative of the genetic parent functioned as a parent

of the child before the child reached [18] years of age.

(f) [Transferor Not Adoptive Parent.] In construing a dispositive provision of a transferor who is not the adoptive parent, an adoptee is not considered the child of the adoptive parent unless:

(1) the adoption took place before the adoptee reached [18] years of age;

(2) the adoptive parent was the adoptee's stepparent or foster parent; or

(3) the adoptive parent functioned as a parent of the adoptee before the adoptee reached [18] years of age.

(g) [Class-Closing Rules.] The following rules apply for purposes of the class-closing rules:

(1) A child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth.

(2) If a child of assisted reproduction or a gestational child is conceived posthumously and the distribution date is the deceased parent's death, the child is treated as living on the distribution date if the child lives 120 hours after birth and was in utero not later than 36 months after the deceased parent's death or born not later than 45 months after the deceased parent's death.

(3) An individual who is in the process of being adopted when the class closes is treated as adopted when the class closes if the adoption is subsequently granted.

Comment

This section facilitates a modern construction of gifts that identify the recipient by reference to a relationship to someone; usually these gifts will be class gifts. The rules of construction contained in this section are substantially consistent with the rules of construction contained in the Restatement (Third) of Property: Wills and Other Donative Transfers §§ 14.5 through 14.9. These sections of the Restatement apply to the treatment for class-gift purposes of an adoptee, a nonmarital child, a child of assisted reproduction, a gestational child, and a relative by marriage.

The rules set forth in this section are rules of construction, which under Section 2-701 are controlling in the absence of a finding of a contrary intention. With two exceptions, Section 2-705 invokes the rules pertaining to intestate succession as rules of construction for interpreting terms of relationship in private instruments.

Subsection (a): Definitions. With one exception, the definitions in subsection (a) rely on definitions contained in intestacy sections. The one exception is the definition of "distribution date," which is relevant to the class-closing rules contained in subsection (g). *Distribution date* is defined as the date when an immediate or postponed class gift takes effect in possession or enjoyment.

Subsection (b): Terms of Relationship. Subsection (b) provides that a class gift that uses a term of relationship to identify the takers includes a child of assisted reproduction and a gestational child, and their respective descendants if appropriate to the class, in accordance with the rules for intestate succession regarding parent-child relationships. As provided in subsection (g), inclusion of a child of assisted reproduction or a gestational child in a class is subject to the class-closing rules. See Examples 11 through 15.

The last sentence of subsection (b) was added by technical amendment in 2010. That sentence is necessary to prevent a provision in a governing instrument that relates to the inclusion or exclusion of a child born to parents who are not married to each other from applying to a child of assisted reproduction or a gestational child, unless the provision specifically refers to such a child. Technically, for example, a posthumously conceived child born to a decedent's surviving widow could be considered a nonmarital child. See, e.g., Woodward v. Commissioner of Social Security, 760 N.E.2d 257, 266-67 (Mass. 2002) ("Because death ends a marriage, ... posthumously conceived children are always nonmarital children."). A provision in a will, trust, or other governing instrument that relates to the inclusion or exclusion of a nonmarital child, or to the inclusion or exclusion of a nonmarital child under specified circumstances, was not likely inserted with a child of assisted reproduction or a gestational child in mind. The last sentence of subsection (b) provides that, unless that type of provision specifically refers to a child of assisted reproduction or a gestational child, such a provision does not state a contrary intention under Section 2-701 to the rule of construction contained in subsection (b).

Subsection (b) also provides that, except as otherwise provided in subsections (e) and (f), an adoptee and a child born to parents who are not married to each other, and their respective descendants if appropriate to the class, are included in class gifts and other terms of relationship in accordance with the rules for intestate succession regarding parent-child relationships. The subsection (e) exception relates to situations in which the transferor is not the genetic parent of the child. The subsection (f) exception relates to situations in which the transferor is not the adoptive parent of the adoptee. Consequently, if the transferor *is* the genetic or adoptive parent of the child, neither exception applies, and the class gift or other term of relationship is construed in accordance with the rules for intestate succession regarding parent-child relationships. As provided in subsection (g), inclusion of an adoptee or a child born to parents who are not married to each other in a class is subject to the class-closing rules. See Examples 9 and 10.

Subsection (c): Relatives by Marriage. Subsection (c) provides that terms of relationship that do not differentiate relationships by blood from those by marriage, such as "uncles", "aunts", "nieces", or "nephews", are construed to exclude relatives by marriage, unless (i) when the governing instrument was executed, the class was then and foreseeably would be empty or (ii) the language or circumstances otherwise establish that relatives by marriage were intended to be included. The Restatement (Third) of Property: Wills and Other Donative Transfers § 14.9 adopts a similar rule of construction. As recognized in both subsection (c) and the Restatement, there are situations in which the circumstances would tend to include a relative by marriage. As provided in subsection (g), inclusion of a relative by marriage in a class is subject to the class-closing rules.

One situation in which the circumstances would tend to establish an intent to include a relative by marriage is the situation in which, looking at the facts existing when the governing instrument was executed, the class was then and foreseeably would be empty unless the transferor intended to include relatives by marriage.

Example 1. G's will devised property in trust, directing the trustee to pay the income in equal shares "to G's children who are living on each income payment date and on the death of G's last surviving child, to distribute the trust property to G's issue then living, such issue to take per stirpes, and if no issue of G is then living, to distribute the trust property to the X Charity." When G executed her will, she was past the usual childbearing age, had no children of her own, and was married to a man who had four children by a previous marriage. These children had lived with G and her husband for many years, but G had never adopted them. Under these circumstances, it is reasonable to conclude that when G referred to her "children" in her will she was referring to her stepchildren. Thus her stepchildren should be included in the presumptive meaning of the gift "to G's children" and the issue of her stepchildren should be included in the presumptive meaning of the gift "to G's issue." If G, at the time she executed her will, had children of her own, in the absence of additional facts, G's stepchildren should not be included in the presumptive meaning of the gift to "G's children" or in the gift to "G's issue."

Example 2. G's will devised property in trust, directing the trustee to pay the income to G's wife W for life, and on her death, to distribute the trust property to "my grandchildren." W had children by a prior marriage who were G's stepchildren. G never had any children of his own and he never adopted his stepchildren. It is reasonable to conclude that under these circumstances G meant the children of his stepchildren when his will gave the future interest under the trust to G's "grandchildren."

Example 3. G's will devised property in trust, directing the trustee to pay the income "to my daughter for life and on her death, to distribute the trust property to her children." When G executed his will, his son had died, leaving surviving the son's wife, G's daughter-in-law, and two children. G had no daughter of his own. Under these circumstances, the conclusion is justified that G's daughter-in-law is the "daughter" referred to in G's will.

Another situation in which the circumstances would tend to establish an intent to include

a relative by marriage is the case of reciprocal wills, as illustrated in Example 4, which is based on Martin v. Palmer, 1 S.W.3d 875 (Tex. Ct. App. 1999).

> *Example 4*. G's will devised her entire estate "to my husband if he survives me, but if not, to my nieces and nephews." G's husband H predeceased her. H's will devised his entire estate "to my wife if she survives me, but if not, to my nieces and nephews." Both G and H had nieces and nephews. In these circumstances, "my nieces and nephews" is construed to include G's nieces and nephews by marriage. Were it otherwise, the combined estates of G and H would pass only to the nieces and nephews of the spouse who happened to survive.

Still another situation in which the circumstances would tend to establish an intent to include a relative by marriage is a case in which an ancestor participated in raising a relative by marriage other than a stepchild.

> *Example 5*. G's will devised property in trust, directing the trustee to pay the income in equal shares "to my nieces and nephews living on each income payment date until the death of the last survivor of my nieces and nephews, at which time the trust shall terminate and the trust property shall be distributed to the X Charity." G's wife W was deceased when G executed his will. W had one brother who predeceased her. G and W took the brother's children, the wife's nieces and nephews, into their home and raised them. G had one sister who predeceased him, and G and W were close to her children, G's nieces and nephews. Under these circumstances, the conclusion is justified that the disposition "to my nieces and nephews" includes the children of W's brother as well as the children of G's sister.

The language of the disposition may also establish an intent to include relatives by marriage, as illustrated in Examples 6, 7, and 8.

> *Example 6*. G's will devised half of his estate to his wife W and half to "my children." G had one child by a prior marriage, and W had two children by a prior marriage. G did not adopt his stepchildren. G's relationship with his stepchildren was close, and he participated in raising them. The use of the plural "children" is a factor indicating that G intended to include his stepchildren in the class gift to his children.

> *Example 7*. G's will devised the residue of his estate to "my nieces and nephews named herein before." G's niece by marriage was referred to in two earlier provisions as "my niece." The previous reference to her as "my niece" indicates that G intended to include her in the residuary devise.

> *Example 8*. G's will devised the residue of her estate "in twenty-five (25) separate equal shares, so that there shall be one (1) such share for each of my nieces and nephews who shall survive me, and one (1) such share for each of my nieces and nephews who shall not survive me but who shall have left a child or children surviving me." G had 22 nieces and nephews by blood or adoption and three nieces and nephews by marriage. The reference to twenty-five nieces and nephews indicates that G intended to include her three nieces and nephews by marriage in the residuary devise.

Subsection (d): Half Blood Relatives. In providing that terms of relationship that do not differentiate relationships by the half blood from those by the whole blood, such as "brothers", "sisters", "nieces", or "nephews", are construed to include both types of relationships, subsection (d) is consistent with the rules for intestate succession regarding parent-child relationships. See Section 2-107 and the phrase "or either of them" in Section 2-103(3) and (4). As provided in subsection (g), inclusion of a half blood relative in a class is subject to the class-closing rules.

Subsection (e): Transferor Not Genetic Parent. The general theory of subsection (e) is that a transferor who is not the genetic parent of a child would want the child to be included in a class gift as a child of the genetic parent only if the genetic parent (or one or more of the specified relatives of the child's genetic parent functioned as a parent of the child before the child reached the age of [18]. As provided in subsection (g), inclusion of a genetic child in a class is subject to the class-closing rules.

Example 9. G's will created a trust, income to G's son, A, for life, remainder in corpus to A's descendants who survive A, by representation. A fathered a child, X; A and X's mother, D, never married each other, and A never functioned as a parent of the child, nor did any of A's relatives or spouses or surviving spouses of any of A's relatives. D later married E; D and E raised X as a member of their household. Because neither A nor any of A's specified relatives ever functioned as a parent of X, X would not be included as a member of the class of A's descendants who take the corpus of G's trust on A's death.

If, however, A executed a will containing a devise to his children or designated his children as beneficiary of his life insurance policy, X would be included in the class. Under Section 2-117, X would be A's child for purposes of intestate succession. Subsection (c) is inapplicable because the transferor, A, is the genetic parent.

Subsection (f): Transferor Not Adoptive Parent. The general theory of subsection (f) is that a transferor who is not the adoptive parent of an adoptee would want the child to be included in a class gift as a child of the adoptive parent only if (i) the adoption took place before the adoptee reached the age of [18]; (ii) the adoptive parent was the adoptee's stepparent or foster parent; or (iii) the adoptive parent functioned as a parent of the adoptee before the adoptee reached the age of [18]. As provided in subsection (g), inclusion of an adoptee in a class is subject to the class-closing rules.

Example 10. G's will created a trust, income to G's daughter, A, for life, remainder in corpus to A's descendants who survive A, by representation. A and A's husband adopted a 47-year old man, X. Because the adoption did not take place before X reached the age of [18], A was not X's stepparent or foster parent, and A did not function as a parent of X before X reached the age of [18]. X would not be included as a member of the class of A's descendants who take the corpus of G's trust on A's death.

If, however, A executed a will containing a devise to her children or designated her children as beneficiary of her life insurance policy, X would be included in the class.

Under Section 2-118, X would be A's child for purposes of intestate succession. Subsection (d) is inapplicable because the transferor, A, is an adoptive parent.

Subsection (g): Class-Closing Rules. In order for an individual to be a taker under a class gift that uses a term of relationship to identify the class members, the individual must (i) qualify as a class member under subsection (b), (c), (d), (e), or (f) and (ii) not be excluded by the class-closing rules. For an exposition of the class-closing rules, see Restatement (Third) of Property: Wills and Other Donative Transfers § 15.1. Section 15.1 provides that, "unless the language or circumstances establish that the transferor had a different intention, a class gift that has not yet closed physiologically closes to future entrants on the distribution date if a beneficiary of the class gift is then entitled to distribution."

Subsection (g)(1): Child in Utero. Subsection (g)(1) codifies the well-accepted rule that a child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth.

Subsection (g)(2): Children of Assisted Reproduction and Gestational Children; Class Gift in Which Distribution Date Arises At Deceased Parent's Death. Subsection (g)(2) changes the class-closing rules in one respect. If a child of assisted reproduction (as defined in Section 2-120) or a gestational child (as defined in Section 2-121) is conceived posthumously, and if the distribution date arises at the deceased parent's death, then the child is treated as living on the distribution date if the child lives 120 hours after birth and was either (i) in utero no later than 36 months after the deceased parent's death or (ii) born no later than 45 months after the deceased parent's death.

The 36-month period in subsection (g)(2) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The 36-month period also coincides with Section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent's death or one year after distribution. If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases. The 45-month period is based on the 36-month period with an additional nine months tacked on to allow for a normal period of pregnancy.

Example 11. G, a member of the armed forces, executed a military will under 10 U.S.C. § 1044d shortly before being deployed to a war zone. G's will devised "90 percent of my estate to my wife W and 10 percent of my estate to my children." G also left frozen sperm at a sperm bank in case he should be killed in action. G consented to be treated as the parent of the child within the meaning of § 2-120(f). G was killed in action. After G's death, W decided to become inseminated with his frozen sperm so she could have his child. If the child so produced was either (i) in utero within 36 months after G's death or (ii) born within 45 months after G's death, and if the child lived 120 hours after birth, the child is treated as living at G's death and is included in the class.

Example 12. G, a member of the armed forces, executed a military will under 10 U.S.C. § 1044d shortly before being deployed to a war zone. G's will devised "90 percent of my estate to my husband H and 10 percent of my estate to my issue by representation." G also left frozen embryos in case she should be killed in action. G consented to be the parent of the child within the meaning of § 2-120(f). G was killed in action. After G's death, H arranged for the embryos to be implanted in the uterus of a gestational carrier. If the child so produced was either (i) in utero within 36 months after G's death or (ii) born within 45 months after the G's death, and if the child lived 120 hours after birth, the child is treated as living at G's death and is included in the class.

Example 13. The will of G's mother created a testamentary trust, directing the trustee to pay the income to G for life, then to distribute the trust principal to G's children. When G's mother died, G was married but had no children. Shortly after being diagnosed with leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. G consented to be the parent of the child within the meaning of § 2-120(f). After G's death, G's widow decided to become inseminated with his frozen sperm so she could have his child. If the child so produced was either (i) in utero within 36 months after G's death or (ii) born within 45 months after the G's death, and if the child lived 120 hours after birth, the child is treated as living at G's death and is included in the class under the rule of convenience.

Subsection (g)(2) Inapplicable Unless Child of Assisted Reproduction or Gestational Child is Conceived Posthumously and Distribution Date Arises At Deceased Parent's Death. Subsection (g)(2) only applies if a child of assisted reproduction or a gestational child is conceived posthumously and the distribution date arises at the deceased parent's death. Subsection (g)(2) does not apply if a child of assisted reproduction or a gestational child is not conceived posthumously. It also does not apply if the distribution date arises before or after the deceased parent's death. In cases to which subsection (g)(2) does not apply, the ordinary class-closing rules apply. For purposes of the ordinary class-closing rules, subsection (g)(1) provides that a child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth.

This means, for example, that, with respect to a child of assisted reproduction or a gestational child, a class gift in which the distribution date arises after the deceased parent's death is not limited to a child who is born before or in utero at the deceased parent's death or, in the case of posthumous conception, either (i) in utero within 36 months after the deceased parent's death or (ii) born within 45 months after the deceased parent's death. The ordinary class-closing rules would only exclude a child of assisted reproduction or a gestational child if the child was not yet born or in utero on the distribution date (or who was then in utero but who failed to live 120 hours after birth).

A case that reached the same result that would be reached under this section is In re Martin B., 841 N.Y.S.2d 207 (Sur. Ct. 2007). In that case, two children (who were conceived posthumously and were born to a deceased father's widow around three and five years after his death) were included in class gifts to the deceased father's "issue" or "descendants". The children would be included under this section because (i) the deceased father signed a record that

would satisfy Section 2-120(f)(1), (ii) the distribution dates arose after the deceased father's death, and (iii) the children were living on the distribution dates, thus satisfying subsection (g)(1).

Example 14. G created a revocable inter vivos trust shortly before his death. The trustee was directed to pay the income to G for life, then "to pay the income to my wife, W, for life, then to distribute the trust principal by representation to my descendants who survive W." When G died, G and W had no children. Shortly before G's death and after being diagnosed with leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. G consented to be the parent of the child within the meaning of § 2-120(f). After G's death, W decided to become inseminated with G's frozen sperm so that she could have his child. The child, X, was born five years after G's death. W raised X. Upon W's death many years later, X was a grown adult. X is entitled to receive the trust principal, because a parent-child relationship between G and X existed under § 2-120(f) and X was living on the distribution date.

Example 15. The will of G's mother created a testamentary trust, directing the trustee to pay the income to G for life, then "to pay the income by representation to G's issue from time to time living, and at the death of G's last surviving child, to distribute the trust principal by representation to G's descendants who survive G's last surviving child." When G's mother died, G was married but had no children. Shortly after being diagnosed with leukemia, G feared that he would be rendered infertile by the disease or by the treatment for the disease, so he left frozen sperm at a sperm bank. G consented to be the parent of the child within the meaning of § 2-120(f). After G's death, G's widow decided to become inseminated with his frozen sperm so she could have his child. If the child so produced was either (i) in utero within 36 months after G's death or (ii) born within 45 months after the G's death, and if the child lived 120 hours after birth, the child is treated as living at G's death and is included in the class-gift of income under the rule of convenience. If G's widow later decides to use his frozen sperm to have another child or children, those children would be included in the class-gift of income (assuming they live 120 hours after birth) even if they were not in utero within 36 months after G's death or born within 45 months after the G's death. The reason is that an income interest in class-gift form is treated as creating separate class gifts in which the distribution date is the time of payment of each subsequent income payment. See Restatement (Third) of Property: Wills and Other Donative Transfers § 15.1 cmt. p. Regarding the remainder interest in principal that takes effect in possession on the death of G's last living child, the issue of the posthumously conceived children who are then living would take the trust principal.

Subsection (g)(3). For purposes of the class-closing rules, an individual who is in the process of being adopted when the class closes is treated as adopted when the class closes if the adoption is subsequently granted. An individual is "in the process of being adopted" if a legal proceeding to adopt the individual had been filed before the class closed. However, the phrase "in the process of being adopted" is not intended to be limited to the filing of a legal proceeding, but is intended to grant flexibility to find on a case by case basis that the process commenced earlier.

Reference. For the application of this section to children of assisted reproduction and gestational children, see Sheldon F. Kurtz & Lawrence W. Waggoner, The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproduction Technologies, 35 ACTEC J. 30 (2009).

Historical Note. This Comment was revised in 1993~~, and~~ 2008, and 2010.

PART 8

GENERAL PROVISIONS CONCERNING PROBATE AND NONPROBATE TRANSFERS

SECTION 2-805. REFORMATION TO CORRECT MISTAKES. The court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor's intention if it is proved by clear and convincing evidence ~~that the transferor's intent~~ what the transferor's intention was and that the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.

Comment

Added in 2008, Section 2-805 is based on Section 415 of the Uniform Trust Code, which in turn was based on Section 12.1 of the Restatement (Third) of Property: Wills and Other Donative Transfers (2003).

Section 2-805 is broader in scope than Section 415 of the Uniform Trust Code because Section 2-805 applies but is not limited to trusts.

Section 12.1, and hence Section 2-805, is explained and illustrated in the Comments to Section 12.1 of the Restatement and also, in the case of a trust, in the Comment to Section 415 of the Uniform Trust Code.

2010 Amendment. This section was revised by technical amendment in 2010. The amendment better conforms the language of the section to the language of the Restatement (Third) of Property provision on which the section is based.

PART 11

UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT (1999)

Section 2-1104. Part Supplemented By Other Law.

(a) Unless displaced by a provision of this Part, the principles of law and equity supplement this Part.

(b) This Part does not limit any right of a person to waive, release, disclaim, or renounce an interest in or power over property under a law other than this Part.

Comment

The supplementation of the provisions of the Act by the principles of law and equity in Section 2-1104(a) is important because the Act is not a complete statement of the law relating to disclaimers. For example, Section 2-1105(b) permits a trustee to disclaim, yet the disclaiming trustee must still adhere to all applicable fiduciary duties. See Restatement (Third) of Trusts §86 Reporter's Notes to cmt. f. Similarly, the provisions of Section 2-1113 on bars to disclaiming are subject to supplementation by equitable principles. See *Badouh v. Hale*, 22 S.W.3d 392 (Tex. 2000) (invalidating a disclaimer of an expectancy as contrary to equity, on the ground that the putative disclaimant had earlier pledged it to a third party).

Not only are the provisions of the Act supplemented by the principles of law and equity, but under Section 2-1104(b) the provisions of the Act do not preempt other law that creates the right to reject an interest in or power over property. The growth of the law would be unduly restricted were the provisions of the Act completely to displace other law.

Historical Note. This Comment was added in 2010.

SECTION 2-1112. DELIVERY OR FILING.

(a) In this section, "beneficiary designation" means an instrument, other than an instrument creating a trust, naming the beneficiary of:

(1) an annuity or insurance policy;

(2) an account with a designation for payment on death;

(3) a security registered in beneficiary form;

(4) a pension, profit-sharing, retirement, or other employment-related benefit

plan; or

(5) any other nonprobate transfer at death.

(b) Subject to subsections (c) through (l), delivery of a disclaimer may be effected by personal delivery, first-class mail, or any other method likely to result in its receipt.

(c) In the case of an interest created under the law of intestate succession or an interest created by will, other than an interest in a testamentary trust:

(1) a disclaimer must be delivered to the personal representative of the decedent's estate; or

(2) if no personal representative is then serving, it must be filed with a court having jurisdiction to appoint the personal representative.

(d) In the case of an interest in a testamentary trust:

(1) a disclaimer must be delivered to the trustee then serving, or if no trustee is then serving, to the personal representative of the decedent's estate; or

(2) if no personal representative is then serving, it must be filed with a court having jurisdiction to enforce the trust.

(e) In the case of an interest in an inter vivos trust :

(1) a disclaimer must be delivered to the trustee then serving;

(2) if no trustee is then serving, it must be filed with a court having jurisdiction to enforce the trust; or

(3) if the disclaimer is made before the time the instrument creating the trust becomes irrevocable, it must be delivered to the settlor of a revocable trust or the transferor of the interest.

(f) In the case of an interest created by a beneficiary designation which is disclaimed ~~made~~ before ~~the time~~ the designation becomes irrevocable, ~~a~~ the disclaimer must be delivered to

the person making the beneficiary designation.

(g) In the case of an interest created by a beneficiary designation which is disclaimed ~~made~~ after ~~the time~~ the designation becomes irrevocable~~,~~:

(1) ~~a~~ the disclaimer of an interest in personal property must be delivered to the person obligated to distribute the interest~~.~~; and

(2) the disclaimer of an interest in real property must be recorded in [the office of the county recorder of deeds] of the [county] where the real property that is the subject of the disclaimer is located.

(h) In the case of a disclaimer by a surviving holder of jointly held property, the disclaimer must be delivered to the person to whom the disclaimed interest passes.

(i) In the case of a disclaimer by an object or taker in default of exercise of a power of appointment at any time after the power was created:

(1) the disclaimer must be delivered to the holder of the power or to the fiduciary acting under the instrument that created the power; or

(2) if no fiduciary is then serving, it must be filed with a court having authority to appoint the fiduciary.

(j) In the case of a disclaimer by an appointee of a nonfiduciary power of appointment:

(1) the disclaimer must be delivered to the holder, the personal representative of the holder's estate or to the fiduciary under the instrument that created the power ; or

(2) if no fiduciary is then serving, it must be filed with a court having authority to appoint the fiduciary.

(k) In the case of a disclaimer by a fiduciary of a power over a trust or estate, the disclaimer must be delivered as provided in subsection (c), (d), or (e), as if the power disclaimed were an interest in property.

(l) In the case of a disclaimer of a power by an agent, the disclaimer must be delivered to the principal or the principal's representative.

Comment

The rules set forth in Section 2-1112 are designed ~~so that anyone who has the duty to distribute the disclaimed interest will be notified~~ to provide notice of the disclaimer. For example, a disclaimer of an interest in a decedent's estate must be delivered to the personal representative of the estate. A disclaimer is required to be filed in court only ~~when there is no one person or entity to whom delivery can be made~~ in very limited circumstances.

Historical Note: This Comment was revised in 2010 to account for the amendment of subsections (f) and (g)(1) and the addition of subsection (g)(2), amendments that were necessitated by the approval of the Uniform Real Property Transfer on Death Act (2009), which is codified in this Code at Article VI, Part 4.

SECTION 2-1114. TAX QUALIFIED DISCLAIMER. Notwithstanding any other provision of this Part, if as a result of a disclaimer or transfer the disclaimed or transferred interest is treated pursuant to the provisions of Title 26 of the United States Code, as now or hereafter amended, or any successor statute thereto, and the regulations promulgated thereunder, as never having been transferred to the disclaimant, then the disclaimer or transfer is effective as a disclaimer under this Part.

Legislative Note: *States with constitutions that prohibit a dynamic reference to federal law ("as now or hereafter amended, or any successor statute thereto") may wish to refer instead to Title 26 of the United States Code as it exists on a specified date. See, e.g., Ariz. Rev. Stat. sec. 14-10014; Or. Rev. Stat. sec. 105.645."*

Comment

This section coordinates the Act with the requirements of a qualified disclaimer for transfer tax purposes under IRC §2518. Any disclaimer which is qualified for estate and gift tax purposes is a valid disclaimer under this Act even if it does not otherwise meet the Act's more specific requirements.

SECTION 2-1115. RECORDING OF DISCLAIMER. If an instrument transferring an interest in or power over property subject to a disclaimer is required or permitted by law to be filed, recorded, or registered, the disclaimer may be so filed, recorded, or registered. Except as

otherwise provided in Section 2-1112(g)(2), ~~F~~failure to file, record, or register the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer.

Comment

This section permits the recordation of a disclaimer of an interest in property ownership of or title to which is the subject of a recording system. This section expands on the corresponding provision of previous Uniform Acts which ~~only~~ referred to permissive recording of a disclaimer of an interest in real property. While local practice may vary, disclaimants should realize that in order to establish the chain of title to real property, and to ward off creditors and bona fide purchasers, the disclaimer may have to be recorded. This section does not change the law of the state governing notice. The reference to Section 2-1112(g)(2) concerns the disclaimer of an interest in real property created by a "beneficiary designation" as that term is defined in §2-1112(a). Such a disclaimer must be recorded.

2010 Technical Amendment: The cross-reference to Section 2-1112 was added in 2010. This addition was necessitated by the approval of the Uniform Transfer on Death Real Property Act (2009), which is codified in this Code at Article VI, Part 4.

ARTICLE III

PROBATE OF WILLS AND ADMINISTRATION

PART 6

PERSONAL REPRESENTATIVE; APPOINTMENT, CONTROL AND TERMINATION OF AUTHORITY

SECTION 3-605. DEMAND FOR BOND BY INTERESTED PERSON. Any person apparently having an interest in the estate worth in excess of [~~$1000~~ $5,000], or any creditor having a claim in excess of [~~$1000~~ $5,000], may make a written demand that a personal representative give bond. The demand must be filed with the Registrar and a copy mailed to the personal representative, if appointment and qualification have occurred. Thereupon, bond is required, but the requirement ceases if the person demanding bond ceases to be interested in the estate, or if bond is excused as provided in Section 3-603 or 3-604. After he has received notice

and until the filing of the bond or cessation of the requirement of bond, the personal representative shall refrain from exercising any powers of his office except as necessary to preserve the estate. Failure of the personal representative to meet a requirement of bond by giving suitable bond within 30 days after receipt of notice is cause for his removal and appointment of a successor personal representative.

Comment

The demand for bond described in this section may be made in a petition or application for appointment of a personal representative, or may be made after a personal representative has been appointed. The mechanism for compelling bond is designed to function without unnecessary judicial involvement. If demand for bond is made in a formal proceeding, the judge can determine the amount of bond to be required with due consideration for all circumstances. If demand is not made in formal proceedings, methods for computing the amount of bond are provided by statute so that the demand can be complied with without resort to judicial proceedings. The information which a personal representative is required by Section 3-705 to give each beneficiary includes a statement concerning whether bond has been required.

2010 Amendment: This section was amended in 2010 to increase the amount from $1,000 to $5,000 on account of inflation that has occurred since the original 1969 approval of the Uniform Probate Code.

PART 7

DUTIES AND POWERS OF PERSONAL REPRESENTATIVES

SECTION 3-703. GENERAL DUTIES; RELATION AND LIABILITY TO PERSONS INTERESTED IN ESTATE; STANDING TO SUE.

(a) A personal representative is a fiduciary who shall observe the standards of care applicable to trustees ~~as described by Section 7-302.~~ A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this Code, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this Code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of

successors to the estate.

(b) A personal representative may not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will is authority to administer and distribute the estate according to its terms. An order of appointment of a personal representative, whether issued in informal or formal proceedings is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of a pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning his appointment or fitness to continue, or a supervised administration proceeding. This section does not affect the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants whose claims have been allowed, the surviving spouse, any minor and dependent children and any pretermitted child of the decedent as described elsewhere in this Code.

(c) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the Courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to death.

Comment

This and the next section are especially important sections for they state the basic theory underlying the duties and powers of personal representatives. Whether or not a personal representative is supervised, this section applies to describe the relationship he bears to interested parties. If a supervised representative is appointed, or if supervision of a previously appointed personal representative is ordered, an additional obligation to the Court is created. *See* Section 3-501.

Pursuant to subsection (a), a personal representative has a duty to settle and distribute the estate as expeditiously and efficiently as is consistent with the best interests of the estate. While this duty includes an obligation to ascertain the beneficiaries of the estate, it does not require the personal representative to delay distribution pending the possible birth of a posthumously

conceived child. A delay is appropriate only if the personal representative has (1) received notice or has knowledge that there is an intention to use the decedent's genetic material to create a child and (2) the birth of the child could have an effect on distribution of the decedent's estate. Should the personal representative properly distribute the estate and a posthumously conceived child is later born, any remedy the child might have is against the other beneficiaries, and not the personal representative. See Sections 3-909, 3-1005.

The fundamental responsibility of a personal representative is that of a trustee. Unlike many trustees, a personal representative's authority is derived from appointment by the public agency known as the Court. But, the Code also makes it clear that the personal representative, in spite of the source of his authority, is to proceed with the administration, settlement and distribution of the estate by use of statutory powers and in accordance with statutory directions. *See* Sections 3-107 and 3-704. Subsection (b) is particularly important, for it ties the question of personal liability for administrative or distributive acts to the question of whether the act was "authorized at the time". Thus, a personal representative may rely upon and be protected by a will which has been probated without adjudication or an order appointing him to administer which is issued in no-notice proceedings even though proceedings occurring later may change the assumption as to whether the decedent died testate or intestate. *See* Section 3-302 concerning the status of a will probated without notice and Section 3-102 concerning the ineffectiveness of an unprobated will. However, it does *not* follow from the fact that the personal representative distributed under authority that the distributees may not be liable to restore the property or values received if the assumption concerning testacy is later changed. *See* Sections 3-909 and 3-1004. Thus, a distribution may be "authorized at the time" within the meaning of this section, but be "improper" under the latter section.

Paragraph (c) is designed to reduce or eliminate differences in the amenability to suit of personal representatives appointed under this Code and under traditional assumptions. Also, the subsection states that so far as the law of the appointing forum is concerned, personal representatives are subject to suit in other jurisdictions. It, together with various provisions of Article IV, are designed to eliminate many of the present reasons for ancillary administrations.

1997 Technical Amendment. By technical amendment ~~effective July 31, 1997~~, the final sentence of Section 3-703(b) was modified to clarify the originally intended meaning that a personal representative of a decedent's estate does not owe fiduciary duties to a person whose claim has not yet been allowed. This added language is not intended to affect any duty to give notice to prospective claimants under Section 3-801 or *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988).

2010 Technical Amendment. By technical amendment, a cross-reference in subsection (a) to Section 7-302 was deleted. Article VII, which addressed selected issues of trust law, including the standard of care for trustees, was withdrawn due to the approval of and widespread enactment of the Uniform Trust Code (2000).

Historical Note: The second paragraph of the Comment was added in 2010 due to the approval in 2008 of provisions relating to children born of assisted reproductive technology.

SECTION 3-705. DUTY OF PERSONAL REPRESENTATIVE; INFORMATION TO HEIRS AND DEVISEES. Not later than 30 days after his appointment every personal representative, except any special administrator, shall give information of his appointment to the heirs and devisees, including, if there has been no formal testacy proceeding and if the personal representative was appointed on the assumption that the decedent died intestate, the devisees in any will mentioned in the application for appointment of a personal representative. The information shall be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the personal representative. The duty does not extend to require information to persons who have been adjudicated in a prior formal testacy proceeding to have no interest in the estate. The information shall include the name and address of the personal representative, indicate that it is being sent to persons who have or may have some interest in the estate being administered, indicate whether bond has been filed, and describe the Court where papers relating to the estate are on file. The information shall state that the estate is being administered by the personal representative under the [State] Probate Code without supervision by the Court but that recipients are entitled to information regarding the administration from the personal representative and can petition the Court in any matter relating to the estate, including distribution of assets and expenses of administration. The personal representative's failure to give this information is a breach of his duty to the persons concerned but does not affect the validity of his appointment, his powers or other duties. A personal representative may inform other persons of his appointment by delivery or ordinary first class mail.

Comment

This section requires the personal representative to inform persons who appear to have an interest in the estate as it is being administered, of his appointment. Also, it requires the personal representative to give notice to persons who appear to be disinherited by the assumption concerning testacy under which the personal representative was appointed. The communication involved is not to be confused with the notice requirements relating to litigation. The duty

applies even though there may have been a prior testacy proceeding after notice, except that persons who have been adjudicated to be without interest in the estate are excluded. The rights, if any, of persons in regard to estates cannot be cut off completely except by the running of the three year statute of limitations provided in Section 3-108, or by a formal judicial proceeding which will include full notice to all interested persons. The interests of some persons may be shifted from rights to specific property of the decedent to the proceeds from sale thereof, or to rights to values received by distributees. However, such a shift of protected interest from one thing to another, or to funds or obligations, is not new in relation to trust beneficiaries. A personal representative may initiate formal proceedings to determine whether persons, other than those appearing to have interests, may be interested in the estate, under Section 3-401 or, in connection with a formal closing, as provided by Section 3-1001.

No information or notice is required by this section if no personal representative is appointed. Nor does this section require that information be given to beneficiaries not born within 30 days of the personal representative's appointment, including children born by posthumous conception.

In any circumstance in which a fiduciary accounting is to be prepared, preparation of an accounting in conformity with the Uniform Principles and Model Account Formats promulgated by the National Fiduciary Accounting Project shall be considered as an appropriate manner of presenting a fiduciary account. *See* ~~ALI-ABA Monograph, Whitman, Brown and Kramer, Fiduciary Accounting Guide (2nd edition 1990)~~ English and Whitman, Fiduciary Accounting and Trust Administration Guide (ALI-ABA 2d ed. 2008).

Historical Note: This Comment was revised in 2010. The sentence "Nor does this section require that information be given to beneficiaries not born within 30 days of the personal representative's appointment, including children born by posthumous conception," was added on account of the approval in 2008 of provisions relating to children born of assisted reproductive technology.

PART 9

SPECIAL PROVISIONS RELATING TO DISTRIBUTION

SECTION 3-912. PRIVATE AGREEMENTS AMONG SUCCESSORS TO DECEDENT BINDING ON PERSONAL REPRESENTATIVE. Subject to the rights of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and

costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing herein relieves trustees of any duties owed to beneficiaries of trusts.

Comment

It may be asserted that this section is only a restatement of the obvious and should be omitted. Its purpose, however, is to make it clear that the successors to an estate have residual control over the way it is to be distributed. Hence, they may compel a personal representative to administer and distribute as they may agree and direct. Successors should compare the consequences and possible advantages of careful use of the power to renounce as described by Article II, Part 11 with the effect of agreement under this section. The most obvious difference is that an agreement among successors under this section would involve transfers by some participants to the extent it changed the pattern of distribution from that otherwise applicable. Differing from a pattern that is familiar in many states, this Code does not subject testamentary trusts and trustees to special statutory provisions, or supervisory jurisdiction. A testamentary trustee is treated as a devisee with special duties which are of no particular concern to the personal representative. ~~Article VII contains optional procedures extending the safeguards available to personal representatives to trustees of both inter vivos and testamentary trusts.~~

Historical Note. This Comment was revised in 2010 to delete a cross-reference to Article VII, which dealt with selected issues of trust law and which was withdrawn due to the approval and widespread enactment of the Uniform Trust Code (2000).

SECTION 3-913. DISTRIBUTIONS TO TRUSTEE.

(a) Before distributing to a trustee, the personal representative may require that the trust be registered if the state in which it is to be administered provides for registration and that the trustee inform the beneficiaries as provided in [Section ~~7-303~~ 813 of the Uniform Trust Code].

(b) If the trust instrument does not excuse the trustee from giving bond, the personal representative may petition the appropriate Court to require that the trustee post bond if he apprehends that distribution might jeopardize the interests of persons who are not able to protect

themselves, and he may withhold distribution until the Court has acted.

(c) No inference of negligence on the part of the personal representative shall be drawn from his failure to exercise the authority conferred by subsections (a) and (b).

Comment

This section is concerned with the fiduciary responsibility of the executor to beneficiaries of trusts to which he may deliver. Normally, the trustee represents beneficiaries in matters involving third persons, including prior fiduciaries. Yet, the executor may apprehend that delivery to the trustee may involve risks for the safety of the fund and for him. For example, he may be anxious to see that there is no equivocation about the devisee's willingness to accept the trust, and no problem of preserving evidence of the acceptance. He may have doubts about the integrity of the trustee, or about his ability to function satisfactorily. The testator's selection of the trustee may have been based on facts which are still current, or which are of doubtful relevance at the time of distribution. If the risks relate to the question of the trustee's intention to handle the fund without profit for himself, a conflict of interest problem is involved. If the risk relates to the ability of the trustee to manage prudently, a more troublesome question is posed for the executor. Is he, as executor, not bound to act in the best interests of the beneficiaries?

In many instances involving doubts of this sort, the executor probably will want the protection of a Court Order. Sections 3-1001 and 3-1002 provide ample authority for an appropriate proceeding in the Court which issued the executor's letters. Absent a court order, the personal representative should consider demanding that the trustee notify the trust beneficiaries of the distribution as authorized by subsection (a). States that have not enacted the Uniform Trust Code should substitute a reference to their local statute on a trustee's duty to keep the beneficiaries informed.

In other cases, however, the executor may believe that he may be adequately protected if the acceptance of the trust by the devisee is unequivocal, or if the trustee is bonded. The purpose of this section is to make it clear that it is proper for the executor to require the trustee to register the trust and to notify beneficiaries before receiving distribution. Also, the section complements ~~Section 7-304~~ Section 7-102 of the Uniform Trust Code by providing that the personal representative may petition an appropriate Court to require that the trustee be bonded.

Status of testamentary trustees under the Uniform Probate Code. Under the Uniform Probate Code, the testamentary trustee by construction would be considered a devisee, distributee, and successor to whom title passes at time of the testator's death even though the will must be probated to prove the transfer. The informally probated will is conclusive until set aside and the personal representative may distribute to the trustee under the informally probated will or settlement agreement and the title of the trustee as distributee represented by the instrument or deed of distribution is conclusive until set aside on showing that it is improper. Should the informally probated will be set aside or the distribution to the trustee be shown to be improper, the trustee as distributee would be liable for value received but purchasers for value from the trustee as distributee under an instrument of distribution would be protected. Section 1-201's definition of "distributee" limits the distributee liability of the trustee and substitutes that of the

trust beneficiaries to the extent of distributions by the trustee.

As a distributee as defined by 1-201, the testamentary trustee or beneficiary of a testamentary trust is liable to claimants like other distributees, would have the right of contribution from other distributees of the decedent's estate and would be protected by the same time limitations as other distributees (3-1006).

Incident to his standing as a distributee of the decedent's estate, the testamentary trustee would be an interested party who could petition for an order of complete settlement by the personal representative or for an order terminating testate administration. He also could appropriately receive the personal representative's account and distribution under a closing statement. As distributee he could represent his beneficiaries in compromise settlements in the decedent's estate which would be binding upon him and his beneficiaries. *See* Section 3-912.

The general fiduciary responsibilities of the testamentary trustee are not altered by the Uniform Probate Code and the trustee continues to have the duty to collect and reduce to possession within a reasonable time the assets of the trust estate including the enforcement of any claims on behalf of the trust against prior fiduciaries, including the personal representative, and third parties.

2010 Technical Amendment: By technical amendment, cross-references in this section to Article VII of this Code were replaced by references to comparable provisions of the Uniform Trust Code (2000) and the Comment was revised accordingly.

SECTION 3-915. DISTRIBUTION TO PERSON UNDER DISABILITY.

(a) A personal representative may discharge his obligation to distribute to any person under legal disability by distributing in a manner expressly provided in the will.

(b) Unless contrary to an express provision in the will, the personal representative may discharge his obligation to distribute to a minor or person under other disability as authorized by Section 5-104 or any other statute. If the personal representative knows that a conservator has been appointed or that a proceeding for appointment of a conservator is pending, the personal representative is authorized to distribute only to the conservator.

(c) If the heir or devisee is under disability other than minority, the personal representative is authorized to distribute to:

(1) an attorney in fact who has authority under a power of attorney to receive

property for that person; or

(2) the spouse, parent or other close relative with whom the person under disability resides if the distribution is of amounts not exceeding [$10,000] a year, or property not exceeding ~~[$10,000~~ $50,000] in value, unless the court authorizes a larger amount or greater value.

Persons receiving money or property for the disabled person are obligated to apply the money or property to the support of that person, but may not pay themselves except by way of reimbursement for out-of-pocket expenses for goods and services necessary for the support of the disabled person. Excess sums must be preserved for future support of the disabled person. The personal representative is not responsible for the proper application of money or property distributed pursuant to this subsection.

Comment

Section 5-104, which is referred to in subsection (a), is especially important as a possible source of authority for a valid discharge for payment or distribution made on behalf of a minor.

2010 Amendment: The value of property that can be distributed under subsection (c)(2) to the spouse, parent or other close relative with whom the person under disability resides was increased from $10,000 to $50,000 to account for inflation that has occurred since the Uniform Probate Code was originally approved in 1969. The The amount that can be distributed per year under subsection (c)(1) to the spouse, parent or other close relative with whom the person under disability resides was not increased in order to conform the the $10,000 limit in subsection (c)(1) to the comparable limit in Section 5-104.

ARTICLE V

~~PROTECTION OF PERSONS UNDER DISABILITY AND THEIR PROPERTY~~

THE UNIFORM GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT (1997)

~~The following free-standing Acts are associated with Article V:~~

~~Uniform Guardianship and Protective Proceedings Act (1997)~~

~~Article V, Parts 1 through 4, have also been adopted as the Uniform Guardianship and Protective Proceedings Act (1997).~~

~~Uniform Durable Power of Attorney Act~~

~~Article V, Part 5, has also been adopted as the Uniform Durable Power of Attorney Act.~~

~~Adoption of Uniform Guardianship and Protective Proceedings Act (1997)~~

Reproduced in this article is the Uniform Guardianship and Protective Proceedings Act (1997), which replaces the 1982 Act of the same name.

Article V is a codification of the Uniform Guardianship and Protective Proceedings Act (1997). Former Article V, Part 5, which contained the Uniform Durable Power of Attorney Act, was withdrawn upon approval of the Uniform Power of Attorney Act (2006), which is codified in this Code at Article 5B.

Similar to the 1982 Act, the 1997 revision can be enacted either as a free-standing act or as part of the Uniform Probate Code.

Approval of the 1997 Act necessitated technical amendments elsewhere in the UPC, consisting of correction of definitions and cross-references. The following sections were amended: 1-201, 3-303, 3-308, and 3-915.

In addition, UGPPA (1997) Sections 103 (Supplemental General Principles of Law Applicable) and 109 (Practice in Court) are not incorporated into the UPC because they duplicate provisions in UPC Article 1. To preserve comparable numbering of sections between UPGGA (1997) and the UPC, UPC Sections 5-103 and 5-109 are titled "Reserved."

Separate from this Article is the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007). That Act is codified in this Code at Article 5B. Because this Article also dealt with jurisdiction and related issues, upon the addition of Article 5B to this Code, conforming amendments to this Article were necessary. See Sections 5-106, 5-107, 5-432, 5-433, and 5-434.

PREFATORY NOTE ~~TO PARTS 1-4~~

The topics covered in UPC Article V~~, Parts 1-4~~ include minors' guardianships, adults' guardianships, and conservatorships of both minors and adults. Part 1 contains definitions and general provisions applicable to both guardianships and conservatorships, including provisions that relate to the office of guardian and conservator and to the jurisdiction of the courts, many of which were previously scattered throughout Article V. Part 2 contains provisions on guardianships for minors, whether by the court or the parent. Part 3 contains provisions for

guardianships for incapacitated persons, who will most often be adults, but who may also be minors whose need for guardianship is unrelated to their age. Part 4 covers conservatorships and other protective arrangements for both minors and adults, including the procedures for appointment of conservators and the process for implementing a protective arrangement.

The Code's provisions on guardianship and conservatorship codified in ~~Parts 1-4 of~~ this article are copied from the 1997 revision of the Uniform Guardianship and Protective Proceedings Act (UGPPA). These provisions replace the 1982 UGPPA, which in turn replaced the guardianship and protective provisions of the original UPC.

The 1997 revisions were precipitated by a two year study by the A.B.A. Senior Lawyers Division Task Force on Guardianship Reform. The Task Force consisted of representatives not only of the Senior Lawyers Division, but also of other A.B.A. entities, including the Real Property Probate and Trust Law Section and the Commissions on Legal Problems of the Elderly and Mental and Physical Disability Law, as well as a variety of other groups interested in guardianship, such as AARP and the National Senior Citizens Law Center. The Task Force generated a report that served as the starting point for the redrafting of the Uniform Guardianship and Protective Proceedings Act. The drafting committee of the Uniform Law Commissioners began the drafting of the revision in 1995. The revised Act was approved at the 1997 Annual Meeting of the National Conference of Commissioners on Uniform State Laws, with amendments to the provisions on appointment of counsel approved at the 1998 Annual Meeting of the National Conference of Commissioners on Uniform State Laws, and subsequently approved by the A.B.A. House of Delegates at its 1998 annual meeting. The National Conference, at its 1998 Annual Meeting, also approved the 1997 Act for integration into the UPC.

Significant developments in the areas of guardianship and conservatorship occurred in the late 1980s and early 1990s, as states revised their guardianship and conservatorship statutes. The 1982 UGPPA, with its emphasis on limited guardianship and conservatorship, was groundbreaking in its support of autonomy. The 1997 revision builds on this and on developments occurring in the states, by providing that guardianship and conservatorship should be viewed as a last resort, that limited guardianships or conservatorships should be used whenever possible, and that the guardian or conservator should consult with the ward or protected person, to the extent feasible, when making decisions.

The 1997 revision makes other substantial changes. The following discussion summarizes those of most significance.

The 1997 revision bases the definition of incapacitated person on functional abilities, recognizing that a person may have the capacity to do some things while needing help with others. Before a guardian may be appointed for an adult or a minor for reasons other than age, the individual must be determined to be incapacitated, that is, the individual must be "unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance." Section 5-102(4)). If assistive technology is available that may enable the individual to receive and evaluate information or to make or communicate decisions, then the individual may not be an "incapacitated person."

A parent or spouse may appoint a guardian to take office immediately upon the need. Parts 2 and 3 contain provisions for a parental or spousal appointment of a "standby" guardian: by a parent for a minor child under Part 2 and by a parent for an adult disabled child or by a spouse for an incapacitated spouse under Part 3. The addition of these provisions was spurred by the increasing number of single-parent families in the United States as well as by the recognition that adults are living longer and may need assistance in their later lives. The standby provisions are available in a wide variety of situations where there is a need for a guardian to step in immediately upon the occurrence of an event, without seeking prior court approval. The appointment may be used by all parents of minor children as well as for the spouse of an incapacitated adult or the parent of an adult disabled child.

A guardian or a conservator should be appointed only if there are no other lesser restrictive alternatives that will meet the respondent's needs. The Code encourages the use of alternatives to guardianship or conservatorship and views the appointment of a guardian or a conservator as a last resort. The court may not appoint a guardian for an incapacitated person unless the court makes a finding that the respondent's needs cannot be met by any less restrictive means. Section 5-311(a)(1)(B). The visitor appointed by the court to investigate the appropriateness of the guardianship or conservatorship requested for an adult, must investigate whether alternatives are available and report this to the court. Sections 5-305(e), 5-406(e).

Additionally, procedural steps are specified which must be met before a guardian for an incapacitated person or conservator may be appointed or a protective order entered. Specific information is required in the petition (Sections 5-304, 5-403), the respondent must be personally served with the notice of the hearing and the petition at least fourteen days in advance of the hearing and others must receive copies (Sections 5-113, 5-309, 5-404), and the court must appoint a visitor (Sections 5-305, 5-406). Enacting jurisdictions must choose between requiring counsel if requested by the respondent, recommended by the visitor**,** or if the court otherwise orders (Alternative 1 to Sections 5-305(b) and 5-406(b)), or requiring counsel for the respondent in all cases (Alternative 2 to Sections 5-305(b) and 5-406(b)). In guardianships, the court must order a professional evaluation of the respondent if the respondent requests one or the court determines one to be appropriate (Section 5-306), while in a conservatorship proceeding, the court may order a professional evaluation. Section 5-406(f). The respondent and proposed guardian or conservator must attend the hearing unless excused by the court for good cause. Sections 5-308(a),5-408(a).

The committee which drafted UGPPA (1997) preferred Alternative 1 to Sections 5-305(b) and 5-406(b). Under the committee's preferred process, a visitor is appointed in every proceeding for appointment of a guardian under Part 3, with counsel appointed on the respondent's request, the visitor's recommendation, or the court's determination that a counsel is needed. *See* Section 5-305. Concomitantly, in Part 4, a visitor is appointed in every case where a petition for appointment of conservator is filed and may be appointed when a protective arrangement is sought and the respondent is not already represented by counsel. *See* Section 5-406.

Alternative 2 for Sections 5-305(b) and 5-406(b) was included at the request of the American Bar Association (A.B.A.) Commission on Legal Problems of the Elderly.

Emphasized throughout ~~Parts 1-4 of~~ this article are the concepts of limited guardianship and limited conservatorship. Only when no alternative to guardianship or conservatorship is available should the court create a guardianship or conservatorship. Courts are directed to tailor the guardianship or conservatorship to fit the needs of the incapacitated person and only remove those rights that the incapacitated person no longer can exercise or manage. Sections 5-311(b), 5-409(b). If an unlimited guardianship or conservatorship is requested, the petition must state why a limited guardianship or conservatorship is not being sought. Sections 5-304(b)(8), 5-403(c)(3). The guardian or conservator must take the views of the ward or protected person into account when making decisions. The guardian must maintain sufficient contact with the ward so that the guardian knows of the capabilities, limitations, needs and opportunities of the ward (Sections 5-207(b)(1), 5-314(b)(1)). The guardian or conservator must encourage the ward or protected person to participate in decisions, to act on his or her own behalf, and to develop or regain capacity to manage personal or financial affairs. Sections 5-314(a), 5-418(b). The guardian must consider the ward's expressed desires and personal values when making decisions (Section 5-314(a)), while the conservator, in making decisions with respect to the protected person's estate plan, or the court, in deciding on a protective arrangement, must rely, when possible, on the decision the protected person would have made. Sections 5-411(c), 5-412(b).

The position of the drafting committee is that appointment of counsel should not be mandated in every guardianship under Part 3 or every conservatorship under Part 4. Alternative provisions are instead provided. Sections 5-305(b) and 5-406(b). The enacting jurisdiction must choose between requiring counsel only when requested by the respondent, recommended by the visitor, or otherwise ordered by the court, or requiring counsel for the respondent in all cases. The appointment of counsel is in addition to the requirement that a visitor be appointed, a requirement in all proceedings where a guardian for an incapacitated person is requested or where the appointment of a conservator is sought. (Sections 5-305(a) and 5-406(a)).

The burden of proof in establishing a guardianship or conservatorship is clear and convincing evidence (*see* Sections 5-311, 5-401) while the burden of proof for terminating a guardianship or conservatorship is prima facie evidence. *See* Sections 5-318(c), 5-431(d). This distinction was made in recognition that a guardianship or conservatorship, as vehicles that take away from individuals their rights, should require a higher burden of proof (and thus more protections) to establish than should be required to restore rights to an individual.

Monitoring of guardianships and conservatorships is critical. Guardians must present a written report to the court within thirty days of appointment and annually thereafter (Section 5-317), while the conservator is required to file a plan and an inventory with the court within sixty days of appointment and annual reports thereafter. Sections 5-418(c), 5-419, 5-420. Both the guardian and the conservator, in their reports, make recommendations as to whether the guardianship or conservatorship should be continued or modified. The court is required to establish a monitoring system. Sections 5-317(c), 5-420(d). The court may use visitors as part of the monitoring system. Sections 5-317(b), 5-420(c). Suggestions on what an effective monitoring system should contain can be found in Sally Balch Hurme, *Steps to Enhance Guardianship Monitoring* (A.B.A. 1991).

PART 1
GENERAL PROVISIONS

SECTION 5-101. SHORT TITLE. ~~Parts 1-4 of this~~ This Article may be cited as the Uniform Guardianship and Protective Proceedings Act.

SECTION 5-102. DEFINITIONS. In ~~Parts 1-4 of~~ this Article:

(1) "Conservator" means a person who is appointed by a court to manage the estate of a protected person. The term includes a limited conservator.

(2) "Court" means the [designate appropriate court].

(3) "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent or spouse, or by the court. The term includes a limited, emergency, and temporary substitute guardian but not a guardian ad litem.

(4) "Incapacitated person" means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.

(5) "Legal representative" includes a representative payee, a guardian or conservator acting for a respondent in this State or elsewhere, a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary, and an agent designated under a power of attorney, whether for health care or property, in which the respondent is identified as the principal.

(6) "Minor" means an unemancipated individual who has not attained [18] years of age.

(7) "Parent" means a parent whose parental rights have not been terminated.

(8) "Protected person" means a minor or other individual for whom a conservator has been appointed or other protective order has been made.

(9) "Respondent" means an individual for whom the appointment of a guardian or conservator other protective order is sought.

(10) "Ward" means an individual for whom a guardian has been appointed.

Comment

The concepts of limited guardian and limited conservator embraced in this article are reflected in the definitions of "guardian" (see paragraph (3)) and "conservator" (see paragraph (1)).

While Part 4 authorizes the appointment of a conservator with limited powers, no provision is made for the appointment of an emergency or temporary conservator, a type of conservatorship usually denoting an appointment of limited duration. In situations where other statutes might permit the appointment of a temporary, emergency or special conservator, Part 4 instead allows the Court to appoint a "master." *See* Sections 5-405(b), 5-406(g) and 5-412(c). This is a departure from the 1982 UGPPA, which provided for the appointment of special conservators, but not of temporary or emergency conservators. *See, e.g.,* UPC Section 5-408(c) (1982).

Like the 1982 UGPPA, the 1997 revision allows the appointment of a guardian by a parent or spouse by will or other signed writing, but subjects the appointment to significantly different requirements. *See* Sections 5-202 and 5-302. The definition of guardian (*see* paragraph (3)) includes a limited guardian, an emergency guardian, or a temporary substitute guardian. *See* Sections 5-204, 5-311, 5-312, and 5-313. There is a distinction between an emergency guardian and a temporary substitute guardian. *Compare* Sections 5-312 and 5-313. Guardian ad litem is specifically excluded from the definition of guardian, as a guardian ad litem is generally viewed as having a separate and limited role in the proceedings.

A finding that a person is an "incapacitated person" is required before a guardian may be appointed for reasons other than that the respondent is a minor. The definition of "incapacitated person" (*see* paragraph (4)) requires that the respondent have an inability to receive and evaluate information or to make or communicate decisions to the point that the person's ability to care for his or her health, safety or self is compromised. This definition emphasizes the importance of functional assessment and recognizes that the more appropriate measure of a person's incapacity is a measurement of the person's abilities. Like other areas of the law where the concept of capacity is used, the required incapacity for the appointment of a guardian is no longer considered an all or nothing proposition but instead it is recognized as having varying degrees. This definition is designed to work with the concepts of least restrictive alternative and limited guardianship or conservatorship-only removing those rights that the incapacitated person cannot exercise, and not establishing a guardianship or conservatorship if a lesser restrictive alternative exists. *See* Sections 5-311 and 5-409 for examples. These concepts are carried throughout the article.

The definition of incapacitated person differs significantly from the definition in the 1982 UGPPA. The requirement that the person be unable to make "responsible" decisions is

deleted, as is the requirement that the person have an impairment by reason of a specified disability or other cause, a requirement which may have led the trier of fact to focus unduly on the type of the respondent's disabling condition, as opposed to the respondent's actual ability to function. The revised definition is based on recommendations of the 1988 Wingspread conference on guardianship reform, the report of which should be referred to for additional background. *See Guardianship: An Agenda For Reform* 15 (A.B.A. 1989). *See also* Stephen J. Anderer, *Determining Competency in Guardianship Proceedings* (A.B.A. 1990). Courts seeking guidance on particular factors to consider should also consult the California Due Process in Competency Determination Act, California Probate Code Section 811.

The definition of "legal representative" (*see* paragraph (5)) expands beyond the traditional lawyer to include as well those who act in a legally recognized representative capacity, such as a representative payee, trustee, custodian, and agent, as well as those who hold Court appointments, such as the traditional guardian and conservator. This definition serves to identify those persons who must receive notice of both guardianship and protective proceedings, the lawyer, if any, as well as those others holding nominated positions. *See* Sections 5-304, 5-403.

The definition of "minor" (paragraph (6)) excludes a minor who has been emancipated. The effect of this definition is to preclude the appointment of either a guardian or conservator for an emancipated minor unless the appointment is made for reasons other than the minor's age. A guardianship or conservatorship for a minor also terminates upon the minor's emancipation. *See* Sections 5-210, 5-431. Under the 1982 UGPPA, the appointment of a guardian terminated upon the minor's marriage but not other emancipation, and the appointment of a conservator could continue until the minor attained age 21, without regard to marriage or other emancipating event.

The drafters of the 1997 revision intentionally chose not to define parent (other than as those whose parental rights have not been terminated), instead leaving the definition up to the enacting state's probate code. Thus, the definition of "parent" (see paragraph (7)) may or may not include a step-parent. A parent whose parental rights have been terminated, however, is not a parent as so defined even if the parent is allowed to inherit from the child under the enacting state's probate code. Because such a parent has been found to be unfit, the parent is denied a continued role in determining the child's custody, including the appointment of a guardian, whether by parental or Court appointment. *See* Sections 5-202, 5-204, 5-205 and 5-403.

The person who is the subject of a proceeding is referred to as the "respondent." *See* paragraph (9). Once a guardianship is established, the incapacitated person or minor is referred to as the "ward." *See* paragraph (10). Once the conservatorship is established or other protective order entered, the respondent who was the subject of the proceeding is referred to as the "protected person." *See* paragraph (8). A person for whom a guardian and a conservator has been appointed or other protective order made is both a ward and a protected person.

SECTION 5-104. FACILITY OF TRANSFER.

(a) Unless a person required to transfer money or personal property to a minor knows

that a conservator has been appointed or that a proceeding for appointment of a conservator of the estate of the minor is pending, the person may do so, as to an amount or value not exceeding [~~$5,000~~ $10,000] a year, by transferring it to:

(1) a person who has the care and custody of the minor and with whom the minor resides;

(2) a guardian of the minor;

(3) a custodian under the Uniform Transfers To Minors Act or custodial trustee under the Uniform Custodial Trust Act; or

(4) a financial institution as a deposit in an interest-bearing account or certificate in the sole name of the minor and giving notice of the deposit to the minor.

(b) A person who transfers money or property in compliance with this section is not responsible for its proper application.

(c) A guardian or other person who receives money or property for a minor under subsection (a)(1) or (2) may only apply it to the support, care, education, health, and welfare of the minor, and may not derive a personal financial benefit except for reimbursement for necessary expenses. Any excess must be preserved for the future support, care, education, health, and welfare of the minor, and any balance must be transferred to the minor upon emancipation or attaining majority.

Comment

When a minor annually receives from a specific payer property or cash of ~~$5,000~~ $10,000 or less, in all likelihood it will be expended for the ward's support within the year and it would be cumbersome and unnecessarily expensive to require the establishment of a conservatorship to handle the payments. This section allows the person required to transfer the property to do so in a more expeditious way.

The person required to transfer the property has the option of making the transfer to the person having care and custody of the minor when the minor resides with that person, or may instead make payments to the minor's guardian, a custodian under the Uniform Transfers to

Minors Act or the custodial trustee under the Uniform Custodial Trust Act, or to a financial institution where an interest-bearing account or certificate in only the minor's name is located.

The protections of this section do not apply if the person required to make the transfer knows that a conservator has been appointed or that there is a proceeding pending for the appointment of a conservator. Consequently, the fact that a guardian has been appointed does not require that payment be made to that guardian. A guardian of a minor may receive payments but has no power to compel payment from a third person. *See* Section 5-208. Should a guardian desire such authority, the appropriate course is for the guardian to petition the Court to be appointed as conservator.

Although the person making the transfer has no duty or obligation to see that the money or property is properly applied, this section is a default statute and does not override any specific provisions in a will or trust instrument relating to monies to be paid to a minor. In those cases, the duty of the person making the transfer would be dictated by the terms of the instrument. This section also does not override the provisions of other statutes in the enacting jurisdiction such as the Uniform Transfers to Minors Act, which allow payment by alternative means based on the size of the minor's estate, as opposed to this section, which allows payment based on the annual payment obligation of the person making the payment.

The section limits the use of the money or property to the minor's support, care, education, health or welfare. Only necessary expenses may be reimbursed from this money or property, with the balance being preserved for the minor's future education, health, support, care or welfare. This section is not applicable to child support payments made pursuant to a Court order because child support payments are made to another for the minor's benefit.

While a recipient of funds is not a fiduciary in the normally understood sense of a person appointed by the Court or by written instrument, a recipient under this section is subject to fiduciary obligations. Under subsection (c), the recipient may not derive any personal benefit from the transfer and must preserve funds not used for the minor's benefit and transfer any balance to the minor upon emancipation or attainment of majority. Should the recipient misapply the funds or property transferred, the recipient, given this fiduciary role, would be liable for breach of trust.

The person receiving the monies may consider, in appropriate cases, the purchase of an annuity or some other financial arrangement whereby payout occurs at a time subsequent to the minor's attainment of majority. But to provide more certainty for the transaction, the recipient should consider petitioning the Court under Section 5-412 for approval of the purchase as a protective arrangement.

This section is derived from the UGPPA (1982) Section 1-106 (UPC Section 5-101 (1982).

2010 Amendment: The amount that can be paid annually was increased from $5,000 to $10,000 to account for inflation and to conform this Section to Section 3-915.

SECTION 5-106. SUBJECT-MATTER JURISDICTION. ~~Parts 1-4 of this~~

(a) This Article ~~apply~~ applies to~~, and the court has jurisdiction over,~~ guardianship and ~~related proceedings for individuals domiciled or present in this State,~~ protective proceedings for individuals ~~domiciled in or having property located in this State,~~ over whom the court has jurisdiction, and property coming into the control of a guardian or conservator who is subject to the laws of this ~~State~~ state.

(b) Except to the extent the guardianship is subject to the [insert citation to Uniform Child Custody Jurisdiction and Enforcement Act], the court of this state has jurisdiction over guardianship for minors domiciled or present in this state. The court of this state has jurisdiction over protective proceedings for minors domiciled in or having property located in this state.

(c) The court of this state has jurisdiction over guardianship and protective proceedings for an adult individual as provided in the [insert citation to Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act].

Comment

This section provides a clear delineation of jurisdiction over guardianships and protective proceedings. Under the Act, jurisdiction over an individual's person is based on the person's domicile or person's physical location while jurisdiction over a person's property is based on the person's domicile or the property's location. Consequently, location of property alone does not grant a Court the authority to appoint a guardian for the person who owns the property. The person must also be domiciled or physically located in the jurisdiction. Nor does the physical location of a person alone grant the Court authority to appoint a conservator or enter another protective order. The person must also be domiciled in or have property located in the jurisdiction.

This section should be read in conjunction with Sections 5-107 and 5-108. Section 5-107 allows for transfer of jurisdiction to a Court in another state or foreign country, whether or not the Court in the other governmental unit originally had jurisdiction to appoint a guardian or conservator or make another protective order. Section 5-108, which contains the rules on venue, acts as a restraint on the expansive jurisdiction granted under this section. While the presence of property alone grants the Courts of a particular state the jurisdiction to appoint a conservator, should the respondent be a resident of a particular county within that state, only that county has authority to make the appointment. Also, while physical presence alone generally grants the Courts of a particular place jurisdiction to appoint a guardian, only the place where an incapacitated person permanently resides has authority to appoint a guardian on other than an emergency or temporary basis. Physical presence alone merely grants the Court of the person's

location the authority to appoint an emergency or temporary guardian.

This section is pre-empted in part by the Parental Kidnaping Prevention Act (PKPA) which, despite its name, is a comprehensive federal statute regulating all types of interstate custody issues for minors, including appointment of guardians. Under PKPA, the Court supervising a minor's guardianship will normally lose jurisdiction six months after the minor's removal from the state, even if the Court was not consulted about the transfer. The federal statute, however, does not apply with respect to proceedings relating to property or to any proceeding involving an adult. For a discussion of the impact of PKPA and related legislation on minors' guardianships, *see* David M. English, *Minors' Guardianship in an Age of Multiple Marriage*, 29 Inst. on Est. Plan. ¶ 500 *et seq* (1995).

SECTION 5-107. TRANSFER OF JURISDICTION.

(a) Except as otherwise provided in subsection (b), the following rules apply:

(1) After the appointment of a guardian or conservator entry of another protective order, the court making the appointment or entering the order may transfer the proceeding to a court in another [county] in this ~~State~~ state or to another ~~State~~ state if the court is satisfied that a transfer will serve the best interest of the ward or protected person.

~~(b)~~(2) If a guardianship or protective proceeding is pending in another ~~State~~ state or foreign country and a petition for guardianship or protective proceeding is filed in a court in this ~~State~~ state, the court in this ~~State~~ state shall notify the original court and, after consultation with the original court, assume or decline jurisdiction, whichever is in the best interest of the ward or protected person.

~~(c)~~(3) A guardian, conservator, or like fiduciary appointed in another ~~State~~ state may petition the court for appointment as a guardian or conservator in this ~~State~~ state if venue in this ~~State~~ state is or will be established. The appointment may be made upon proof of appointment in the other ~~State~~ state and presentation of a certified copy of the portion of the court record in the other ~~State~~ state specified by the court in this ~~State~~ state. Notice of hearing on the petition, together with a copy of the petition, must be given to the ward or protected

person, if the ward or protected person has attained 14 years of age, and to the persons who would be entitled to notice if the regular procedures for appointment of a guardian or conservator under this ~~Article~~ [article] were applicable. The court shall make the appointment in this ~~State~~ state unless it concludes that the appointment would not be in the best interest of the ward or protected person. ~~Upon~~ On the filing of an acceptance of office and any required bond, the court shall issue appropriate letters of guardianship or conservatorship. ~~Within~~ Not later than 14 days after an appointment, the guardian or conservator shall send or deliver a copy of the order of appointment to the ward or protected person, if the ward or protected person has attained 14 years of age, and to all persons given notice of the hearing on the petition.

(b) This section does not apply to a guardianship or protective proceeding for an adult individual that is subject to the transfer provisions of [insert citation to Article 3 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act].

Comment

This section is based on South Dakota Codified Laws Sections 29A-5-109 and 29A-5-114. This section sets out the process for transferring cases to another county, state, or foreign country and the procedures by which a case transferred in from another state or foreign country is to be received. In the case of a guardianship for a minor under Part 2, the Uniform Child Custody Jurisdiction and Enforcement Act should be consulted for additional rules on when a case may be transferred and the procedures to be used when more than one Court is involved in making these determinations.

This section, and Section 5-108, which addresses the appropriate venue for the appointment of a guardian or conservator, are designed to limit forum shopping in which some guardians and conservators have engaged and also assist the Courts in keeping track of guardianships and conservatorships. Some guardians and conservators have attempted to thwart a Court's authority by moving the ward or protected person to another county, state, or foreign country. The standard for transferring a guardianship or protective proceeding under this section is always the best interest of the ward or protected person.

The use of a best interest of the ward or protected person standard may be differentiated for adults and minors. When dealing with an adult, the personal values and current and past expressed desires of the ward or protected person should be considered. To the extent that these personal values and expressed desires are unknown, the guardian or conservator should make an effort to learn the ward's or protected person's values and ask about the ward's or protected

person's desires. Considering the personal values and expressed desires of the ward or protected person is also a priority for decision making by guardians and conservators in general. *See* Sections 5-314(a), 5-411(c), and 5-418(b).

Once the guardianship is established, the Court does not lose jurisdiction because of a change in location of the guardian or the ward. *See* Sections 5-201 and 5-301.

In the case of intra-state transfer of proceedings, transfers should be made only when the best interest of the ward or protected person will be advanced, and care should be used by the Court to determine that this is not an attempt to secure more favorable venue for other reasons. Under subsection (a), Courts should be particularly cognizant in minors' guardianships of attempts to use such transfers to circumvent school district assignments or tuition payment rules.

When a guardianship or protective proceeding is started in one state and a guardianship or conservatorship already exists in another state, the Courts from those two states should communicate with each other. For purposes of subsection (b), the original Court is the Court where the petition is first filed, not necessarily where the appointment was first made. The second Court, only after consultation with the first Court, should take or decline jurisdiction only if doing so is in the best interest of the ward or protected person. The burden is on the second Court to contact the original Court because the second Court would be informed of the existence of the guardianship or conservatorship as well as the contents of the petition and have access to other information of which the original Court most likely would be unaware. In making this determination, the second Court would ordinarily grant deference to the determination of the original Court, but the granting of such deference is not specifically required by this section nor should such deference be given when the determination of the original Court is clearly contrary to the current best interest of the ward or protected person.

Should a transfer of jurisdiction be appropriate, subsection (c) provides a simplified procedure for transferring the case. The subsection assumes that the appointment in the prior jurisdiction is appropriate and that there is consequently no need to duplicate the documentation and evaluations required in the original proceeding. The establishment of the new guardianship or protective proceeding is not automatic, however. In addition to the authority to decide that jurisdiction should not be transferred, the Court may also determine that the appointment is no longer in the best interest of the ward or protected person. The procedure made available in subsection (c) will most often be used for the appointment of a guardian when both the guardian and ward no longer reside in the state of the original appointment. The procedure will also prove useful when the appointment of an ancillary conservator is needed to administer property located in a state other than the state of the protected person's domicile. The appointment of a guardian in the second state would be ineffective in such circumstances because a guardian does not have general authority to manage the ward's property. Should a guardian discover that the ward has property located in another state, the guardian should explore the possibility of being appointed conservator in that or state.

SECTION 5-108. VENUE.

(a) Venue for a guardianship proceeding for a minor is in the [county] of this State in

which the minor resides or is present at the time the proceeding is commenced.

(b) Venue for a guardianship proceeding for an incapacitated person is in the [county] of this State in which the respondent resides and, if the respondent has been admitted to an institution by order of a court of competent jurisdiction, in the [county] in which the court is located. Venue for the appointment of an emergency or a temporary substitute guardian of an incapacitated person is also in the [county] in which the respondent is present.

(c) Venue for a protective proceeding is in the [county] of this State in which the respondent resides, whether or not a guardian has been appointed in another place or, if the respondent does not reside in this state, in any [county] of this State in which property of the respondent is located.

(d) If a proceeding under ~~Parts 1-4 of~~ this Article is brought in more than one [county] of this State, the court of the [county] in which the proceeding is first brought has the exclusive right to proceed unless that court determines that venue is properly in another court or that the interests of justice otherwise require that the proceeding be transferred.

Comment

This section consolidates but otherwise generally follows the venue provisions of the 1982 UGPPA except that it allows for the appointment of a permanent guardian for an incapacitated person only in the place where the incapacitated person resides. A Court in the place where the incapacitated person is currently located but not a resident is not prohibited from taking action, however, such action is limited to the appointment of an emergency or temporary substitute guardian. This revision was made in direct response to the growing number of cases where older individuals have been moved across state lines and a guardianship then used to confirm custody rights in the new state. The drafters concluded that while it is always appropriate for a Court on the scene to issue temporary orders to protect the person's welfare, only the Court in the place where the person has the most significant contacts should be allowed to make what could turn out to be a permanent custody order. This requirement that only a Court in the place where the respondent resides may appoint a permanent guardian applies not only to proceedings brought in different states, but also to multiple proceedings brought in different counties within a particular state. Subsection (d) provides that when there is more than one proceeding brought within a state, the first Court decides where venue is appropriate. The first Court does not automatically proceed; it should decide where proper venue lies and enter an order accordingly.

While the venue provisions are generally consolidated in this section, there is one exception. The venue provisions for the appointment of a guardian by a parent or spouse without prior Court approval are contained in Sections 5-202 and 5-303. However, the subsequent petition to the Court to confirm the parental or spousal appointment is subject to the venue requirements of this section.

SECTION 5-113. NOTICE.

(a) Except as otherwise ordered by the court for good cause, if notice of a hearing on a petition is required, other than a notice for which specific requirements otherwise provided, the petitioner shall give notice of the time and place of the hearing to the person to be notified. Notice must be given in compliance with [insert the applicable rule of civil procedure], at least 14 days before the hearing.

(b) Proof of notice must be made before or at the hearing and filed in the proceeding.

(c) A notice under ~~Parts 1-4 of~~ this Article must be given in plain language.

Comment

Notice may be provided by mail as well as by private courier or delivery service. If the adopting states's rules allow, a faxed copy of the notice may be an appropriate method of providing notice. This section does not supersede specific notice requirements provided elsewhere in this article. Special notice requirements apply to a petition for the appointment of an emergency guardian and to service on the respondent of a petition for the appointment of a guardian or conservator or other protective order. *See* Sections 5-309, 5-312, and 5-404. The requirement of at least fourteen days' prior notice is copied from the 1982 UGPPA. A fourteen day prior notice provision has also been part of the UPC, including its provisions on guardianships and protective proceedings, since the inception of the Code. Under this section, notice should be given using the method of notice provided in the enacting jurisdiction's applicable rule of civil procedure. However, the time limit for notice contained in subsection (a) should be applied, even if different from that in the state's applicable rule.

Subsection (c) provides that the notice be in plain language. The requirement that all notices be given in plain language is based on a recommendation of the Wingspread conference on guardianship reform. *See Guardianship: An Agenda for Reform* 9 (A.B.A. 1989). Although this section does not require it, if English is not the respondent's primary language, best practice and due process would direct that a copy of the notice be provided in the respondent's primary language.

PART 3

GUARDIANSHIP OF INCAPACITATED PERSON

SECTION 5-305. JUDICIAL APPOINTMENT OF GUARDIAN: PRELIMINARIES TO HEARING.

(a) Upon receipt of a petition to establish a guardianship, the court shall set a date and time for hearing the petition and appoint a [visitor]. The duties and reporting requirements of the [visitor] are limited to the relief requested in the petition. The [visitor] must be an individual having training or experience in the type of incapacity alleged.

ALTERNATE PROVISIONS ON APPOINTMENT OF A LAWYER

ALTERNATIVE 1

[(b) The court shall appoint a lawyer to represent the respondent in the proceeding if:

(1) requested by the respondent;

(2) recommended by the [visitor]; or

(3) the court determines that the respondent needs representation.]

ALTERNATIVE 2

[(b) Unless the respondent is represented by a lawyer, the court shall appoint a lawyer to represent the respondent in the proceeding.]

END OF ALTERNATE PROVISIONS

(c) The [visitor] shall interview the respondent in person and, to the extent that the respondent is able to understand:

(1) explain to the respondent the substance of the petition, the nature, purpose, and effect of the proceeding, the respondent's rights at the hearing, and the general powers and duties of a guardian;

(2) determine the respondent's views about the proposed guardian, the proposed

guardian's powers and duties, and the scope and duration of the proposed guardianship;

(3) inform the respondent of the right to employ and consult with a lawyer at the respondent's own expense and the right to request a court-appointed lawyer; and

(4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, will be paid from the respondent's estate.

(d) In addition to the duties imposed by subsection (c), the [visitor] shall:

(1) interview the petitioner and the proposed guardian;

(2) visit the respondent's present dwelling and any dwelling in which the respondent will live if the appointment is made;

(3) obtain information from any physician or other person who is known to have treated, advised, or assessed the respondent's relevant physical or mental condition; and

(4) make any other investigation the court directs.

(e) The [visitor] shall promptly file a report in writing with the court, which must include:

(1) a recommendation as to whether a lawyer should be appointed to represent the respondent;

(2) a summary of daily functions the respondent can manage without assistance, could manage with the assistance of supportive services or benefits, including use of appropriate technological assistance, and cannot manage;

(3) recommendations regarding the appropriateness of guardianship, including as to whether less restrictive means of intervention are available, the type of guardianship, and, if a limited guardianship, the powers to be granted to the limited guardian;

(4) a statement of the qualifications of the proposed guardian, together with a statement as to whether the respondent approves or disapproves of the guardian, and the

powers and duties proposed or the scope of the guardianship;

(5) a statement as to whether the proposed dwelling meets the respondent's individual needs;

(6) a recommendation as to whether a professional evaluation or further evaluation is necessary; and

(7) any other matters the court directs.

***Legislative Note*:** *Those states that enact Alternative 2 of subsection (b) which requires appointment of counsel for the respondent in all proceedings for appointment of a guardian should not enact subsection (e)(1).*

Comment

Alternative provisions are offered for subsection (b). Alternative 1 was favored by the drafting committee. Alternative 1 relies on an expanded role for the "visitor," who can be chosen or selected to provide the court with advice on a variety of matters other than legal issues. Appointments of a lawyer, nevertheless, is *required* under Alternative 1 when the court determines that the respondent needs representation, or counsel is requested by the respondent or recommended by the visitor.

Alternative 2 is derived from UGPPA (1982) Section 2-203 (UPC Section 5-303 (1982)). It is expected that in states enacting Alternative [2] of subsection (b), counsel will be appointed in virtually all of the cases. Alternative 2 was favored by the A.B.A. Commission on Legal Problems of the Elderly, which attached great significance to expressly making appointment of counsel "mandatory." Therefore, for states which wish to provide for "mandatory appointment" of counsel, Alternative 2 should be enacted.

In Alternative 1 for subsection (b), then, appointment of counsel for an unrepresented respondent is mandated when requested by the respondent, when recommended by the visitor**,** or when the court determines the respondent needs representation. This requirement is in accord with the National Probate Court Standards. *National Probate Court Standards*, Standard 3.3.5 "Appointment of Counsel" (1993), which provides:

(a) Counsel should be appointed by the probate court to represent the respondent when:

(1) requested by an unrepresented respondent;

(2) recommended by a court visitor;

(3) the court, in the exercise of its discretion, determines that the respondent is in need of representation; or

(4) otherwise required by law.

(b) The role of counsel should be that of an advocate for the respondent.

Alternative 1 of subsection (b) follows the National Probate Court Standards, Standard 3.3.5(a)(1) through (a)(3). Alternative 2 perhaps may be said to be in accord with the National Probate Court Standards, Standard 3.3.5(a)(4).

The drafting committee for the 1997 UGPPA ~~(Parts 1-4 of this article)~~ debated at length whether to mandate appointment of counsel or to expand the role of the visitor. The drafting committee concluded that as between the two, the visitor may be more helpful to the court in providing information on a wider variety of issues and concerns, by acting as the eyes and ears of the court as well as determining the respondent's wishes and conveying them to the court. The committee was concerned that including mandatory appointment of counsel would cause many to view the Act as a "lawyer's bill" and thus severely handicap the Act's acceptance and adoption. It is the intent of the committee that counsel for respondent be appointed in all but the most clear cases, such as when the respondent is clearly incapacitated.

For jurisdictions enacting Alternative 1 under subsection (b), the visitor needs to be especially sensitive to the fact that if the respondent is incapacitated, then the respondent may not have sufficient capacity to intelligently and knowingly waive appointment of counsel. A court should err on the side of protecting the respondent's rights and appoint counsel in most cases.

Appointment of a visitor is mandatory (subsection (a)), regardless of which alternative is enacted under subsection (b). The visitor serves as the information gathering arm of the court. The visitor can be a physician, psychologist, or other individual qualified to evaluate the alleged impairment, such as a nurse, social worker, or individual with pertinent expertise. It is imperative that the visitor have training or experience in the type of incapacity alleged. The visitor must individually meet with the respondent, the petitioner and the proposed guardian. The visitor's report must contain information and recommendations to the court regarding the appropriateness of the guardianship, whether lesser restrictive alternatives might meet the respondent's needs, recommendations about further evaluations, powers to be given the guardian, and the appointment of counsel. If the petition is withdrawn prior to the appointment of the visitor, no appointment of the visitor is necessary.

National Probate Court Standards, Standard 3.3.4 "Court Visitor" (1993) provides:

> The probate court should require a court appointee to visit with the respondent in a guardianship petition to (1) explain the rights of the respondent; (2) investigate the facts of the petition; and (3) explain the circumstances and consequences of the action. The visitor should investigate the need for additional court appointments and should file a written report with the court promptly after the visit.

The visitor must visit the respondent in person and explain a number of items to the respondent to the extent the respondent can understand. If the respondent does not have a good command of the English language, then the visitor should be accompanied by an interpreter. The drafters did not mandate that the visitor be able to speak the respondent's primary language,

but good practice and due process protections dictate the use of interpreters when needed for the respondent to understand. The phrase "to the extent that the respondent is able to understand" is a recognition that some respondents may be so impaired that they are unable to understand. If assistive devices are needed in order for the visitor to explain to the respondent in a manner necessary so that the respondent can understand, then the visitor should use those assistive devices. The visitor is also charged with confirming compliance with the Americans With Disabilities Act when visiting the respondent's dwelling and the proposed dwelling in which it is expected that the respondent will reside.

Subsection (c)(4) puts the respondent on notice that if the respondent has an estate, costs and expenses are paid from the estate, including attorney's fees and visitor's fees. If there is an estate, those entitled to compensation would be paid from the estate. If there is no estate, those entitled to compensation will ordinarily be compensated by whatever process the enacting state has for indigent proceedings, such as from the county general fund**,** unless the enacting jurisdiction has made other arrangements. If a conservatorship exists, payment is made pursuant to the procedures provided in Section 5-417, otherwise the guardian must file a fee petition. *See* Section 5-316.

The visitor must talk with the physician or other person who is known to have assessed, treated or advised about the respondent's relevant physical or mental condition. This information is crucial to the court in making a determination of whether to grant the petition, since a professional evaluation will no longer be required in every case. *See* Section 5-306. If the doctor refuses to talk to the visitor, the visitor may need to seek from the appointing court an order authorizing the release of the information.

The visitor's report must be in writing and include a list of recommendations or statements. For states enacting Alternative 1 to subsection (b), if the visitor does not recommend that a lawyer be appointed, the visitor should include in the report the reasons why a lawyer should not be appointed. States enacting Parts 1-4 of this article should consider developing a checklist for the items enumerated in subsection (e).

"Visitor" is bracketed in recognition that states use and may wish to substitute different words to refer to this position.

SECTION 5-312. EMERGENCY GUARDIAN.

(a) If the court finds that compliance with the procedures of this part will likely result in substantial harm to the respondent's health, safety, or welfare, and that no other person appears to have authority and willingness to act in the circumstances, the court, on petition by a person interested in the respondent's welfare, may appoint an emergency guardian whose authority may not exceed [60] days and who may exercise only the powers specified in the order. Immediately

upon receipt of the petition for an emergency guardianship, the court shall appoint a lawyer to represent the respondent in the proceeding. Except as otherwise provided in subsection (b), reasonable notice of the time and place of a hearing on the petition must be given to the respondent and any other persons as the court directs.

(b) An emergency guardian may be appointed without notice to the respondent and the respondent's lawyer only if the court finds from affidavit or testimony that the respondent will be substantially harmed before a hearing on the appointment can be held. If the court appoints an emergency guardian without notice to the respondent, the respondent must be given notice of the appointment within 48 hours after the appointment. The court shall hold a hearing on the appropriateness of the appointment within [five] days after the appointment.

(c) Appointment of an emergency guardian, with or without notice, is not a determination of the respondent's incapacity.

(d) The court may remove an emergency guardian at any time. An emergency guardian shall make any report the court requires. In other respects, the provisions of this article concerning guardians apply to an emergency guardian.

Comment

There are limited circumstances where there is no one else willing or able to act when following the normal process for appointment of a guardian would, due to the time involved to follow the procedures, likely lead to substantial harm to the respondent's health, safety or welfare. The classic example of when an emergency guardianship is needed is when the respondent needs a medical procedure, lacks capacity to consent, has no health care power of attorney, and no one else is willing or in a position to make the health-care decision. This section requires appointment of counsel for the respondent.

An emergency guardian may only be appointed without prior notice when there is testimony that the respondent would be immediately and substantially harmed before the hearing on the appointment. In such case, notice must be given within forty-eight hours and a hearing held within five days. (Section 5-113 provides the procedures for giving notice.)

States enacting ~~Parts 1-4 of~~ this article should look at their requirements for an ex parte hearing and determine whether to adopt the time limit contained in this section or whether to

impose different time limits. Five days seems to be the most common time period for a return hearing following an ex parte appointment. If the enacting state uses a different time period for a hearing following an ex parte appointment of a guardian, the time period used should be relatively short.

The *National Probate Court Standards*, Standard 3.3.6 "Emergency Appointment of a Temporary Guardian" (1993) provides:

(a) Ex parte appointment of a temporary guardian by the probate Court should occur only:

(1) upon the showing of an emergency;

(2) in connection with the filing of a petition for a permanent guardianship;

(3) where the petition is set for hearing on the proposed permanent guardianship on an expedited basis; and

(4) when notice of the temporary appointment is promptly provided to the respondent.

This section deviates from the above standard by permitting an emergency guardian to be appointed without the need of filing a petition for a permanent appointment. The drafting committee was concerned that requiring the filing of a petition for a permanent appointment would lend an air of inevitability that a permanent guardian should be appointed. Frequently, the need for an emergency guardian is temporary only and the respondent's long-term needs can be met by mechanisms other than guardianship. Consistent with this, subsection (c) provides that the appointment of an emergency guardian is in no way a finding of incapacity. For purposes of appointing a regular guardian, the same quantum of proof is required whether or not an emergency guardian has been appointed.

Unless stated to the contrary in this section, other sections of Part 3 apply to an emergency guardian appointed under this section, including the provisions relating to the duties of guardians.

SECTION 5-313. TEMPORARY SUBSTITUTE GUARDIAN.

(a) If the court finds that a guardian is not effectively performing the guardian's duties and that the welfare of the ward requires immediate action, it may appoint a temporary substitute guardian for the ward for a specified period not exceeding six months. Except as otherwise ordered by the court, a temporary substitute guardian so appointed has the powers set forth in the previous order of appointment. The authority of any unlimited or limited guardian previously

appointed by the court is suspended as long as a temporary substitute guardian has authority. If an appointment is made without previous notice to the ward or the affected guardian, the court, within five days after appointment, shall inform the ward or guardian of the appointment.

(b) The court may remove a temporary substitute guardian at any time. A temporary substitute guardian shall make any report the court requires. In other respects, the provisions of this Article concerning guardians apply to a temporary substitute guardian.

Comment

This section differs from Section 5-312 since this section is used when there is a guardian, but the guardian is not discharging the functions of office. The role of the temporary substitute guardian, as the name implies, is to literally fill in for the regular guardian, whose powers are suspended for the duration of the appointment. This section also differs from Section 5-204(d). A temporary guardian for a minor is appointed under Section 5-204(d) in situations where there is no guardian, whereas under this section, the temporary substitute guardian is temporarily substituted for another non-performing guardian.

The standard for appointment under this section is that the ward's welfare requires immediate action and that the appointed guardian is not effectively performing the duties of office. This is not the same as the best interest standard applied in the selection of the original guardian. The standard instead invokes the sense of urgency usually involved in these cases, most of which involve possible abuse by the regularly-appointed guardian.

If, at the end of the six months, the ward still needs a guardian, the Court should appoint a permanent guardian rather than granting an extension to the temporary substitute guardian. A temporary substitute guardian does not automatically have preference to be appointed as guardian in such cases.

In some cases, circumstances may dictate the appointment of the temporary substitute guardian without notice being given to the ward or current guardian. If that occurs, within five days of the appointment of the temporary substitute guardian, the Court must inform either the ward or the guardian. Since the authority of the regularly-appointed guardian is suspended by the appointment of the temporary substitute guardian, the Court should make every effort to inform the guardian of the appointment. In keeping with the concept of limited guardianship and empowerment of the ward, the Court should also notify the ward of the appointment of the temporary substitute guardian if the ward has the ability to understand.

States adopting ~~Parts 1-4 of~~ this Article are free to enact a notice period of less than five days but are encouraged to not enact a notice period of more than five days.

This section is based on UGPPA (1982) Section 2-208(b) (UPC Section 5-308(b) (1982)).

SECTION 5-317. REPORTS; MONITORING OF GUARDIANSHIP.

(a) Within 30 days after appointment, a guardian shall report to the court in writing on the condition of the ward and account for money and other assets in the guardian's possession or subject to the guardian's control. A guardian shall report at least annually thereafter and whenever ordered by the court. A report must state or contain:

(1) the current mental, physical, and social condition of the ward;

(2) the living arrangements for all addresses of the ward during the reporting period;

(3) the medical, educational, vocational, and other services provided to the ward and the guardian's opinion as to the adequacy of the ward's care;

(4) a summary of the guardian's visits with the ward and activities on the ward's behalf and the extent to which the ward has participated in decision-making;

(5) if the ward is institutionalized, whether the guardian considers the current plan for care, treatment, or habilitation to be in the ward's best interest;

(6) plans for future care; and

(7) a recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship.

(b) The court may appoint a [visitor] to review a report, interview the ward or guardian, and make any other investigation the court directs.

(c) The court shall establish a system for monitoring guardianships, including the filing and review of annual reports.

Comment

Under subsection (a), the report must contain the current mental, physical and social condition of the ward. Letters from the treating physician should accompany the report.

Emphasizing the importance of limited guardianship, even if no limited guardian was appointed, subsections (a)(4), (6), and (7) require the guardian to report information regarding the ward's participation in decisions, future care plans and the need for continuing the guardianship. Compliance with subsection (a)(7) should not be read as relieving the guardian of the duty under Section 5-314(b)(5) to immediately notify the court that the ward's condition has changed.

Each state enacting ~~Parts 1-4 of~~ this article should establish a system for monitoring guardianships, which would include, but not be limited to, mechanisms for assuring that annual reports are timely filed and reviewed. An independent monitoring system is crucial for a court to adequately safeguard against abuses in the guardianship cases. Monitors can be paid court personnel, Court appointees or volunteers. For a comprehensive discussion of the various methods for monitoring guardianships, *see Sally Balch Hurme, Steps to Enhance Guardianship Monitoring* (A.B.A. 1991).

The National Probate Court Standards also provide for the filing of reports and procedures for monitoring guardianships. *See National Probate Court Standards*, Standards 3.3.14 "Reports by the Guardian," and 3.3.15 "Monitoring of the Guardian" (1993). The National Probate Court Standards additionally contain recommendations relating to the need for periodic review of guardianships and sanctions for failures of guardians to comply with reporting requirements. *See National Probate Court Standards*, Standards 3.3.16 "Revaluation of Necessity for Guardianship," and 3.3.17 "Enforcement."

PART 4

PROTECTION OF PROPERTY OF PROTECTED PERSON

SECTION 5-403. ORIGINAL PETITION FOR APPOINTMENT OF CONSERVATOR OF OTHER PROTECTIVE ORDER.

(a) The following may petition for the appointment of a conservator or for any other appropriate protective order:

(1) the person to be protected;

(2) an individual interested in the estate, affairs, or welfare of the person to be protected, including a parent, guardian, or custodian; or

(3) a person who would be adversely affected by lack of effective management of the property and business affairs of the person to be protected.

(b) A petition under subsection (a) must set forth the petitioner's name, residence, current address if different, relationship to the respondent, and interest in the appointment or other protective order, and, to the extent known, state or contain the following with respect to the respondent and the relief requested:

(1) the respondent's name, age, principal residence, current street address, and, if different, the address of the dwelling where it is proposed that the respondent will reside if the appointment is made;

(2) if the petition alleges impairment in the respondent's ability to receive and evaluate information, a brief description of the nature and extent of the respondent's alleged impairment;

(3) if the petition alleges that the respondent is missing, detained, or unable to return to the United States, a statement of the relevant circumstances, including the time and nature of the disappearance or detention and a description of any search or inquiry concerning the respondent'swhereabouts;

(4) the name and address of the respondent's:

(A) spouse or, if the respondent has none, an adult with whom the respondent has resided for more than six months before the filing of the petition; and

(B) adult children or, if the respondent has none, the respondent's parents and adult brothers and sisters or, if the respondent has none, at least one of the adults nearest in kinship to the respondent who can be found;

(5) the name and address of the person responsible for care or custody of the respondent;

(6) the name and address of any legal representative of the respondent;

(7) a general statement of the respondent's property with an estimate of its value,

including any insurance or pension, and the source and amount of other anticipated income or receipts; and

(8) the reason why a conservatorship or other protective order is in the best interest of the respondent.

(c) If a conservatorship is requested, the petition must also set forth to the extent known:

(1) the name and address of any proposed conservator and the reason why the proposed conservator should be selected;

(2) the name and address of any person nominated as conservator by the respondent if the respondent has attained 14 years of age; and

(3) the type of conservatorship requested and, if an unlimited conservatorship, the reason why limited conservatorship is inappropriate or, if a limited conservatorship, the property to be placed under the conservator's control and any limitation on the conservator's powers and duties.

Comment

This section lists the information that must be contained in the petition for appointment of a conservator or other protective order. Although subsection (a) allows a petition for appointment to be filed by the person to be protected, the court should scrutinize such a petition closely to confirm that the petition is truly voluntary and that the petitioner has the requisite capacity to file a petition. Normally in such a case it would be better for the individual to execute a durable power of attorney instead of utilizing the more invasive conservatorship.

Subsection (a) specifically provides that a petition for appointment of a conservator or other protective order may be filed by the respondent's guardian. The process for appointing a guardian is more detailed than the appointment of a conservator because of the rights involved and because other mechanisms are available to protect the respondent's property besides a conservatorship. However, in many cases a conservatorship may also be necessary, and so it is incumbent on a guardian to determine whether there is a need for a conservatorship, and if so, petition for an appointment.

Subsections (b)(4)-(6) require that the petition list family members and others who may have information useful to the court and to whom notice of the proceeding must be given under Section 5-404(b). These persons will likely also have the greatest interest in protecting the respondent and in making certain that the proposed conservatorship is appropriate.

Subsection (b)(4)(A) requires that the petition contain the name and address of the spouse or, if none, then an adult with whom the respondent has resided for more than six months before the petition was filed. Included among the persons with whom the respondent may have resided are a domestic partner and companions**.** Note that there is no requirement that the respondent have resided with the other person for more than six months *immediately prior* to the filing of the petition, just that the requirement has been met at some point in time before the petition was filed. In applying this provision, the court should keep the purpose of this provision in mind – to obtain a list of person who likely have a significant interest in the respondent's welfare. Courts should use a reasonableness standard so that the petitioner does not have to give the name of every person the respondent has resided with in the respondent's entire life and whose current interest in the respondent may be quite remote. Also, in interpreting what is meant by "resided," the closeness of the relationship to the respondent should be taken into account.

Courts should consider whether they wish to exclude persons providing care for a fee from the class of persons with whom it is considered that the respondent resided. This would limit the application of subsection (b)(4)(A) to individuals with whom the respondent has a close personal relationship, a relative, or to a domestic partner or companion, and would eliminate a professional relationship such as that of a housekeeper, landlord, or owner of a board and care facility.

The drafters originally used the language "domestic partner or companion," and intended to limit the application of subsection (b)(4)(A) to the spouse, domestic partner or companion, but at the 1997 Annual Meeting of the Uniform Law Commissioners where the revision of the Uniform Guardianship and Protective Proceedings Act ~~(Parts 1-4 of this article)~~ was finalized, this phrase was replaced by the phrase "adult with whom the respondent has resided for more than six months." The intent behind this amendment was not to substantially broaden the concept but only to expand it to include other individuals who have had an enduring relationship with the respondent for at least a six-month period and who, because of this relationship, should be given notice.

Subsection (b)(4)(B) requires the names and addresses of the respondent's adult children or, if none, parent and adult brothers and sisters or, if none, a relative of the nearest degree in which a relation can be found. However, if there are several adults of equal degree of kinship to the respondent, the name and address of one is all that is required, rather than the names and addresses of the members of the entire class.

Under subsection (b)(6), if the respondent has a legal representative, the representative's name and address must be included in the petition. A "legal representative" is defined in Section 5-102(5). Notice to such a representative, as required by Section 5-404(b), is especially critical for ascertaining whether a conservatorship or other protective order is really necessary. For example, should a conservator have already been appointed elsewhere or the respondent have executed a durable power of attorney with authority in the agent to make financial decisions, the court may conclude that there may be no need for it to appoint a conservator.

Subsection (b)(7) requires the petitioner to make a general statement of the respondent's property, including an estimated value, insurance and pension information and information

about other anticipated income or receipts. This information should be as detailed as possible to enable the visitor to better complete the report required by Section 5-406, and to enable the court to determine whether a protective order is really needed.

Subsection (c)(3) emphasizes the importance of limited conservatorship, the encouragement of which is a major theme of this article. The petitioner must state in the petition why a limited conservatorship is not sufficient when requesting an unlimited conservatorship. If a limited conservatorship is requested, the petition must set out the property requested to be placed under the conservator's control.

This section differs slightly from the *National Probate Court Standards*, Standard 3.4.1, "Petition" (1993), which also requires that a petition for conservatorship include a description of the respondent's functional limitations and a statement that less intrusive alternatives have been considered.

This section is based on UGPPA (1982) Section 2-304 (UPC Section 5-404) (1982)).

SECTION 5-406. ORIGINAL PETITION: PRELIMINARIES TO HEARING.

(a) Upon the filing of a petition for a conservatorship or other protective order for a respondent for reasons other than being a minor, the court shall set a date for hearing. The court shall appoint a [visitor] unless the petition does not request the appointment of a conservator and the respondent is represented by a lawyer. The duties and reporting requirements of the [visitor] are limited to the relief requested in the petition. The [visitor] must be an individual having training or experience in the type of incapacity alleged.

ALTERNATE PROVISIONS ON APPOINTMENT OF A LAWYER

ALTERNATIVE 1

[(b) The court shall appoint a lawyer to represent the respondent in the proceeding if:

(1) requested by the respondent;

(2) recommended by the [visitor]; or

(3) the court determines that the respondent needs representation.]

ALTERNATIVE 2

[(b) Unless the respondent is represented by a lawyer, the court shall appoint a lawyer to

represent the respondent in the proceeding.]

END OF ALTERNATE PROVISIONS

(c) The [visitor] shall interview the respondent in person and, to the extent that the respondent is able to understand:

(1) explain to the respondent the substance of the petition and the nature, purpose, and effect of the proceeding;

(2) if the appointment of a conservator is requested, inform the respondent of the general powers and duties of a conservator and determine the respondent's views regarding the proposed conservator, the proposed conservator's powers and duties, and the scope and duration of the proposed conservatorship;

(3) inform the respondent of the respondent's rights, including the right to employ and consult with a lawyer at the respondent's own expense, and the right to request a court-appointed lawyer; and

(4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, will be paid from the respondent's estate.

(d) In addition to the duties imposed by subsection (c), the [visitor] shall:

(1) interview the petitioner and the proposed conservator, if any; and

(2) make any other investigation the court directs.

(e) The [visitor] shall promptly file a report with the court, which must include:

(1) a recommendation as to whether a lawyer should be appointed to represent the respondent;

(2) recommendations regarding the appropriateness of a conservatorship, including whether less restrictive means of intervention are available, the type of conservatorship, and, if a limited conservatorship, the powers and duties to be granted the

limited conservator, and the assets over which the conservator should be granted authority;

(3) a statement of the qualifications of the proposed conservator, together with a statement as to whether the respondent approves or disapproves of the proposed conservator, and a statement of the powers and duties proposed or the scope of the conservatorship;

(4) a recommendation as to whether a professional evaluation or further evaluation is necessary; and

(5) any other matters the court directs.

The court may also appoint a physician, psychologist, or other individual qualified to evaluate the alleged impairment to conduct an examination of the respondent.

(g) While a petition to establish a conservatorship or for another protective order is pending, after preliminary hearing and without notice to others, the court may issue orders to preserve and apply the property of the respondent as may be required for the support of the respondent or individuals who are in fact dependent upon the respondent. The court may appoint a [master] to assist in that task.

Legislative Note*: Those states that enact Alternative 2 of subsection (b) which requires appointment of counsel for the respondent in all protective proceedings should not enact subsection (e)(1).*

Comment

Alternative provisions are offered for subsection (b). Alternative 1 is the drafting committee's position. Alternative 1 relies on an expanded role for the "visitor," who can be chosen or selected to provide the court with advice on a variety of matters other than legal issues. Appointment of a lawyer, nevertheless, is *required* under Alternative 1 when the court determines that the respondent needs representation, or counsel is requested by the respondent or recommended by the visitor.

Alternative 2 is derived from UGPPA (1982) Section 2-306 (UPC Section 5-406 (1982)). It is expected that in states enacting Alternative 1 of subsection (b), counsel will be appointed in most of the cases. However, the A.B.A. Commission on Legal Problems of the Elderly attached great significance to expressly making appointment of counsel "mandatory." Therefore, for states which wish to provide for "mandatory appointment" of counsel, Alternative 2 should be enacted.

In Alternative 1 for subsection (b), then, appointment of counsel for an unrepresented respondent is mandated when requested by the respondent, when recommended by the [visitor], or when the court determines the respondent needs representation. This requirement is in accord with the National Probate Court Standards. *National Probate Court Standards*, Standard 3.4.5 "Appointment of Counsel" (1993), like subsection (b) of this section, provides for appointment of counsel in a conservatorship proceeding when the unrepresented respondent requests it, the [visitor] recommends it, the law otherwise requires it, or the court determines that the respondent needs representation.

The drafting committee for the 1997 revision of the Uniform Guardianship and Protective Proceedings Act ~~(Parts 1-4 of this Article)~~ debated at length whether to mandate appointment of counsel or to expand the role of the visitor. The drafting committee concluded that as between the two, the visitor may be more helpful to the court in providing information on a wider variety of issues and concerns, by acting as the eyes and ears of the court as well as determining the respondent's wishes and conveying them to the court. The committee was concerned that including mandatory appointment of counsel would cause many to view the Uniform Guardianship and Protective Proceedings Act as a "lawyer's bill" and thus severely handicap the Act's acceptance and adoption. It is the intent of the committee that counsel for respondent be appointed in all but the most clear cases, where all are in agreement regarding the need for a conservatorship or protective order as well as the proposed conservator. For jurisdictions enacting Alternative 1 under subsection (b), the visitor needs to be especially sensitive to the fact that if the respondent is incapacitated, then the respondent may not have sufficient capacity to intelligently and knowingly waive appointment of counsel. A court should err on the side of protecting the respondent's rights and appoint counsel in most cases.

Appointment of a visitor is mandatory when a conservatorship is sought for reasons other than minority even if the respondent is represented by a lawyer (subsection (a)), and regardless of which alternative is enacted under subsection (b). Only when the respondent is represented by counsel and the petitioner is seeking a protective order other than the appointment of a conservator is the appointment of a visitor waived. Although a lawyer, if qualified, may be appointed as a visitor, the attorney's role is that of a visitor and not that of an attorney for the respondent. The visitor serves as the information gathering arm of the court. The role of the attorney is to act as the respondent's advocate. *See National Probate Court Standards*, Standard 3.4.5(b) "Appointment of Counsel" (1993).

The role of a visitor in a conservatorship proceeding is addressed in *National Probate Court Standard* 3.4.4 "Court visitor" (1993)

> The probate court should require a court appointee to visit with the respondent in a conservatorship petition to (1) explain the rights of the respondent; (2) investigate the facts of the petition; and (3) explain the circumstances and consequences of the action. The visitor should investigate the need for additional court appointments and should file a written report with the court promptly after the visit.

The visitor may be any qualified individual with "training or experience in the type of incapacity alleged." Under subsection (c), the visitor must visit the respondent in person and explain to the respondent a number of items, to the extent the respondent can understand. If the

respondent does not have a good command of the English language, then the visitor should be accompanied by an interpreter. The drafters did not mandate that the visitor be able to speak the respondent's primary language, but good practice and due process protections dictate the use of interpreters where needed for the respondent to understand. The phrase "to the extent that the respondent is able to understand" is a recognition that some respondents may be so impaired that they are unable to understand. If assistive devices are needed in order for the visitor to explain to the respondent in a manner necessary so that the respondent can understand, then the visitor should use those assistive devices.

Subsection (c)(4) puts the respondent on notice that if the respondent has an estate, costs and expenses are paid from the estate, including attorney's fees and visitor's fees. If there is an estate, those entitled to compensation would be paid from the estate**.** If there is no estate, those entitled to compensation will ordinarily be compensated by whatever process the enacting state has for indigent proceedings, such as from the county general fund, unless the enacting state has made other arrangements. Payment is made pursuant to the procedures provided in Section 5-417.

If the relief sought is a protective order other than the appointment of a conservator, the visitor's powers and duties relate only to the relief sought in the protective order. When the relief sought is a conservatorship, the visitor has an expanded list of duties. The visitor's report must contain information and recommendations to the court regarding the appropriateness of the conservatorship, whether lesser restrictive alternatives might meet the respondent's needs, recommendations about further evaluations, powers to be given the conservator, and the appointment of counsel. The visitor's recommendation about the assets over which the conservator should be granted authority should also include a recommendation of the amount of the bond that should be required of the conservator. For states enacting Alternative 1 under subsection (b), if the visitor does not recommend that a lawyer be appointed, the visitor should explain in the report the reasons why the visitor is recommending that a lawyer should not be appointed.

States enacting the guardianship and conservatorship provisions of this article should consider developing a checklist for the items enumerated in subsection (e).

Subsection (f) authorizes the court to order a professional evaluation of the respondent when recommended by the visitor, requested by counsel, or the court otherwise believes it to be necessary. Subsection (g) authorizes the court to use a master to help in the preservation and application of the respondent's property while a petition for appointment of a conservator or other protective order is pending. For an explanation of why a "master" is appointed instead of a temporary conservator, *see* the comment to Section 5-405.

"Visitor" is bracketed in recognition that states use different words to refer to this position. States enacting ~~Parts 1-4 of~~ this Article should insert the term used in their states.

If there is an estate, the visitor would be paid from it. If there is no estate, the visitor will ordinarily be compensated from the county general fund unless the enacting jurisdiction has made other arrangements. Payment is made pursuant to the procedures provided in Section 5-417.

This section is based on UGPPA (1982) Section 2-306 (UPC Sections 5-406 (1982)).

SECTION 5-413. WHO MAY BE CONSERVATOR: PRIORITIES.

(a) Except as otherwise provided in subsection (d), the court, in appointing a conservator, shall consider persons otherwise qualified in the following order of priority:

(1) a conservator, guardian of the estate, or other like fiduciary appointed or recognized by an appropriate court of any other jurisdiction in which the protected person resides;

(2) a person nominated as conservator by the respondent, including the respondent's most recent nomination made in a durable power of attorney, if the respondent has attained 14 years of age and at the time of the nomination had sufficient capacity to express a preference;

(3) an agent appointed by the respondent to manage the respondent's property under a durable power of attorney;

(4) the spouse of the respondent;

(5) an adult child of the respondent;

(6) a parent of the respondent; and

(7) an adult with whom the respondent has resided for more than six months before the filing of the petition.

(b) A person having priority under subsection (a)(1), (4), (5), or (6) may designate in writing a substitute to serve instead and thereby transfer the priority to the substitute.

(c) With respect to persons having equal priority, the court shall select the one it considers best qualified. The court, acting in the best interest of the protected person, may decline to appoint a person having priority and appoint a person having a lower priority or no

priority.

(d) An owner, operator, or employee of [a long-term care institution] at which the respondent is receiving care may not be appointed as conservator unless related to the respondent by blood, marriage, or adoption.

Comment

This section gives top priority for appointment to existing conservators appointed elsewhere, to the respondent's nominee for the position, and to the respondent's agent, in that order. Existing conservators are granted a first priority for two reasons. First, many of these cases will involve transfers of a conservatorship from another state. To assure a smooth transition, the currently appointed conservator appointed in this state or another should have the right to the appointment at the new location. Second, many cases may involve situations where a conservatorship appointment is sought despite the appointment in another place. Granting the existing conservator priority will deter such forum shopping. Should the existing conservator be inappropriate for some reason, subsection (c) permits the court to skip over the existing conservator and appoint someone with lower priority or even no priority.

A conservator or individual nominated by the respondent or the agent named in the respondent's durable power of attorney has priority for appointment over the respondent's relatives. The nomination may include anyone nominated orally at the hearing, if the respondent has sufficient capacity at the time to express a preference. The nomination may also be made by separate document. While it is generally good practice for an individual to nominate as conservator the agent named in a durable power of attorney, the section grants such an agent a preference in the absence of a specific nomination. The agent is granted preference on the theory that the agent is the person the respondent would most likely prefer to act. The nomination of the agent will also make it more difficult for someone to use a conservatorship to thwart the agent's authority. To assure that the agent will be in a position to assert his priority, Section 5-404(b) requires that the agent receive notice of the proceeding. Also, until the court has acted to approve the revocation of that authority, Section 5-411(d) provides that the authority of an agent takes precedence over that of the conservator.

Subsection (a)(7) gives a seventh-level preference to a domestic partner or companion or an individual who has a close, personal relationship with the respondent. Note there is no requirement that the respondent have resided with the other person for more than six months *immediately prior* to the filing of the petition, just that the requisite residency have occurred at some point in time before the petition is filed. Courts should use a reasonableness standard in applying this subsection so that priority is given to someone with whom the respondent has had a close, enduring relationship. For factors to consider in making this determination, *see* the detailed comment to Section 5-304.

While this section substantially overlaps with Section 5-310, the comparable provision on selection of guardians, there are some differences. For example, Section 5-310 denies a priority to an emergency or temporary guardian, but this section does not expressly deny a

priority for appointment to an emergency or temporary conservator appointed in another state. But the failure in subsection (a)(1) to expressly exclude these categories of conservator does not mean that they enjoy a priority for appointment. Unlike the case with guardians, emergency or temporary conservators are not included within the definition of "conservator" found in Section 5-102(1).

Subsection (d) prohibits anyone affiliated with a long-term care facility at which the respondent is receiving care from being appointed as conservator absent a blood, marital or adoptive arrangement. Strict application of this subsection is crucial to avoid a conflict of interest and to protect the protected person from potential financial exploitation. Each state enacting ~~Parts 1-4 of~~ this article needs to insert the particular term or terms used in the state for facilities considered to be long-term care institutions.

National Probate Court Standards, Standard 3.4.11 "Qualifications and Appointments of Conservators" (1993), recognizes that the court should appoint as conservator one who is both willing and suitable to manage the respondent's finances and property, based on the nature of the respondent's estate and the respondent's incapacity. The standard provides a preference in appointment to one known by, related to, or requested by the respondent.

This section is based on UGPPA (1982) Section 2-309 (UPC Section 5-409 (1982)).

SECTION 5-430. PERSONAL LIABILITY OF CONSERVATOR.

(a) Except as otherwise agreed, a conservator is not personally liable on a contract properly entered into in a fiduciary capacity in the course of administration of the estate unless the conservator fails to reveal in the contract the representative capacity and identify the estate.

(b) A conservator is personally liable for obligations arising from ownership or control of property of the estate or for other acts or omissions occurring in the course of administration of the estate only if personally at fault.

(c) Claims based on contracts entered into by a conservator in a fiduciary capacity, obligations arising from ownership or control of the estate, and claims based on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator in a fiduciary capacity, whether or not the conservator is personally liable therefor.

(d) A question of liability between the estate and the conservator personally may be

determined in a proceeding for accounting, surcharge, or indemnification, or in another appropriate proceeding or action.

[(e) A conservator is not personally liable for any environmental condition on or injury resulting from any environmental condition on land solely by reason of an acquisition of title under Section 5-421.]

Comment

Subsection (a) is significant in that it provides that the conservator is generally *not personally liable* for contracts entered into as the conservator as long as the conservator discloses the representative capacity in the contract as well as identifies the estate. Liability in such cases is limited to the estate assets. But the conservator will be personally liable if the contract expressly so provides.

Subsection (b) reverses the common law rule that a conservator, as a fiduciary is liable for torts committed in the course of administering the conservatorship property regardless of the conservator's personal fault. The protection from liability provided by this subsection does not apply, however, if the conservator is "personally at fault," meaning that the conservator committed the tort either intentionally or negligently.

Subsection (c) confirms the intent of this section, that absent special agreement or other circumstances, a conservator is liable only in a representative capacity.

Subsection (e) is new, in recognition of the growing issue of environmental conditions on land that must be dealt with by the conservator. The effect of this subsection is to protect a conservator from possible liability due to the automatic transfer of title to the protected person's assets accruing upon the conservator's appointment pursuant to Section 5-421. For actions taken as conservator, the conservator's liability under state or federal environmental provision or regulation is generally limited to those assets held in the capacity as conservator. The conservator may be liable if the conservator's negligence causes or contributes to an environmental problem or potential environmental problem. Whether the conservator might be liable for actions or failures to act with respect to an environmental condition depends on state and federal environmental regulations, including CERCLA (Comprehensive Environmental Response, Compensation and Liability Act), found at 42 U.S.C. § 9601 et seq.

This section is placed in brackets to signal to the enacting jurisdiction that it should expand on and conform the language of subsection (e) to whatever provisions it may have enacted with respect to liability of other types of fiduciaries for environmental conditions.

This section is based on UGPPA (1982) Section 2-328 (UPC Section 5-428 (1982)). This section, with the exception of subsection (e), is also similar to UPC ~~Sections~~ Section 3-808 (personal representatives) ~~and 7-306 (trustees)~~.

SECTION 5-432. PAYMENT OF DEBT AND DELIVERY OF PROPERTY TO FOREIGN CONSERVATOR WITHOUT LOCAL PROCEEDING.

(a) A person who is indebted to or has the possession of tangible or intangible property of a protected person may pay the debt or deliver the property to a foreign conservator, guardian of the estate, or other court-appointed fiduciary of the State of residence of the protected person. Payment or delivery may be made only upon proof of appointment and presentation of an affidavit made by or on behalf of the fiduciary stating that a protective proceeding relating to the protected person is not pending in this State and the foreign fiduciary is entitled to payment or to receive delivery.

(b) Payment or delivery in accordance with subsection (a) discharges the debtor or possessor, absent knowledge of any protective proceeding pending in this State.

COMMENT

This section confirms that a person holding personal property of a protected person may deliver it to a conservator appointed in another state or foreign country without concern about liability. The protection does not apply, however, if the person holding the property is aware that a protective proceeding is pending in this state. Unlike UGPPA (1982) Section 2-330 (UPC Section 5-430 (1982)), upon which this section was derived, the conservator need no longer present a special affidavit in order to obtain the protection of this section. The third party may of course always demand an affidavit or other proof in order to make certain that the foreign conservator does indeed have the requisite authority.

Should it become necessary to appoint a conservator in the enacting state, the conservator has priority for appointment under Section 5-413(a)(1). The conservator may also petition for ancillary powers as provided under Section 5-433.

SECTION 5-433. FOREIGN CONSERVATOR: PROOF OF AUTHORITY; BOND; POWERS. If a conservator has not been appointed in this State and a petition in a protective proceeding is not pending in this State, a conservator appointed in the jurisdiction in which the protected person resides may file in a court of this State, in a [county] in which

~~property belonging to the protected person is located, authenticated copies of letters of appointment and of any bond. Thereafter, the conservator may exercise all powers of a conservator appointed in this State as to property in this State and may maintain actions and proceedings in this State subject to any conditions otherwise imposed upon nonresident parties.~~

~~**COMMENT**~~

~~This section allows a conservator appointed in another state or foreign country to exercise powers with respect to assets located in the enacting state. This section is particularly useful should the protected person own real estate in the enacting jurisdiction. Personal property can ordinarily be disposed of pursuant to the authority conferred by Section 5-432.~~

~~This section should be contrasted with Section 5-107, which contains the procedure for transferring jurisdiction over the conservatorship from another state or foreign country. Unlike Section 5-107, the Court in the other state or foreign country retains continuing authority over the conservatorship and the conservator remains accountable to that Court. This section merely allows the conservator to exercise management powers with respect to assets located in the enacting jurisdiction.~~

~~This section is based on UGPPA (1982) Section 2-331 (UPC Section 5-431 (~~1982)).

SECTION 5-432. REGISTRATION OF GUARDIANSHIP ORDERS. If a guardian has been appointed in another state and a petition for the appointment of a guardian is not pending in this state, the guardian appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship order in this state by filing as a foreign judgment in a court, in any appropriate [county] of this state, certified copies of the order and letters of office.

SECTION 5-433. REGISTRATION OF PROTECTIVE ORDERS. If a conservator has been appointed in another state and a petition for a protective order is not pending in this state, the conservator appointed in the other state, after giving notice to the appointing court of an intent to register, may register the protective order in this state by filing as a foreign judgment in a court of this state, in any [county] in which property belonging to the protected person is located, certified copies of the order and letters of office and of any bond.

SECTION 5-434. EFFECT OF REGISTRATION.

(a) Upon registration of a guardianship or protective order from another state, the guardian or conservator may exercise in this state all powers authorized in the order of appointment except as prohibited under the laws of this state, including maintaining actions and proceedings in this state and, if the guardian or conservator is not a resident of this state, subject to any conditions imposed upon nonresident parties.

(b) A court of this state may grant any relief available under this [article] and other law of this state to enforce a registered order.

~~**PART 5**~~

~~**DURABLE POWER OF ATTORNEY**~~

~~**Adoption of Uniform Durable Power of Attorney Act**~~

~~Part 5 of Article V of the Uniform Probate Code was amended by the National Conference of Commissioners on Uniform State Laws in 1979. Sections 5–501 to 5–505, as enacted in 1979, are identical to sections 1 to 5 of the Uniform Durable Power of Attorney Act (see Volume 8A Uniform Laws Annotated, Master Edition or ULA Database on WESTLAW), also approved by the National Conference in 1979 as an alternative to Part 5 of Article V of the Uniform Probate Code. See Prefatory Note, post.~~

~~**PREFATORY NOTE**~~

~~The National Conference included Sections 5-501 and 5-502 in Uniform Probate Code (1969) (1975) concerning powers of attorney to assist persons interested in establishing non-Court regimes for the management of their affairs in the event of later incompetency or disability. The purpose was to recognize a form of senility insurance comparable to that available to relatively wealthy persons who use funded, revocable trusts for persons who are unwilling or unable to transfer assets as required to establish a trust.~~

~~The provisions included in the original UPC modify two principles that have controlled written powers of attorney. Section 5-501 (UPC (1969) (1975)), creating what has come to be known as a "durable power of attorney," permits a principal to create an agency in another that continues in spite of the principal's later loss of capacity to contract. The only requirement is that an instrument creating a durable power contain language showing that the principal intends the agency to remain effective in spite of his later incompetency.~~

~~Section 5-502 (UPC (1969) (1975)) alters the common law rule that a principal's death ends the authority of his agents and voids all acts occurring thereafter including any done in~~

complete ignorance of the death. The new view, applicable to durable and nondurable, written powers of attorney, validates post-mortem exercise of authority by agents who act in good faith and without actual knowledge of the principal's death. The idea here was to encourage use of powers of attorney by removing a potential trap for agents in fact and third persons who decide to rely on a power at a time when they cannot be certain that the principal is then alive.

To the knowledge of the Joint Editorial Board for the Uniform Probate Code, the only statutes resembling the power of attorney sections of the UPC (1969) (1975) that had been enacted prior to the approval and promulgation of the Code were Sections 11-9.1 and 11-9.2 of Code of Virginia [1950]. Since then, a variety of UPC inspired statutes adjusting agency rules have been enacted in more than thirty states.

This [Act] [Section] originated in 1977 with a suggestion from within the National Conference that a new free-standing uniform act, designed to make powers of attorney more useful, would be welcome in many states. For states that have yet to adopt durable power legislation, this new National Conference product represents a respected, collective judgment, identifying the best of the ideas reflected in the recent flurry of new state laws on the subject; additional enactments of a new and improved uniform act should result. For other states that have acted already, this new act offers a reason to consider amendments, including elimination of restrictions that no longer appear necessary.

In the course of preparing this Section, the Joint Editorial Board for the Uniform Probate Code, acting as a Special Committee on the new project, evolved what it considers to be improvements in §§ 5-501 and 5-502 of the 1969 and 1975 versions of the Code. In the main, the changes reflect stylistic matters. However, the idea reflected in Section 3(a)-that draftsmen of powers of attorney may wish to anticipate the appointment of a conservator or guardian for the principal-is new, and a brief explanation is in order.

When the Code was originally drafted, the dominant idea was that durable powers would be used as alternatives to Court-oriented, protective procedures. Hence, the draftsmen merely provided that appointment of a conservator for a principal who had granted a durable power to another did not automatically revoke the agency; rather, it would be up to the Court's appointee to determine whether revocation was appropriate. The provision was designed to discourage the institution of Court proceedings by persons interested solely in ending an agent's authority. It later appeared sensible to adjust the durable power concept so that it may be used either as an alternative to a protective procedure, or as a designed supplement enabling nomination of the principal's choice for guardian to an appointing Court and continuing to authorize efficient estate management under the direction of a Court appointee.

The sponsoring committee considered and rejected the suggestion that the word "durable" be omitted from the title. While it is true that the act describes "durable" and "non-durable" powers of attorney, this is merely the result of use of language to accomplish a purpose of making both categories of power more reliable for use than formerly. In the case of non-durable powers, the act extends validity by the provisions in Section [4] [5-504] protecting agents in fact and third persons who rely in good faith on a power of attorney when, unknown to them, the principal is incompetent or deceased. The general purpose of the act is to alter common law rules that created traps for the unwary by voiding powers on the principal's

incompetency or death. The act does not purport to deal with other aspects of powers of attorney, and a label that would result from dropping "durable" would be misleading to the extent that it suggested otherwise.

SECTION 5-501. DEFINITION. A durable power of attorney is a power of attorney by which a principal designates another his attorney in fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time," or "This power of attorney shall become effective upon the disability or incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity, and, unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument.

COMMENT

This section, derived from the first sentence of UPC 5-501 (1969) (1975), is a definitional section that supports use of the term "durable power of attorney" in the sections that follow. The second quoted expression was designed to emphasize that a durable power with postponed effectiveness is permitted. Some UPC critics have been bothered by the reference here to a later condition of "disability or incapacity," a circumstance that may be difficult to ascertain if it can be established without a Court order. The answer, of course, is that draftsmen of durable powers are not limited in their choice of words to describe the later time when the principal wishes the authority of the agent in fact to become operative. For example, a durable power might be framed to confer authority commencing when two or more named persons, possibly including the principal's lawyer, physician or spouse, concur that the principal has become incapable of managing his affairs in a sensible and efficient manner and deliver a signed statement to that effect to the attorney in fact.

In this and following sections, it is assumed that the principal is competent when the power of attorney is signed. If this is not the case, nothing in this Act is intended to alter the result that would be reached under general principles of law.

SECTION 5-502. DURABLE POWER OF ATTORNEY NOT AFFECTED BY LAPSWE OF TIME, DISABILITY OR INCAPACITY. All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his

successors in interest as if the principal were competent and not disabled. Unless the instrument states a time of termination, the power is exercisable notwithstanding the lapse of time since the execution of the instrument.

COMMENT

This section is derived from the second sentence of UPC 5-501 (1969) (1975) modified by deleting reference to the effect on a durable power of the principal's death, a matter that is now covered in Section [4] [5-504] which provides a single standard for durable and non-durable powers.

The words "any period of disability or incapacity of the principal" are intended to include periods during which the principal is legally incompetent, but are not intended to be limited to such periods. In the Uniform Probate Code, the word "disability" is defined, and the term "incapacitated person" is defined. In the context of this section, however, the important point is that the terms embrace "legal incompetence," as well as less grievous disadvantages.

SECTION 5-503. RELATION OF ATTORNEY IN FACT TO COURT-APPOINTED FIDUCIARY.

(a) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of his property except specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he were not disabled or incapacitated.

(b) A principal may nominate, by a durable power of attorney, the conservator, guardian of his estate, or guardian of his person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.

COMMENT

Subsection (a) closely resembles the last two sentences of UPC § 5-501 (1969) (1975); most of the changes are stylistic. One change going beyond style states that an agent in fact is accountable both to the principal and a conservator or guardian if a Court has appointed a fiduciary; the earlier version described accountability only to the fiduciary.

As explained in the introductory comment, the purpose of subsection (b) is to emphasize that agencies under durable powers and guardians or conservators may co-exist. It is not the purpose of the act to encourage resort to Court for a fiduciary appointment that should be largely unnecessary when an alternative regime has been provided via a durable power. Indeed, the best reason for permitting a principal to use a durable power to express his preference regarding any future Court appointee charged with the care and protection of his person or estate may be to secure the authority of the attorney in fact against upset by arranging matters so that the likely appointee in any future protective proceedings will be the attorney in fact or another equally congenial to the principal and his plans. However, the evolution of a free-standing durable power act increases the prospects that UPC-type statutes covering protective proceedings will not apply when a protective proceeding is commenced for one who has created a durable power. This means that a receiving a petition for a guardian or conservator may not be governed by standards like those in UPC § 5-304 (personal guardians) and § 5-401(2) and related sections which are designed to deter unnecessary protective proceedings. Finally, attorneys and others may find various good uses for a regime in which a conservator directs exercise of an agent's authority under a durable power. For example, the combination would confer jurisdiction on the Court handling the protective proceeding to approve or ratify a desirable transaction that might not be possible without the protection of a Court order. The alternative of a declaratory judgment proceeding might be difficult or impossible in some states.

It is to be noted that the "fiduciary" described in subsection (a), to whom an attorney in fact under a durable power is accountable and who may revoke or amend the durable power, does not include a guardian of the person only. In subsection (b), however, the authority of a principal to nominate extends to a guardian of the person as well as to conservators and guardians of estates.

Discussion of this section in NCCUSL's Committee of the Whole involved the question of whether an agent's accountability, as described here, might be effectively countermanded by appropriate language in a power of attorney. The response was negative. The reference is to basic accountability like that owed by every fiduciary to his beneficiary and that distinguishes a fiduciary relationship from those involving gifts or general powers of appointment. The section is not intended to describe a particular form of accounting. Hence, the context differs from those involving statutory duties to account in Court, or with specified frequency, where draftsmen of controlling instruments may be able to excuse statutory details relating to accountings without affecting the general principle of accountability.

SECTION 5-504. POWER OF ATTORNEY NOT REVOKED UNTIL NOTICE.

(a) The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person,

who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.

(b) The disability or incapacity of a principal who has previously executed a written power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the disability or incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his successors in interest.

COMMENT

UPC §§ 5-501 and 5-502 (1969) (1975) are flawed by different standards for durable and nondurable powers vis a vis the protection of an attorney in fact who purports to exercise a power after the principal has died. Section 5-501 (1969) (1975), applicable only to durable powers, expresses a most unsatisfactory standard, i.e. the attorney in fact is protected if the exercise occurs "during any period of uncertainty as to whether the principal is dead or alive ...." Section 5-502 (1969) (1975), applicable only to non-durable powers, protects the agent who "without actual knowledge of the death ... of the principal, acts in good faith under the power of attorney...." Section [4] [5-504](a) expresses as a single test the standard now contained in § 5-502 (1969) (1975).

Subsection (b), applicable only to nondurable powers that are controlled by the traditional view that a principal's loss of capacity ends the authority of his agents, embodies the substance of UPC § 5-502 (1969) (1975).

The discussion in the Committee of the Whole established that the language "or other person" in subsections (a) and (b) is intended to refer to persons who transact business with the attorney in fact under the authority conferred by the power. Consequently, persons in this category who act in good faith and without the actual knowledge described in the subsections are protected by the statute.

Also, there was discussion of possible conflict between the actual knowledge test here prescribed for protection of persons relying on the continuance of a power and constructive notice concepts under statutes governing the recording of instruments affecting real estate. The view was expressed in the Committee of the Whole that the recording statutes would continue to control since those statutes are specifically designed to encourage public recording of documents affecting land titles. It was also suggested that "good faith," as required by this section, might be lacking in the unlikely case of one who, without actual knowledge of the principal's death or incompetency, accepted a conveyance executed by an attorney in fact without checking the public record where he would have found an instrument disclosing the principal's death or

incompetency. If so, there would be no conflict between this act and recording statutes.

It is to be noted, also, that this section deals only with the effect of a principal's death or incompetency as a revocation of a power of attorney; it does not relate to an express revocation of a power or to the expiration of a power according to its terms. Further, since a durable power is not revoked by incapacity, the section's coverage of revocation of powers of attorney by the principal's incapacity is restricted to powers that are not durable. The only effect of the Act on rules governing express revocations of powers of attorney is as described in Section [5] [5-505].

SECTION 5-505. PROOF OF CONTINUANCE OF DURABLE AND OTHER POWERS OF ATTORNEY BY AFFIDAVIT. As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney in fact under a power of attorney, durable or otherwise, stating that he did not have at the time of exercise of the power actual knowledge of the termination of the power by revocation or of the principal's death, disability, or incapacity is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable. This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

COMMENT

This section, embodying the substance and form of UPC 5-502(b)(1969) (1975), has been extended to apply to durable powers. It is unclear whether UPC 5-502(b) (1969) (1975) applies to durable powers. Affidavits protecting persons dealing with attorneys in fact extend the utility of powers of attorney and plainly should be available for use by all attorneys in fact.

The matters stated in an affidavit that are strengthened by this section are limited to the revocation of a power by the principal's voluntary act, his death, or, in the case of non-durable power, by his incompetence. With one possible exception, other matters, including circumstances made relevant by the terms of the instrument to the commencement of the agency or to its termination by other circumstances, are not covered. The exception concerns the case of a power created to begin on "incapacity." The affidavit of the agent in fact that all conditions necessary to the valid exercise of the power might be aided by the statute in relation to the fact of incapacity. An affidavit as to the existence or nonexistence of facts and circumstances not covered by this section nonetheless may be useful in establishing good faith reliance.

ARTICLE 5A

UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT

PREFATORY NOTE

The Uniform Guardianship and Protective Proceedings Act (UGPPA), which was last revised in 1997 and which is codified at Article V, is a comprehensive act addressing all aspects of guardianships and protective proceedings for both minors and adults. The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) has a much narrower scope, dealing only with jurisdiction and related issues in adult proceedings. Drafting of the UAGPPJA began in 2005. The Act had its first reading at the Uniform Law Commission's 2006 Annual Meeting, and was approved at the 2007 Annual Meeting.

States may enact the UAGPPJA either separately or as part of the broader UGPPA or the even broader Uniform Probate Code (UPC), of which the UGPPA and UAGPPJA form a part.

The Problem of Multiple Jurisdiction

Because the United States has 50 plus guardianship systems, problems of determining jurisdiction are frequent. Questions of which state has jurisdiction to appoint a guardian or conservator can arise between an American state and another country. But more frequently, problems arise because the individual has contacts with more than one American state.

In nearly all American states, a guardian may be appointed by a court in a state in which the individual is domiciled or is physically present. In nearly all American states, a conservator may be appointed by a court in a state in which the individual is domiciled or has property. Contested cases in which courts in more than one state have jurisdiction are becoming more frequent. Sometimes these cases arise because the adult is physically located in a state other than the adult's domicile. Sometimes the case arises because of uncertainty as to the adult's domicile, particularly if the adult owns a second home in another state. There is a need for an effective mechanism for resolving multi-jurisdictional disputes. Part 2 of this Article is intended to provide such a mechanism.

The Problem of Transfer

Oftentimes, problems arise even absent a dispute. Even if everyone is agreed that an already existing guardianship or conservatorship should be moved to another state, few states have streamlined procedures for transferring a proceeding to another state or for accepting such a transfer. In most states, all of the procedures for an original appointment must be repeated, a time consuming and expensive prospect. Part 3 of this Article is designed to provide an expedited process for making such transfers, thereby avoiding the need to relitigate incapacity and whether the guardian or conservator appointed in the first state was an appropriate selection.

The Problem of Out-of-State Recognition

The Full Faith and Credit Clause of the United States Constitution requires that court orders in one state be honored in another state. But there are exceptions to the full faith and credit doctrine, of which guardianship and protective proceedings is one. Sometimes, guardianship or protective proceedings must be initiated in a second state because of the refusal of financial institutions, care facilities, and the courts to recognize a guardianship or protective order issued in another state. Part 4 of this Article creates a registration procedure. Following registration of the guardianship or protective order in the second state, the guardian may exercise in the second state all powers authorized in the original state's order of appointment except for powers that cannot be legally exercised in the second state.

The Proposed Uniform Law and the Child Custody Analogy

Similar problems of jurisdiction existed for many years in the United States in connection with child custody determinations. If one parent lived in one state and the other parent lived in another state, frequently courts in more that one state had jurisdiction to issue custody orders. But the Uniform Law Conference has approved two uniform acts that have effectively minimized the problem of multiple court jurisdiction in child custody matters; the Uniform Child Custody Jurisdiction Act (UCCJA), approved in 1968, succeeded by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), approved in 1997. The drafters of the UAGPPJA have elected to model Part 2 and portions of Part 1 of their Act after these child custody analogues. However, the UAGPPJA applies only to adult proceedings. The UAGPPJA is limited to adults in part because most jurisdictional issues involving guardianships for minors are subsumed by the UCCJEA.

The Objectives and Key Concepts of the Proposed UAGPPJA

The UAGPPJA is organized into five articles, the first four of which are codified into Article 5A of the UPC. Part 1 contains definitions and provisions designed to facilitate cooperation between courts in different states. Part 2 is the heart of the Act, specifying which court has jurisdiction to appoint a guardian or conservator or issue another type of protective order and contains definitions applicable only to that part. Its principal objective is to assure that an appointment or order is made or issued in only one state except in cases of emergency or in situations where the individual owns property located in multiple states. Part 3 specifies a procedure for transferring a guardianship or conservatorship proceedings from one state to another state. Part 4 deals with enforcement of guardianship and protective orders in other states. The final article of UAGPPJA, not codified into this Article of the UPC, contains an effective date provision, a place to list provisions of existing law to be repealed or amended, and boilerplate provisions common to all uniform acts.

Key Definitions (Section 5A-201)

To determine which court has primary jurisdiction under the UAGPPJA, the key factors are to determine the individual's "home state" and "significant-connection state." A "home state" (Section 5A-201(a)(2)) is the state in which the individual was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or appointment of a guardian. If the respondent was not physically present in a single state for the six months immediately preceding

the filing of the petition, the home state is the place where the respondent was last physically present for at least six months as long a such presence ended within the six months prior to the filing of the petition. Section 5A-201(a)(2). Stated another way, the ability of the home state to appoint a guardian or enter a protective order for an individual continues for up to six months following the individual's physical relocation to another state.

A "significant-connection state," which is a potentially broader concept, means the state in which the individual has a significant connection other than mere physical presence, and where substantial evidence concerning the individual is available. Section 5A-201(a)(3). Factors that may be considered in deciding whether a particular respondent has a significant connection include:

- the location of the respondent's family and others required to be notified of the guardianship or protective proceeding;
- the length of time the respondent was at any time physically present in the state and the duration of any absences;
- the location of the respondent's property; and
- the extent to which the respondent has other ties to the state such as voting registration, filing of state or local tax returns, vehicle registration, driver's license, social relationships, and receipt of services. Section 5A-201(b).

A respondent in a guardianship or protective proceeding may have multiple significant-connection states but will have only one home state.

Jurisdiction (Part 2)

Section 5A-203 is the principal provision governing jurisdiction, creating a three-level priority; the home state, followed by a significant-connection state, followed by other jurisdictions:

Home State: The home state has primary jurisdiction to appoint a guardian or conservator or issue another type of protective order.

Significant-connection State: A significant-connection state has jurisdiction to appoint a guardian or conservator or issue another type of protective order if on the date the petition was filed:

- the respondent does not have a home state or the home state has declined jurisdiction on the basis that the significant-connection state is a more appropriate forum; or

- the respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant-connection state, and, before the court makes the appointment or issues the order (i) a petition for an appointment or order is not filed in the respondent's home state; (ii) an objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding; and (iii) the court in this state

concludes that it is an appropriate forum under the factors set forth in Section 5A-206.

Another State: A court in another state has jurisdiction if the home state and all significant-connection states have declined jurisdiction because the court in the other state is a more appropriate forum, or the respondent does not have a home state or significant-connection state.

Section 5A-204 addresses special cases. Regardless of whether it has jurisdiction under the general principles stated in Section 5A-203, a court in the state where the respondent is currently physically present has jurisdiction to appoint a guardian in an emergency, and a court in a state where a respondent's real or tangible personal property is located has jurisdiction to appoint a conservator or issue another type of protective order with respect to that property. In addition, a court not otherwise having jurisdiction under Section 5A-203 has jurisdiction to consider a petition to accept the transfer of an already existing guardianship or conservatorship from another state as provided in Part 3.

The remainder of Part 2 elaborates on these core concepts. Section 5A-205 provides that once a guardian or conservator is appointed or other protective order is issued, the court's jurisdiction continues until the proceeding is terminated or transferred or the appointment or order expires by its own terms. Section 5A-206 authorizes a court to decline jurisdiction if it determines that the court of another state is a more appropriate forum, and specifies the factors to be taken into account in making this determination. Section 207 authorizes a court to decline jurisdiction or fashion another appropriate remedy if jurisdiction was acquired because of unjustifiable conduct. Section 5A-208 prescribes additional notice requirements if a proceeding is brought in a state other than the respondent's home state. Section 5A-209 specifies a procedure for resolving jurisdictional issues if petitions are pending in more than one state. The UAGPPJA also includes provisions regarding communication between courts in different states, requests for assistance made by a court to a court of another state, and the taking of testimony in another state. Sections 5A-104 to 5A-106.

Transfer to Another State (Part 3)

Part 3 specifies a procedure for transferring an already existing guardianship or conservatorship to another state. To make the transfer, court orders are necessary from both the court transferring the case and from the court accepting the case. The transferring court must find that the incapacitated or protected person is physically present in or is reasonably expected to move permanently to the other state, that adequate arrangements have been made for the person or the person's property in the other state, and that the court is satisfied the case will be accepted by the court in the other state. To assure continuity, the court in the transferring state cannot dismiss the local proceeding until the order from the state accepting the case is filed with the transferring court. To expedite the transfer process, the court in the accepting state must give deference to the transferring court's finding of incapacity and selection of the guardian or conservator. Much of Part 3 is based on the pioneering work of the National Probate Court Standards, a 1993 joint project of the National College of Probate Judges and the National Center for State Courts.

Out of State Enforcement (Part 4)

To facilitate enforcement of guardianship and protective orders in other states, Part 4 authorizes a guardian or conservator to register these orders in other states. Upon registration, the guardian or conservator may exercise in the registration state all powers authorized in the order except as prohibited by the laws of the registration state.

International Application (Section 5A-103)

Section 5A-103 addresses application of the Act to guardianship and protective orders issued in other countries. A foreign order is not enforceable pursuant to the registration procedures under Part 4, but a court in the United State may otherwise apply the Act as if the foreign country were an American state.

The Problem of Differing Terminology

States differ on terminology for the person appointed by the court to handle the personal and financial affairs of a minor or incapacitated adult. Under the UGPPA and in a majority of American states, a "guardian" is appointed to make decisions regarding the person of an "incapacitated person;" a "conservator" is appointed in a "protective proceeding" to manage the property of a "protected person." But in many states, only a "guardian" is appointed, either a guardian of the person or guardian of the estate, and in a few states, the terms guardian and conservator are used but with different meanings. The UAGPPJA adopts the terminology used in the UGPPA and in a majority of the states. An enacting state that uses a different term than "guardian" or "conservator" for the person appointed by the court or that defines either of these terms differently than does the UGPPA may, but is not encouraged to, substitute its own term or definition. Use of common terms and definitions by states enacting the Act will facilitate resolution of cases involving multiple jurisdictions.

The Drafting Committee was assisted by numerous officially designated advisors and observers, representing an array of organizations. In addition to the American Bar Association advisors listed above, important contributions were made by Sally Hurme of AARP, Terry W. Hammond of the National Guardianship Association, Kathleen T. Whitehead and Shirley B. Whitenack of the National Academy of Elder Law Attorneys, Catherine Anne Seal of the Colorado Bar Association, Kay Farley of the National Center for State Courts, and Robert G. Spector, the Reporter for the Joint Editorial Board for Uniform Family Laws and the Reporter for the Uniform Child Custody Jurisdiction and Enforcement Act (1997).

[Part] 1

GENERAL PROVISIONS

General Comment

Part 1 contains definitions and general provisions used throughout the Act. Definitions applicable only to Part 2 are found in Section 5A-201. Section 5A-101 is the title, Section 5A-102 contains the definitions, and Sections 5A-103 through 5A-106, the general provisions.

Section 5A-103 provides that a court of an enacting state may treat a foreign country as a state for the purpose of applying all portions of the Act other than Part 4, Section 5A-104 addresses communication between courts, Section 5A-105 requests by a court to a court in another state for assistance, and Section 5A-106 the taking of testimony in other states. These Part 1 provisions relating to court communication and assistance are essential tools to assure the effectiveness of the provisions of Part 2 determining jurisdiction and in facilitating transfer of a proceeding to another state as authorized in Part 3.

SECTION 5A-101. SHORT TITLE. This [article] may be cited as the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

Comment

The title to the Act succinctly describes the Act's scope. The Act applies only to court jurisdiction and related topics for adults for whom the appointment of a guardian or conservator or other protective order is being sought or has been issued.

The drafting committee elected to limit the Act to adults for two reasons. First, jurisdictional issues concerning guardians for minors are subsumed by the Uniform Child Custody Jurisdiction and Enforcement Act (1997). Second, while the UCCJEA does not address conservatorship and other issues involving the property of minors, all of the problems and concerns that led the Uniform Law Commission to appoint a drafting committee involved adults.

SECTION 5A-102. DEFINITIONS. In this [article]:

(1) "Adult" means an individual who has attained [18] years of age.

(2) "Conservator" means a person appointed by the court to administer the property of an adult as provided in Article V, Parts 1-4.

(3) "Guardian" means a person appointed by the court to make decisions regarding the person of an adult as provided in Article V, Parts 1-4.

(4) "Guardianship order" means an order appointing a guardian.

(5) "Guardianship proceeding" means a judicial proceeding in which an order for the appointment of a guardian is sought or has been issued.

(6) "Incapacitated person" means an adult for whom a guardian has been appointed.

(7) "Party" means the respondent, petitioner, guardian, conservator, or any other person

allowed by the court to participate in a guardianship or protective proceeding.

(8) "Protected person" means an adult for whom a protective order has been issued.

(9) "Protective order" means an order appointing a conservator or other order related to management of an adult's property.

(10) "Protective proceeding" means a judicial proceeding in which a protective order is sought or has been issued.

(11) "Respondent" means an adult for whom a protective order or the appointment of a guardian is sought.

Comment

The definition of "adult" (paragraph (1)) would exclude an emancipated minor. The Act is not designed to supplant the local substantive law on guardianship. States whose guardianship law treats emancipated minors as adults may wish to modify this definition.

Two of the definitions are common procedural terms. The individual for whom a guardianship or protective order is sought is a "respondent" (paragraph (11)). A person who may participate in a guardianship or protective proceeding is referred to as a "party" (paragraph (7)).

The remaining definitions refer to standard guardianship terminology used in a majority of states. A "guardian" (paragraph (3)) is appointed in a "guardianship order" (paragraph (4)) which is issued as part of a "guardianship proceeding" (paragraph (5)) and which authorizes the guardian to make decisions regarding the person of an "incapacitated person" (paragraph (6)). A "conservator" (paragraph (2)) is appointed pursuant to a "protective order" (paragraph (9)) which is issued as part of a "protective proceeding" (paragraph (10)) and which authorizes the conservator to manage the property of a "protected person" (paragraph (8)).

In most states, a protective order may be issued by the court without the appointment of a conservator. For example, under the Uniform Guardianship and Protective Proceedings Act, the court may authorize a so-called single transaction for the security, service, or care meeting the foreseeable needs of the protected person, including the payment, delivery, deposit, or retention of property; sale, mortgage, lease, or other transfer of property; purchase of an annuity; making a contract for life care, deposit contract, or contract for training and education; and the creation of or addition to a suitable trust. UGPPA (1997) §412(1). It is for this reason that the Act contains frequent references to the broader category of protective orders. Where the Act is intended to apply only to conservatorships, such as in Part 3 dealing with transfers of proceedings to other states, the Act refers to conservatorship and not to the broader category of protective proceeding.

The Act does not limit the types of conservatorships or guardianships to which the Act

applies. The Act applies whether the conservatorship or guardianship is denominated as plenary, limited, temporary or emergency. The Act, however, would not ordinarily apply to a guardian ad litem, who is ordinarily appointed by the court to represent a person or conduct an investigation in a specified legal proceeding.

Section 5A-102 is not the sole definitional section in the Act. Section 5A-201 contains definitions of important terms used only in Part 2. These are the definitions of "emergency" (Section 5A-201(1)), "home state" (Section 5A-201(2)), and "significant-connection state" (Section 5A-201(3)).

SECTION 5A- 103. INTERNATIONAL APPLICATION OF [ARTICLE]. A court of this state may treat a foreign country as if it were a state for the purpose of applying this [part] and [parts] 2 and 3.

Comment

This section addresses application of the Act to guardianship and protective orders issued in other countries. A foreign order is not enforceable pursuant to the registration procedures of Part 4, but a court in this country may otherwise apply this Act to a foreign proceeding as if the foreign country were an American state. Consequently, a court may conclude that the court in the foreign country has jurisdiction because it constitutes the respondent's "home state" or "significant-connection state" and may therefore decline to exercise jurisdiction on the ground that the court of the foreign country has a higher priority under Section 5A-203. Or the court may treat the foreign country as if it were a state of the United States for purposes of applying the transfer provisions of Part 3.

This section addresses similar issues to but differs in result from Section 105 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997). Under the UCCJEA, the United States court must honor a custody order issued by the court of a foreign country if the order was issued under factual circumstances in substantial conformity with the jurisdictional standards of the UCCJEA. Only if the child custody law violates fundamental principles of human rights is enforcement excused. Because guardianship regimes vary so greatly around the world, particularly in civil law countries, it was concluded that under this Act a more flexible approach was needed. Under this Act, a court may but is not required to recognize the foreign order.

The fact that a guardianship or protective order of a foreign country cannot be enforced pursuant to the registration procedures of Part 4 does not preclude enforcement by the court under some other provision or rule of law.

SECTION 5A-104. COMMUNICATION BETWEEN COURTS.

[(a)] A court of this state may communicate with a court in another state concerning a proceeding arising under this [article]. The court may allow the parties to participate in the

communication. [Except as otherwise provided in subsection (b), the court shall make a record of the communication. The record may be limited to the fact that the communication occurred.

(b) Courts may communicate concerning schedules, calendars, court records, and other administrative matters without making a record.]

***Legislative Note**: An enacting state is encouraged to enact the bracketed language so that a record will be created of the communication with the other court, even thought the record is limited to the fact that the communication occurred. In some states, however, a legislative enactment directing when a court must make a record in a judicial proceeding may violate the separation of powers doctrine. Such states are encouraged to achieve the objectives of the bracketed language by promulgating a comparable requirement by judicial rule.*

Comment

This section emphasizes the importance of communications among courts with an interest in a particular matter. Most commonly, this would include communication between courts of different states to resolve an issue of which court has jurisdiction to proceed under Part 2. It would also include communication between courts of different states to facilitate the transfer of a guardianship or conservatorship to a different state under Part 3. Communication can occur in a variety of ways, including by electronic means. This section does not prescribe the use of any particular means of communication.

The court may authorize the parties to participate in the communication. But the Act does not mandate participation or require that the court give the parties notice of any communication. Communication between courts is often difficult to schedule and participation by the parties may be impractical. Phone calls or electronic communications often have to be made after-hours or whenever the schedules of judges allow. When issuing a jurisdictional or transfer order, the court should set forth the extent to which a communication with another court may have been a factor in the decision.

This section includes brackets around the language relating to whether a record must be made of any communication with the court of the other state. As indicated by the Legislative Note to this section, the language is bracketed because of a concern in some states that a legislative enactment directing when a court must make a record in a judicial proceeding may violate the doctrine on separation of powers. The language is not bracketed because the drafters concluded that the making of a record is not important. Rather, if concerns about separation of powers leads to the deletion of the bracketed language, the enacting state is encouraged to achieve the objectives of the bracketed language by promulgating a comparable provision by judicial rule.

This section does not prescribe the extent of the record that the court must make, leaving that issue to the court. A record might include notes or transcripts of a court reporter who listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum summarizing a conversation, and email communications. No record need be

made of relatively inconsequential matters such as scheduling, calendars, and court records.

Section 110 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997) addresses similar issues as this section but is more detailed. As is the case with several other provisions of this Act, the drafters of this Act concluded that the more varied circumstances of adult guardianship and protective proceedings suggested a need for greater flexibility.

SECTION 5A-105. COOPERATION BETWEEN COURTS.

(a) In a guardianship or protective proceeding in this state, a court of this state may request the appropriate court of another state to do any of the following:

(1) hold an evidentiary hearing;

(2) order a person in that state to produce evidence or give testimony pursuant to procedures of that state;

(3) order that an evaluation or assessment be made of the respondent;

(4) order any appropriate investigation of a person involved in a proceeding;

(5) forward to the court of this state a certified copy of the transcript or other record of a hearing under paragraph (1) or any other proceeding, any evidence otherwise produced under paragraph (2), and any evaluation or assessment prepared in compliance with an order under paragraph (3) or (4);

(6) issue any order necessary to assure the appearance in the proceeding of a person whose presence is necessary for the court to make a determination, including the respondent or the incapacitated or protected person;

(7) issue an order authorizing the release of medical, financial, criminal, or other relevant information in that state, including protected health information as defined in 45 C.F.R. Section 164.504 [, as amended].

(b) If a court of another state in which a guardianship or protective proceeding is pending requests assistance of the kind provided in subsection (a), a court of this state has jurisdiction for

the limited purpose of granting the request or making reasonable efforts to comply with the request.

***Legislative Note**: A state that permits dynamic references to federal law should delete the brackets in subsection (a)(7). A state that requires that a reference to federal law be to that law on a specific date should delete the brackets and bracketed material, insert a specific date, and periodically update the reference.*

Comment

Subsection (a) of this section is similar to Section 112(a) of the Uniform Child Custody Jurisdiction and Enforcement Act (1997), although modified to address issues of concern in adult guardianship and protective proceedings and with the addition of subsection (a)(7), which addresses the release of health information protected under HIPAA. Subsection (b), which clarifies that a court has jurisdiction to respond to requests for assistance from courts in other states even though it might otherwise not have jurisdiction over the proceeding, is not found in although probably implicit in the UCCJEA.

Court cooperation is essential to the success of this Act. This section is designed to facilitate such court cooperation. It provides mechanisms for courts to cooperate with each other in order to decide cases in an efficient manner without causing undue expense to the parties. Courts may request assistance from courts of other states and may assist courts of other states. Typically, such assistance will be requested to resolve a jurisdictional issue arising under Part 2 or an issue concerning a transfer proceeding under Part 3.

This section does not address assessment of costs and expenses, leaving that issue to local law. Should a court have acquired jurisdiction because of a party's unjustifiable conduct, Section 5A-207(b) authorizes the court to assess against the party all costs and expenses, including attorney's fees.

SECTION 5A-106. TAKING TESTIMONY IN ANOTHER STATE.

(a) In a guardianship or protective proceeding, in addition to other procedures that may be available, testimony of a witness who is located in another state may be offered by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a witness be taken in another state and may prescribe the manner in which and the terms upon which the testimony is to be taken.

(b) In a guardianship or protective proceeding, a court in this state may permit a witness located in another state to be deposed or to testify by telephone or audiovisual or other electronic

means. A court of this state shall cooperate with the court of the other state in designating an appropriate location for the deposition or testimony.

[(c) Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the best evidence rule.]

***Legislative Note**: In cases involving more than one jurisdiction, documentary evidence often must be presented that has been transmitted by facsimile or in electronic form. A state in which the best evidence rule might preclude the introduction of such evidence should enact subsection (c). A state that has adequate exceptions to its best evidence rule to permit the introduction of evidence transmitted by facsimile or in electronic form should delete subsection (c).*

Comment

This section is similar to Section 111 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997). That section was in turn derived from Section 316 of the Uniform Interstate Family Support Act (1992) and the much earlier and now otherwise obsolete Uniform Interstate and International Procedure Act (1962).

This section is designed to fill the vacuum that often exists in cases involving an adult with interstate contacts when much of the essential information about the individual is located in another state.

Subsection (a) empowers the court to initiate the gathering of out-of-state evidence, including depositions, written interrogatories and other discovery devices. The authority granted to the court in no way precludes the gathering of out-of-state evidence by a party, including the taking of depositions out-of-state.

Subsections (b) and (c) clarify that modern modes of communication are permissible for the taking of depositions and receipt of documents into evidence. A state that has adequate exceptions to its best evidence rule to permit the introduction of evidence transmitted by facsimile or in electronic form should delete subsection (c), which has been placed in brackets for this reason.

This section is consistent with and complementary to the Uniform Interstate Depositions and Discovery Act (2007), which specifies the procedure for taking depositions in other states.

[Part] 2

JURISDICTION

General Comment

The jurisdictional rules in Part 2 will determine which state's courts may appoint a guardian or conservator or issue another type of protective order. Section 5A-201 contains definitions of "emergency," "home state," and "significant-connection state," terms used only in Part 2 that are key to understanding the jurisdictional rules under the Act. Section 5A-202 provides that Part 2 is the exclusive jurisdictional basis for a court of the enacting state to appoint a guardian or issue a protective order for an adult. Consequently, Part 2 is applicable even if all of the respondent's significant contacts are in-state. Section 5A-203 is the principal provision governing jurisdiction, creating a three-level priority; the home state, followed by a significant-connection state, followed by other jurisdictions. But there are circumstances under Section 5A-203 where a significant-connection state may have jurisdiction even if the respondent also has a home state, or a state that is neither a home or significant-connection state may be able to assume jurisdiction even though the particular respondent has both a home state and one or more significant-connection states. One of these situations is if a state declines to exercise jurisdiction under Section 5A-206 because a court of that state concludes that a court of another state is a more appropriate forum. Another is Section 5A-207, which authorizes a court to decline jurisdiction or fashion another appropriate remedy if jurisdiction was acquired because of unjustifiable conduct. Section 5A-205 provides that once an appointment is made or order issued, the court's jurisdiction continues until the proceeding is terminated or the appointment or order expires by its own terms.

Section 5A-204 addresses special cases. Regardless of whether it has jurisdiction under the general principles stated in Section 5A-203, a court in the state where the individual is currently physically present has jurisdiction to appoint a guardian in an emergency, and a court in a state where an individual's real or tangible personal property is located has jurisdiction to appoint a conservator or issue another type of protective order with respect to that property. In addition, a court not otherwise having jurisdiction under Section 5A-203 has jurisdiction to consider a petition to accept the transfer of an already existing guardianship or conservatorship from another state as provided in Part 3.

The remainder of Part 2 addresses procedural issues. Section 5A-208 prescribes additional notice requirements if a proceeding is brought in a state other than the respondent's home state. Section 5A-209 specifies a procedure for resolving jurisdictional issues if petitions are pending in more than one state.

SECTION 5A-201. DEFINITIONS; SIGNIFICANT CONNECTION FACTORS.

(a) In this [part]:

(1) "Emergency" means a circumstance that likely will result in substantial harm to a respondent's health, safety, or welfare, and for which the appointment of a guardian is necessary because no other person has authority and is willing to act on the respondent's behalf;

(2) "Home state" means the state in which the respondent was physically present,

including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian; or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition.

(3) "Significant-connection state" means a state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available.

(b) In determining under Sections 5A-203 and Section 5A-301(e) whether a respondent has a significant connection with a particular state, the court shall consider:

(1) the location of the respondent's family and other persons required to be notified of the guardianship or protective proceeding;

(2) the length of time the respondent at any time was physically present in the state and the duration of any absence;

(3) the location of the respondent's property; and

(4) the extent to which the respondent has ties to the state such as voting registration, state or local tax return filing, vehicle registration, driver's license, social relationship, and receipt of services.

Comment

The terms "emergency," "home state," and "significant-connection state" are defined in this section and not in Section 5A-102 because they are used only in Part 2.

The definition of "emergency" (subsection (a)(1)) is taken from the emergency guardianship provision of the Uniform Guardianship and Protective Proceedings Act (1997), Section 312 [Section 5-312 of this Code].

Pursuant to Section 5A-204 of this Act, a court has jurisdiction to appoint a guardian in an emergency for a period of up to 90 days even though it does not otherwise have jurisdiction.

However, the emergency appointment is subject to the direction of the court in the respondent's home state. Pursuant to Section 5A-204(b), the emergency proceeding must be dismissed at the request of the court in the respondent's home state.

Appointing a guardian in an emergency should be an unusual event. Although most states have emergency guardianship statutes, not all states do, and in those states that do have such statutes, there is great variation on whether and how an emergency is defined. To provide some uniformity on when a court acquires emergency jurisdiction, the drafters of this Act concluded that adding a definition of emergency was essential. The definition does not preclude an enacting jurisdiction from appointing a guardian under an emergency guardianship statute with a different or broader test of emergency if the court otherwise has jurisdiction to make an appointment under Section 5A-203.

Pursuant to Section 5A-203, a court in the respondent's home state has primary jurisdiction to appoint a guardian or issue a protective order. A court in a significant-connection state has jurisdiction if the respondent does not have a home state and in other circumstances specified in Section 5A-203. The definitions of "home state" and "significant-connection state" are therefore important to an understanding of the Act.

The definition of "home state" (subsection (a)(2)) is derived from but differs in a couple of respects from the definition of the same term in Section 102 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997). First, unlike the definition in the UCCJEA, the definition in this Act clarifies that actual physical presence is necessary. The UCCJEA definition instead focuses on where the child has "lived" for the prior six months. Basing the test on where someone has "lived" may imply that the term "home state" is similar to the concept of domicile. Domicile, in an adult guardianship context, is a vague concept that can easily lead to claims of jurisdiction by courts in more than one state. Second, under the UCCJEA, home state jurisdiction continues for six months following physical removal from the state and the state has ceased to be the actual home. Under this Act, the six-month tail is incorporated directly into the definition of home state. The place where the respondent was last physically present for six months continues as the home state for six months following physical removal from the state. This modification of the UCCJEA definition eliminates the need to refer to the six-month tail each time home state jurisdiction is mentioned in the Act.

The definition of "significant-connection state" (subsection (a)(3)) is similar to Section 201(a)(2) of the Uniform Child Custody Jurisdiction and Enforcement Act (1997). However, subsection (b) of this Section adds a list of factors relevant to adult guardianship and protective proceedings to aid the court in deciding whether a particular place is a significant-connection state. Under Section 5A-301(e)(1), the significant connection factors listed in the definition are to be taken into account in determining whether a conservatorship may be transferred to another state.

SECTION 5A-202. EXCLUSIVE BASIS. This [part] provides the exclusive jurisdictional basis for a court of this state to appoint a guardian or issue a protective order for an adult.

Comment

Similar to Section 201(b) of the Uniform Child Custody Jurisdiction and Enforcement Act (1997), which provides that the UCCJEA is the exclusive basis for determining jurisdiction to issue a child custody order, this section provides that this part is the exclusive jurisdictional basis for determining jurisdiction to appoint a guardian or issue a protective order for an adult. An enacting jurisdiction will therefore need to repeal any existing provisions addressing jurisdiction in guardianship and protective proceedings cases. A Legislative Note at the end of this Article provides guidance on which provisions need to be repealed or amended. The drafters of this Act concluded that limiting the Act to "interstate" cases was unworkable. Such cases are hard to define, but even if they could be defined, overlaying this Act onto a state's existing jurisdictional rules would leave too many gaps and inconsistencies. In addition, if the particular case is truly local, the local court would likely have jurisdiction under both this Act as well as under prior law.

SECTION 5A-203. JURISDICTION. A court of this state has jurisdiction to appoint a guardian or issue a protective order for a respondent if:

(1) this state is the respondent's home state;

(2) on the date the petition is filed, this state is a significant-connection state and:

(A) the respondent does not have a home state or a court of the respondent's home state has declined to exercise jurisdiction because this state is a more appropriate forum; or

(B) the respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant-connection state, and, before the court makes the appointment or issues the order:

(i) a petition for an appointment or order is not filed in the respondent's home state;

(ii) an objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding; and;

(iii) the court in this state concludes that it is an appropriate forum under the factors set forth in Section 5A-206;

(3) this state does not have jurisdiction under either paragraph (1) or (2), the respondent's home state and all significant-connection states have declined to exercise jurisdiction because this state is the more appropriate forum, and jurisdiction in this state is consistent with the constitutions of this state and the United States; or

(4) the requirements for special jurisdiction under Section 5A-204 are met.

Comment

Similar to the Uniform Child Jurisdiction and Enforcement Act (1997), this Act creates a three-level priority for determining which state has jurisdiction to appoint a guardian or issue a protective order; the home state (defined in Section 5A-201(a)(2)), followed by a significant-connection state (defined in Section 5A-201(a)(3)), followed by other jurisdictions. The principal objective of this section is to eliminate the possibility of dual appointments or orders except for the special circumstances specified in Section 5A-204.

While this section is the principal provision for determining whether a particular court has jurisdiction to appoint a guardian or issue a protective order, it is not the only provision. As indicated in the cross-reference in Section 5A-203(4), a court that does not otherwise have jurisdiction under Section 5A-203 may have jurisdiction under the special circumstances specified in Section 5A-204.

Pursuant to Section 5A-203(1), the home state has primary jurisdiction to appoint a guardian or conservator or issue another type of protective order. This jurisdiction terminates if the state ceases to be the home state, if a court of the home state declines to exercise jurisdiction under Section 206 on the basis that another state is a more appropriate forum, or, as provided in Section 5A-205, a court of another state has appointed a guardian or issued a protective order consistent with this Act. The standards by which a home state that has enacted the Act may decline jurisdiction on the basis that another state is a more appropriate forum are specified in Section 5A-206. Should the home state not have enacted the Act, Section 5A-203(1) does not require that the declination meet the standards of Section 5A-206.

Once a petition is filed in a court of the respondent's home state, that state does not cease to be the respondent's home state upon the passage of time even though it may be many months before an appointment is made or order issued and during that period the respondent is physically located. Only upon dismissal of the petition can the court cease to be the home state due to the passage of time. Under the definition of "home state," the six-month physical presence requirement is fulfilled or not on the date the petition is filed. *See* Section 5A-201(a)(2).

A significant-connection state has jurisdiction under two possible bases; Section 5A-203(2)(A) and Section 5A-203(2)(B). Under Section 5A-203(2)(A), a significant-connection state has jurisdiction if the individual does not have a home state or if the home state has declined jurisdiction on the basis that the significant-connection state is a more appropriate

forum.

Section 5A-203(2)(B) is designed to facilitate consideration of cases where jurisdiction is not in dispute. Section 5A-203(2)(B) allows a court in a significant-connection state to exercise jurisdiction even though the respondent has a home state and the home state has not declined jurisdiction. The significant-connection state may assume jurisdiction under these circumstances, however, only in situations where the parties are not in disagreement concerning which court should hear the case. Jurisdiction may not be exercised by a significant-connection state under Section 203(2)(B) if (1) a petition has already been filed and is still pending in the home state or other significant-connection state; or (2) prior to making the appointment or issuing the order, a petition is filed in the respondent's home state or an objection to the court's jurisdiction is filed by a person required to be notified of the proceeding. Additionally, the court in the significant-connection state must conclude that it is an appropriate forum applying the factors listed in Section 5A-206.

There is nothing comparable to Section 203(2)(B) in the Uniform Child Custody Jurisdiction and Enforcement Act (1997). Under Section 201 of the UCCJEA a court in a significant-connection state acquires jurisdiction only if the child does not have a home state or the court of that state has declined jurisdiction. The drafters of this Act concluded that cases involving adults differed sufficiently from child custody matters that a different rule is appropriate for adult proceedings in situations where jurisdiction is uncontested.

Pursuant to Section 5A-203(3), a court in a state that is neither the home state or a significant-connection state has jurisdiction if the home state and all significant-connection states have declined jurisdiction or the respondent does not have a home state or significant-connection state. The state must have some connection with the proceeding, however. As Section 5A-203(a)(3) clarifies, jurisdiction in the state must be consistent with the state and United States constitutions.

SECTION 5A-204. SPECIAL JURISDICTION.

(a) A court of this state lacking jurisdiction under Section 5A-203 has special jurisdiction to do any of the following:

(1) appoint a guardian in an emergency for a term not exceeding [90] days for a respondent who is physically present in this state;

(2) issue a protective order with respect to real or tangible personal property located in this state;

(3) appoint a guardian or conservator for an incapacitated or protected person for whom a provisional order to transfer the proceeding from another state has been issued under

procedures similar to Section 5A-301.

(b) If a petition for the appointment of a guardian in an emergency is brought in this state and this state was not the respondent's home state on the date the petition was filed, the court shall dismiss the proceeding at the request of the court of the home state, if any, whether dismissal is requested before or after the emergency appointment.

Comment

This section lists the special circumstances where a court without jurisdiction under the general rule of Section 5A-203 has jurisdiction for limited purposes. The three purposes are (1) the appointment of a guardian in an emergency for a term not exceeding 90 days for a respondent who is physically located in the state (subsection (a)(1)); (2) the issuance of a protective order for a respondent who owns an interest in real or tangible personal property located in the state (subsection (a)(2)); and (3) the grant of jurisdiction to consider a petition requesting the transfer of a guardianship or conservatorship proceeding from another state (subsection (a)(3)). If the court has jurisdiction under Section 5A-203, reference to Section 5A-204 is unnecessary. The general jurisdiction granted under Section 5A-203 includes within it all of the special circumstances specified in this section.

When an emergency arises, action must often be taken on the spot in the place where the respondent happens to be physically located at the time. This place may not necessarily be located in the respondent's home state or even a significant-connection state. Subsection (a)(1) assures that the court where the respondent happens to be physically located at the time has jurisdiction to appoint a guardian in an emergency but only for a limited period of 90 days. The time limit is placed in brackets to signal that enacting states may substitute the time period under their existing emergency guardianship procedures. As provided in subsection (b), the emergency jurisdiction is also subject to the authority of the court in the respondent's home state to request that the emergency proceeding be dismissed. The theory here is that the emergency appointment in the temporary location should not be converted into a de facto permanent appointment through repeated temporary appointments.

"Emergency" is specifically defined in Section 5A-201(a)(1). Because of the great variation among the states on how an emergency is defined and its important role in conferring jurisdiction, the drafters of this Act concluded that adding a uniform definition of emergency was essential. The definition does not preclude an enacting jurisdiction from appointing a guardian under an emergency guardianship statute with a different or broader test of emergency if the court otherwise has jurisdiction to make an appointment under Section 5A-203.

Subsection (a)(2) grants a court jurisdiction to issue a protective order with respect to real and tangible personal property located in the state even though the court does not otherwise have jurisdiction. Such orders are most commonly issued when a conservator has been appointed but the protected person owns real property located in another state. The drafters specifically rejected using a general reference to any property located in the state because of the

tendency of some courts to issue protective orders with respect to intangible personal property such as a bank account where the technical situs of the asset may have little relationship to the protected person.

Subsection (a)(3) is closely related to and is necessary for the effectiveness of Part 3, which addresses transfer of a guardianship or conservatorship to another state. A "Catch-22" arises frequently in such cases. The court in the transferring state will not allow the incapacitated or protected person to move and will not terminate the case until the court in the transferee state has accepted the matter. But the court in the transferee state will not accept the case until the incapacitated or protected person has physically moved and presumably become a resident of the transferee state. Subsection (a)(3), which grants the court in the transferee state limited jurisdiction to consider a petition requesting transfer of a proceeding form another state, is intended to unlock the stalemate.

Not included in this section but a provision also conferring special jurisdiction on the court is Section 5A-105(b), which grants the court jurisdiction to respond to a request for assistance from a court of another state.

SECTION 5A-205. EXCLUSIVE AND CONTINUING JURISDICTION. Except as otherwise provided in Section 5A-204, a court that has appointed a guardian or issued a protective order consistent with this [article] has exclusive and continuing jurisdiction over the proceeding until it is terminated by the court or the appointment or order expires by its own terms.

Comment

While this Act relies heavily on the Uniform Child Jurisdiction and Enforcement Act (1997) for many basic concepts, the identity is not absolute. Section 202 of the UCCJEA specifies a variety of circumstances whereby a court can lose jurisdiction based on loss of physical presence by the child and others, loss of a significant connection, or unavailability of substantial evidence. Section 203 of the UCCJEA addresses the jurisdiction of the court to modify a custody determination made in another state. Nothing comparable to either UCCJEA section is found in this Act. Under this Act, a guardianship or protective order may be modified only upon request to the court that made the appointment or issued the order, which retains exclusive and continuing jurisdiction over the proceeding. Unlike child custody matters, guardianships and protective proceedings are ordinarily subject to continuing court supervision. Allowing the court's jurisdiction to terminate other than by its own order would open the possibility of competing guardianship or conservatorship appointments in different states for the same person at the same time, the problem under current law that enactment of this Act is designed to avoid. Should the incapacitated or protected person and others with an interest in the proceeding relocate to a different state, the appropriate remedy is to seek transfer of the proceeding to the other state as provided in Part 3.

The exclusive and continuing jurisdiction conferred by this section only applies to guardianship orders made and protective orders issued under Section 5A-203. Orders made under the special jurisdiction conferred by Section 5A-204 are not exclusive. And as provided in
Section 5A-204(b), the jurisdiction of a court in a state other than the home state to appoint a guardian in an emergency is subject to the right of a court in the home state to request that the proceeding be dismissed and any appointment terminated.

Part 3 authorizes a guardian or conservator to petition to transfer the proceeding to another state. Upon the conclusion of the transfer, the court in the accepting state will appoint the guardian or conservator as guardian or conservator in the accepting state and the court in the transferring estate will terminate the local proceeding, whereupon the jurisdiction of the transferring court terminates and the court in the accepting state acquires exclusive and continuing jurisdiction as provided in Section 5A-205.

SECTION 5A-206. APPROPRIATE FORUM.

(a) A court of this state having jurisdiction under Section 5A-203 to appoint a guardian or issue a protective order may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum.

(b) If a court of this state declines to exercise its jurisdiction under subsection (a), it shall either dismiss or stay the proceeding. The court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a guardian or issuance of a protective order be filed promptly in another state.

(c) In determining whether it is an appropriate forum, the court shall consider all relevant factors, including:

(1) any expressed preference of the respondent;

(2) whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation;

(3) the length of time the respondent was physically present in or was a legal resident of this or another state;

(4) the distance of the respondent from the court in each state;

(5) the financial circumstances of the respondent's estate;

(6) the nature and location of the evidence;

(7) the ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;

(8) the familiarity of the court of each state with the facts and issues in the proceeding; and

(9) if an appointment were made, the court's ability to monitor the conduct of the guardian or conservator.

Comment

This section authorizes a court otherwise having jurisdiction to decline jurisdiction on the basis that a court in another state is in a better position to make a guardianship or protective order determination. The effect of a declination of jurisdiction under this section is to rearrange the priorities specified in Section 5A-203. A court of the home state may decline in favor of a court of a significant-connection or other state and a court in a significant-connection state may decline in favor of a court in another significant-connection or other state. The court declining jurisdiction may either dismiss or stay the proceeding. The court may also impose any condition the court considers just and proper, including the condition that a petition for the appointment of a guardian or issuance of a protective order be filed promptly in another state.

This section is similar to Section 207 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997) except that the factors in Section 5A-206(c) of this Act have been adapted to address issues most commonly encountered in adult guardianship and protective proceedings as opposed to child custody determinations.

Under Section 5A-203(2)(B), the factors specified in subsection (c) of this section are to be employed in determining whether a court of a significant-connection state may assume jurisdiction when a petition has not been filed in the respondent's home state or in another significant-connection state. Under Section 5A-207(a)(3)(B), the court is to consider these factors in deciding whether it will retain jurisdiction when unjustifiable conduct has occurred.

SECTION 5A-207. JURISDICTION DECLINED BY REASON OF CONDUCT.

(a) If at any time a court of this state determines that it acquired jurisdiction to appoint a guardian or issue a protective order because of unjustifiable conduct, the court may:

(1) decline to exercise jurisdiction;

(2) exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to ensure the health, safety, and welfare of the respondent or the protection of the respondent's property or prevent a repetition of the unjustifiable conduct, including staying the proceeding until a petition for the appointment of a guardian or issuance of a protective order is filed in a court of another state having jurisdiction; or

(3) continue to exercise jurisdiction after considering:

(A) the extent to which the respondent and all persons required to be notified of the proceedings have acquiesced in the exercise of the court's jurisdiction;

(B) whether it is a more appropriate forum than the court of any other state under the factors set forth in Section 5A-206(c); and

(C) whether the court of any other state would have jurisdiction under factual circumstances in substantial conformity with the jurisdictional standards of Section 5A-203.

(b) If a court of this state determines that it acquired jurisdiction to appoint a guardian or issue a protective order because a party seeking to invoke its jurisdiction engaged in unjustifiable conduct, it may assess against that party necessary and reasonable expenses, including attorney's fees, investigative fees, court costs, communication expenses, witness fees and expenses, and travel expenses. The court may not assess fees, costs, or expenses of any kind against this state or a governmental subdivision, agency, or instrumentality of this state unless authorized by law other than this [article].

Comment

This section is similar to the Section 208 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997). Like the UCCJEA, this Act does not attempt to define "unjustifiable conduct," concluding that this issue is best left to the courts. However, a common example

could include the unauthorized removal of an adult to another state, with that state acquiring emergency jurisdiction under Section 5A-204 immediately upon the move and home state jurisdiction under Section 5A-203 six months following the move if a petition for a guardianship or protective order is not filed during the interim in the soon-to-be former home state. Although child custody cases frequently raise different issues than do adult guardianship matters, the element of unauthorized removal is encountered in both types of proceedings. For the caselaw on unjustifiable conduct under the predecessor Uniform Child Custody Jurisdiction Act (1968), see David Carl Minneman, *Parties' Misconduct as Grounds for Declining Jurisdiction Under §8 of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 16 A.L.R. 5th 650 (1993).

Subsection (a) gives the court authority to fashion an appropriate remedy when it has acquired jurisdiction because of unjustifiable conduct. The court may decline to exercise jurisdiction; exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to ensure the health, safety, and welfare of the respondent or the protection of the respondent's property or prevent a repetition of the unjustifiable conduct; or continue to exercise jurisdiction after considering several specified factors. Under subsection (a), the unjustifiable conduct need not have been committed by a party.

Subsection (b) authorizes a court to assess costs and expenses, including attorney's fees, against a party whose unjustifiable conduct caused the court to acquire jurisdiction. Subsection (b) applies only if the unjustifiable conduct was committed by a party and allows for costs and expenses to be assessed only against that party. Similar to Section 208 of the UCCJEA, the court may not assess fees, costs, or expenses of any kind against this state or a governmental subdivision, agency, or instrumentality of the state unless authorized by other law.

SECTION 5A-208. NOTICE OF PROCEEDING. If a petition for the appointment of a guardian or issuance of a protective order is brought in this state and this state was not the respondent's home state on the date the petition was filed, in addition to complying with the notice requirements of this state, notice of the petition must be given to those persons who would be entitled to notice of the petition if a proceeding were brought in the respondent's home state. The notice must be given in the same manner as notice is required to be given in this state.

Comment

While this Act tries not to interfere with a state's underlying substantive law on guardianship and protective proceedings, the issue of notice is fundamental. Under this section, when a proceeding is brought other than in the respondent's home state, the petitioner must give notice in the method provided under local law not only to those entitled to notice under local law but also to the persons required to be notified were the proceeding brought in the respondent's home state. Frequently, the respective lists of persons to be notified will be the same. But where the lists are different, notice under this section will assure that someone with a right to assert that the home state has a primary right to jurisdiction will have the opportunity to make that

assertion.

SECTION 5A-209. PROCEEDINGS IN MORE THAN ONE STATE. Except for a petition for the appointment of a guardian in an emergency or issuance of a protective order limited to property located in this state under Section 5A-204(a)(1) or (a)(2), if a petition for the appointment of a guardian or issuance of a protective order is filed in this state and in another state and neither petition has been dismissed or withdrawn, the following rules apply:

(1) If the court in this state has jurisdiction under Section 5A-203, it may proceed with the case unless a court in another state acquires jurisdiction under provisions similar to Section 5A-203 before the appointment or issuance of the order.

(2) If the court in this state does not have jurisdiction under Section 5A-203, whether at the time the petition is filed or at any time before the appointment or issuance of the order, the court shall stay the proceeding and communicate with the court in the other state. If the court in the other state has jurisdiction, the court in this state shall dismiss the petition unless the court in the other state determines that the court in this state is a more appropriate forum.

Comment

Similar to Section 206 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997), this section addresses the issue of which court has the right to proceed when proceedings for the same respondent are brought in more than one state. The provisions of this section, however, have been tailored to the needs of adult guardianship and protective proceedings and the particular jurisdictional provisions of this Act. Emergency guardianship appointments and protective proceedings with respect to property in other states (Sections 5A-204(a)(1) and (a)(2)) are excluded from this section because the need for dual appointments is frequent in these cases; for example, a petition will be brought in the respondent's home state but emergency action will be necessary in the place where the respondent is temporarily located, or a petition for the appointment of a conservator will be brought in the respondent's home state but real estate located in some other state needs to be brought under management.

Under the Act only one court in which a petition is pending will have jurisdiction under Section 5A-203. If a petition is brought in the respondent's home state, that court has jurisdiction over that of any significant-connection or other state. If the petition is first brought in a significant-connection state, that jurisdiction will be lost if a petition is later brought in the home state prior to an appointment or issuance of an order in the significant-connection state.

Jurisdiction will also be lost in the significant-connection state if the respondent has a home state and an objection is filed in the significant-connection state that jurisdiction is properly in the home state. If petitions are brought in two significant-connection states, the first state has a right to proceed over that of the second state, and if a petition is brought in any other state, any claim to jurisdiction of that state is subordinate to that of the home state and all significant-connection states.

Under this section, if the court has jurisdiction under Section 5A-203, it has the right to proceed unless a court of another state acquires jurisdiction prior to the first court making an appointment or issuing a protective order. If the court does not have jurisdiction under Section 5A-203, it must defer to the court with jurisdiction unless that court determines that the court in this state is the more appropriate forum and it thereby acquires jurisdiction. While the rules are straightforward, factual issues can arise as to which state is the home state or significant-connection state. Consequently, while under Section 5A-203 there will almost always be a court having jurisdiction to proceed, reliance on the communication, court cooperation, and evidence gathering provisions of Sections 5A-104 through 5A-106 will sometimes be necessary to determine which court that might be.

[Part] 3

TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP

General Comment

While this part consists of two separate sections, they are part of one integrated procedure. Part 3 authorizes a guardian or conservator to petition the court to transfer the guardianship or conservatorship proceeding to a court of another state. Such a transfer is often appropriate when the incapacitated or protected person has moved or has been placed in a facility in another state, making it impossible for the original court to adequately monitor the proceeding. Part 3 authorizes a transfer of a guardianship, a conservatorship, or both. There is no requirement that both categories of proceeding be administered in the same state.

Section 5A-301 addresses procedures in the transferring state. Section 5A-302 addresses procedures in the accepting state.

A transfer begins with the filing of a petition by the guardian or conservator as provided in Section 5A-301(a). Notice of this petition must be given to the persons who would be entitled to notice were the petition a petition for an original appointment. Section 5A-301(b). A hearing on the petition is required only if requested or on the court's own motion. Section 5A-301(c). Assuming the court in the transferring state is satisfied that the grounds for transfer stated in Section 5A-301(d) (guardianship) or 5A-301(e) (conservatorship) have been met, one of which is that the court is satisfied that the court in the other state will accept the case, the court must issue a provisional order approving the transfer. The transferring court will not issue a final order dismissing the case until, as provided in Section 5A-301(f), it receives a copy of the provisional order from the accepting court accepting the transferred proceeding.

Following issuance of the provisional order by the transferring court, a petition must be

filed in the accepting court as provided in Section 5A-302(a). Notice of that petition must be given to those who would be entitled to notice of an original petition for appointment in both the transferring state and in the accepting state. Section 5A-302(b). A hearing must be held only if requested or on the court's own motion. Section 5A-302(c). The court must issue a provisional order accepting the case unless it is established that the transfer would be contrary to the incapacitated or protected person's interests or the guardian or conservator is ineligible for appointment in the accepting state. Section 5A-302(d). The term "interests" as opposed to "best interests" was chosen because of the strong autonomy values in modern guardianship law. Should the court decline the transfer petition, it may consider a separately brought petition for the appointment of a guardian or issuance of a protective order only if the court has a basis for jurisdiction under Sections 5A-203 or 5A-204 other than by reason of the provisional order of transfer. Section 5A-302(h).

The final steps are largely ministerial. Pursuant to Section 5A-301(f), the provisional order from the accepting court must be filed in the transferring court. The transferring court will then issue a final order terminating the proceeding, subject to local requirements such as filing of a final report or account and the release of any bond. Pursuant to Section 5A-302(e), the final order terminating the proceeding in the transferring court must then be filed in the accepting court, which will then convert its provisional order accepting the case into a final order appointing the petitioning guardian or conservator as guardian or conservator in the accepting state.

Because guardianship and conservatorship law and practice will likely differ between the two states, the court in the accepting state must within 90 days after issuance of a final order determine whether the guardianship or conservatorship needs to be modified to conform to the law of the accepting state. Section 5A-302(f). The number "90"is placed in brackets to encourage states to coordinate this time limit with the time limits for other required filings such as guardianship or conservatorship plans. This initial period in the accepting state is also an appropriate time to change the guardian or conservator if there is a more appropriate person to act as guardian or conservator in the accepting state. The drafters specifically did not try to design the procedures in Part 3 for the difficult problems that can arise in connection with a transfer when the guardian or conservator is ineligible to act in the second state, a circumstance that can occur when a financial institution is acting as conservator or a government agency is acting as guardian. Rather, the procedures in Part 3 are designed for the typical case where the guardian or conservator is legally eligible to act in the second state. Should that particular guardian or conservator not be the best person to act in the accepting state, a change of guardian or conservator can be initiated once the transfer has been secured.

The transfer procedure in this part responds to numerous problems that have arisen in connection with attempted transfers under the existing law of most states. Sometimes a court will dismiss a case on the assumption a proceeding will be brought in another state, but such proceeding is never filed. Sometimes a court will refuse to dismiss a case until the court in the other state accepts the matter, but the court in the other state refuses to consider the petition until the already existing guardianship or conservatorship has been terminated. Oftentimes the court will conclude that it is without jurisdiction to make an appointment until the respondent is physically present in the state, a problem which Section 5A-204(a)(3) addresses by granting a court special jurisdiction to consider a petition to accept a proceeding from another state. But

the most serious problem is the need to prove the case in the second state from scratch, including proving the respondent's incapacity and the choice of guardian or conservator. Part 3 eliminates this problem. Section 5A-302(g) requires that the court accepting the case recognize a guardianship or conservatorship order from the other state, including the determination of the incapacitated or protected person's incapacity and the appointment of the guardian or conservator, if otherwise eligible to act in the accepting state.

SECTION 5A-301. TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP TO ANOTHER STATE.

(a) A guardian or conservator appointed in this state may petition the court to transfer the guardianship or conservatorship to another state.

(b) Notice of a petition under subsection (a) must be given to the persons that would be entitled to notice of a petition in this state for the appointment of a guardian or conservator.

(c) On the court's own motion or on request of the guardian or conservator, the incapacitated or protected person, or other person required to be notified of the petition, the court shall hold a hearing on a petition filed pursuant to subsection (a).

(d) The court shall issue an order provisionally granting a petition to transfer a guardianship and shall direct the guardian to petition for guardianship in the other state if the court is satisfied that the guardianship will be accepted by the court in the other state and the court finds that:

(1) the incapacitated person is physically present in or is reasonably expected to move permanently to the other state;

(2) an objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the incapacitated person; and

(3) plans for care and services for the incapacitated person in the other state are reasonable and sufficient.

(e) The court shall issue a provisional order granting a petition to transfer a conservatorship and shall direct the conservator to petition for conservatorship in the other state if the court is satisfied that the conservatorship will be accepted by the court of the other state and the court finds that:

(1) the protected person is physically present in or is reasonably expected to move permanently to the other state, or the protected person has a significant connection to the other state considering the factors in Section 5A-201(b);

(2) an objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the protected person; and

(3) adequate arrangements will be made for management of the protected person's property.

(f) The court shall issue a final order confirming the transfer and terminating the guardianship or conservatorship upon its receipt of:

(1) a provisional order accepting the proceeding from the court to which the proceeding is to be transferred which is issued under provisions similar to Section 5A-302; and

(2) the documents required to terminate a guardianship or conservatorship in this state.

SECTION 5A-302. ACCEPTING GUARDIANSHIP OR CONSERVATORSHIP TRANSFERRED FROM ANOTHER STATE.

(a) To confirm transfer of a guardianship or conservatorship transferred to this state under provisions similar to Section 5A-301, the guardian or conservator must petition the court in this state to accept the guardianship or conservatorship. The petition must include a certified copy of the other state's provisional order of transfer.

(b) Notice of a petition under subsection (a) must be given to those persons that would be entitled to notice if the petition were a petition for the appointment of a guardian or issuance of a protective order in both the transferring state and this state. The notice must be given in the same manner as notice is required to be given in this state.

(c) On the court's own motion or on request of the guardian or conservator, the incapacitated or protected person, or other person required to be notified of the proceeding, the court shall hold a hearing on a petition filed pursuant to subsection (a).

(d) The court shall issue an order provisionally granting a petition filed under subsection (a) unless:

(1) an objection is made and the objector establishes that transfer of the proceeding would be contrary to the interests of the incapacitated or protected person; or

(2) the guardian or conservator is ineligible for appointment in this state.

(e) The court shall issue a final order accepting the proceeding and appointing the guardian or conservator as guardian or conservator in this state upon its receipt from the court from which the proceeding is being transferred of a final order issued under provisions similar to Section 5A-301 transferring the proceeding to this state.

(f) Not later than [90] days after issuance of a final order accepting transfer of a guardianship or conservatorship, the court shall determine whether the guardianship or conservatorship needs to be modified to conform to the law of this state.

(g) In granting a petition under this section, the court shall recognize a guardianship or conservatorship order from the other state, including the determination of the incapacitated or protected person's incapacity and the appointment of the guardian or conservator.

(h) The denial by a court of this state of a petition to accept a guardianship or conservatorship transferred from another state does not affect the ability of the guardian or

conservator to seek appointment as guardian or conservator in this state under [insert statutory references to this state's ordinary procedures law for the appointment of guardian or conservator] if the court has jurisdiction to make an appointment other than by reason of the provisional order of transfer.

[PART] 4

REGISTRATION AND RECOGNITION OF ORDERS FROM OTHER STATES

General Comment

Part 4 is designed to facilitate the enforcement of guardianship and protective orders in other states. This part does not make distinctions among the types of orders that can be enforced. This part is applicable whether the guardianship or conservatorship is full or limited. While some states have expedited procedures for sales of real estate by conservators appointed in other states, few states have enacted statutes dealing with enforcement of guardianship orders, such as when a care facility questions the authority of a guardian appointed in another state. Sometimes, these sorts of refusals necessitate that the proceeding be transferred to the other state or that an entirely new petition be filed, problems that could often be avoided if guardianship and protective orders were entitled to recognition in other states.

Part 4 provides for such recognition. The key concept is registration. Section5A- 401 provides for registration of guardianship orders, and Section 5A-402 for registration of protective orders. Following registration of the order in the appropriate county of the other state, and after giving notice to the appointing court of the intent to register the order in the other state, Section5A- 403 authorizes the guardian or conservator to thereafter exercise all powers authorized in the order of appointment except as prohibited under the laws of the registering state.

The drafters of the Act concluded that the registration of certified copies provides sufficient protection and that it was not necessary to mandate the filing of authenticated copies.

SECTION 5A-401. REGISTRATION OF GUARDIANSHIP ORDERS. If a guardian has been appointed in another state and a petition for the appointment of a guardian is not pending in this state, the guardian appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship order in this state by filing as a foreign judgment in a court, in any appropriate [county] of this state, certified copies

of the order and letters of office.

SECTION 5A-402. REGISTRATION OF PROTECTIVE ORDERS. If a conservator has been appointed in another state and a petition for a protective order is not pending in this state, the conservator appointed in the other state, after giving notice to the appointing court of an intent to register, may register the protective order in this state by filing as a foreign judgment in a court of this state, in any [county] in which property belonging to the protected person is located, certified copies of the order and letters of office and of any bond.

SECTION 5A-403. EFFECT OF REGISTRATION.

(a) Upon registration of a guardianship or protective order from another state, the guardian or conservator may exercise in this state all powers authorized in the order of appointment except as prohibited under the laws of this state, including maintaining actions and proceedings in this state and, if the guardian or conservator is not a resident of this state, subject to any conditions imposed upon nonresident parties.

(b) A court of this state may grant any relief available under this [article] and other law of this state to enforce a registered order.

ARTICLE 5B

UNIFORM POWER OF ATTORNEY ACT

Prefatory Note

The catalyst for the Uniform Power of Attorney Act (the "Act") was a national review of state power of attorney legislation. The review revealed growing divergence among states' statutory treatment of powers of attorney. The original Uniform Durable Power of Attorney Act ("Original Act"), last amended in 1987, was at one time followed by all but a few jurisdictions. Despite initial uniformity, the review found that a majority of states had enacted non-uniform provisions to deal with specific matters upon which the Original Act is silent. The topics about which there was increasing divergence included: 1) the authority of multiple agents; 2) the authority of a later-appointed fiduciary or guardian; 3) the impact of dissolution or annulment of the principal's marriage to the agent; 4) activation of contingent powers; 5) the authority to

make gifts; and 6) standards for agent conduct and liability. Other topics about which states had legislated, although not necessarily in a divergent manner, included: successor agents, execution requirements, portability, sanctions for dishonor of a power of attorney, and restrictions on authority that has the potential to dissipate a principal's property or alter a principal's estate plan.

A national survey was then conducted by the Joint Editorial Board for Uniform Trust and Estate Acts (JEB) to ascertain whether there was actual divergence of opinion about default rules for powers of attorney or only the lack of a detailed uniform model. The survey was distributed to probate and elder law sections of all state bar associations, to the fellows of the American College of Trust and Estate Counsel, the leadership of the ABA Section of Real Property, Probate and Trust Law and the National Academy of Elder Law Attorneys, as well as to special interest list serves of the ABA Commission on Law and Aging. Forty-four jurisdictions were represented in the 371 surveys returned.

The survey responses demonstrated a consensus of opinion in excess of seventy percent that a power of attorney statute should:

(1) provide for confirmation that contingent powers are activated;
(2) revoke a spouse-agent's authority upon the dissolution or annulment of the marriage to the principal;
(3) include a portability provision;
(4) require gift making authority to be expressly stated in the grant of authority;
(5) provide a default standard for fiduciary duties;
(6) permit the principal to alter the default fiduciary standard;
(7) require notice by an agent when the agent is no longer willing or able to act;
(8) include safeguards against abuse by the agent;
(9) include remedies and sanctions for abuse by the agent;
(10) protect the reliance of other persons on a power of attorney; and
(11) include remedies and sanctions for refusal of other persons to honor a power of attorney.

Informed by the review and the survey results, the Conference's drafting process also incorporated input from the American College of Trust and Estate Counsel, the ABA Section of Real Property, Probate and Trust Law, the ABA Commission on Law and Aging, the Joint Editorial Board for Uniform Trust and Estate Acts, the National Conference of Lawyers and Corporate Fiduciaries, the American Bankers Association, AARP, other professional groups, as well as numerous individual lawyers and corporate counsel. As a result of this process, the Act codifies both state legislative trends and collective best practices, and strikes a balance between the need for flexibility and acceptance of an agent's authority and the need to prevent and redress financial abuse.

While the Act contains safeguards for the protection of an incapacitated principal, the Act is primarily a set of default rules that preserve a principal's freedom to choose both the extent of an agent's authority and the principles to govern the agent's conduct. Among the Act's features that enhance drafting flexibility are the statutory definitions of powers in Part 2, which can be incorporated by reference in an individually drafted power of attorney or selected

for inclusion on the optional statutory form provided in Part 3. The statutory definitions of enumerated powers are an updated version of those in the Uniform Statutory Form Power of Attorney Act (1988), which the Act supersedes. The national review found that eighteen jurisdictions had adopted some type of statutory form power of attorney. The decision to include a statutory form power of attorney in the Act was based on this trend and the proliferation of power of attorney forms currently available to the public.

Sections 5B-119 and 5B-120 of the Act address the problem of persons refusing to accept an agent's authority. Section 5B-119 provides protection from liability for persons that in good faith accept an acknowledged power of attorney. Section 5B-120 sanctions refusal to accept an acknowledged power of attorney unless the refusal meets limited statutory exceptions. An alternate Section 5B-120 is provided for states that may wish to limit sanctions to refusal of an acknowledged statutory form power of attorney.

In exchange for mandated acceptance of an agent's authority, the Act does not require persons that deal with an agent to investigate the agent or the agent's actions. Instead, safeguards against abuse are provided through heightened requirements for granting authority that could dissipate the principal's property or alter the principal's estate plan (Section 5B-201(a)), provisions that set out the agent's duties and liabilities (Sections 5B-114 and 5B-117) and by specification of the categories of persons that have standing to request judicial review of the agent's conduct (Section 5B-116). The following provides a brief overview of the entire Act.

Overview of the Uniform Power of Attorney Act

The Act consists of 4 articles, of which the first three are codified into this Code as Article 5B, Parts 1, 2, and 3. The basic substance of the Act is located in Parts 1 and 2. Part 3 contains the optional statutory form. Article 4, not codified into this Code, consists primarily of general boilerplate provisions common to all uniform acts.

Part 1 – General Provisions and Definitions – Section 5B-102 lists definitions which are useful in interpretation of the Act. Of particular note is the definition of "incapacity" which replaces the term "disability" used in the Original Act. The definition of "incapacity" is consistent with the standard for appointment of a conservator under Section 401 of the Uniform Guardianship and Protective Proceedings Act as amended in 1997 (Section 5-401 of this Code). Another significant change in terminology from the Original Act is the use of "agent" in place of the term "attorney in fact." The term "agent" was also used in the Uniform Statutory Form Power of Attorney Act and is intended to clarify confusion in the lay public about the meaning of "attorney in fact." Section 5B-103 provides that the Act is to apply broadly to all powers of attorney, but excepts from the Act powers of attorney for health care and certain specialized powers such as those coupled with an interest or dealing with proxy voting.

Another innovation is the default rule in Section 5B-104 that a power of attorney is durable unless it contains express language indicating otherwise. This change from the Original Act reflects the view that most principals prefer their powers of attorney to be durable as a hedge against the need for guardianship. While the Original Act was silent on execution requirements for a power of attorney, Section 5B-105 requires the principal's signature and

provides that an acknowledged signature is presumed genuine. Section 5B-106 recognizes military powers of attorney and powers of attorney properly executed in other states or countries, or which were properly executed in the state of enactment prior to the Act's effective date. Section 5B-107 states a choice of law rule for determining the law that governs the meaning and effect of a power of attorney.

Section 5B-108 addresses the relationship of the agent to a later court-appointed fiduciary. The Original Act conferred upon a conservator or other later-appointed fiduciary the same power to revoke or amend the power of attorney as the principal would have had prior to incapacity. In contrast, the Act reserves this power to the court and states that the agent's authority continues until limited, suspended, or terminated by the court. This approach reflects greater deference for the previously expressed preferences of the principal and is consistent with the state legislative trend that has departed from the Original Act.

The default rule for when a power of attorney becomes effective is stated in Section 5B-109. Unless the principal specifies that it is to become effective upon a future date, event, or contingency, the authority of an agent under a power of attorney becomes effective when the power is executed. Section 5B-109 permits the principal to designate who may determine when contingent powers are triggered. If the trigger for contingent powers is the principal's incapacity, Section 5B-109 provides that the person designated to make that determination has the authority to act as the principal's personal representative under the Health Insurance Portability and Accountability Act (HIPAA) for purposes of accessing the principal's health-care information and communicating with the principal's health-care provider. This provision does not, however, confer on the designated person the authority to make health-care decisions for the principal. If the trigger for contingent powers is incapacity but the principal has not designated anyone to make the determination, or the person authorized is unable or unwilling to make the determination, the determination may be made by a physician or licensed psychologist, who must find that the principal's ability to manage property or business affairs is impaired, or by an attorney at law, judge, or appropriate governmental official, who must find that the principal is missing, detained, or unable to return to the United States.

The bases for termination of a power of attorney are covered in Section 5B-110. In response to concerns expressed in the JEB survey, the Act provides as the default rule that authority granted to a principal's spouse is revoked upon the commencement of proceedings for legal separation, marital dissolution or annulment.

Sections 5B-111 through 5B-118 address matters related to the agent, including default rules for coagents and successor agents (Section 5B-111), reimbursement and compensation (Section 5B-112), an agent's acceptance of appointment (Section 5B-113), and the agent's duties (Section 5B-114). Section 5B-115 provides that a principal may lower the standard of liability for agent conduct subject to a minimum level of accountability for actions taken dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal. Section 5B-116 sets out a comprehensive list of persons that may petition the court to review the agent's conduct and Section 5B-117 addresses agent liability. An agent may resign by following the notice procedures described in Section 5B-118.

Sections 5B-119 and 5B-120 are included in the Act to address the frequently reported problem of persons refusing to accept a power of attorney. Section 5B-119 protects persons that in good faith accept an acknowledged power of attorney without actual knowledge that the power of attorney is revoked, terminated, or invalid or that the agent is exceeding or improperly exercising the agent's powers. Subject to statutory exceptions, alternative Sections 5B-120 impose liability for refusal to accept a power of attorney. Alternative A sanctions refusal of an acknowledged power of attorney and Alternative B sanctions only refusal of an acknowledged statutory form power of attorney.

Sections 5B-121 through 5B-123 address the relationship of the Act to other law. Section 5B-121 clarifies that the Act is supplemented by the principles of common law and equity to the extent those principles are not displaced by a specific provision of the Act, and Section 5B-122 further clarifies that the Act is not intended to supersede any law applicable to financial institutions or other entities. With respect to remedies, Section 5B-123 provides that the remedies under the Act are not exclusive and do not abrogate any other cause of action or remedy that may be available under the law of the enacting jurisdiction.

Part 2 – Authority – The Act offers the drafting attorney enhanced flexibility whether drafting an individually tailored power of attorney or using the statutory form. Like the Uniform Statutory Form Power of Attorney Act, Sections 5B-204 through 5B- 217 of the Act set forth detailed descriptions of authority relating to subjects such as "real property," "retirement plans," and "taxes," which a principal, pursuant to Section 5B-202, may incorporate in full into the power of attorney either by a reference to the short descriptive term for the subject used in the Act or to the section number. Section 5B-202 further states that a principal may modify in a power of attorney any authority incorporated by reference. The definitions in Part 2 also provide meaning for authority with respect to subjects enumerated on the optional statutory form in Part 3. Section 5B-203 applies to all incorporated authority and grants of general authority, providing further detail on how the authority is to be construed.

Part 2 also addresses concerns about authority that might be used to dissipate the principal's property or alter the principal's estate plan. Section 5B-201(a) lists specific categories of authority that cannot be implied from a grant of general authority, but which may be granted only through express language in the power of attorney. Section 5B-201(b) contains a default rule prohibiting an agent that is not an ancestor, spouse, or descendant of the principal from creating in the agent or in a person to whom the agent owes a legal obligation of support an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

Part 3 – Statutory Forms – The optional form in Article 3 is designed for use by lawyers as well as lay persons. It contains, in plain language, instructions to the principal and agent. Step-by-step prompts are given for designation of the agent and successor agents, and grant of general and specific authority. In the section of the form addressing general authority, the principal must initial the subjects over which the principal wishes to delegate general authority to the agent. In the section of the form addressing specific authority, the Section 5B-201(a) categories of specific authority are listed, preceded by a warning to the principal about the potential consequences of granting such authority to an agent. The principal is instructed to initial only the specific categories of actions that the principal intends to authorize. Part 3 also

contains a sample agent certification form.

UNIFORM POWER OF ATTORNEY ACT

[PART] 1

GENERAL PROVISIONS

General Comment

The Uniform Power of Attorney Act replaces the Uniform Durable Power of Attorney Act, formerly codified at Article V, Part 5 of this Code, and the Uniform Statutory Form Power of Attorney Act, which was not codified in this Code. The primary purpose of the Uniform Durable Power of Attorney Act was to provide individuals with an inexpensive, non-judicial method of surrogate property management in the event of later incapacity. Two key concepts were introduced by the Uniform Durable Power of Attorney Act: 1) creation of a durable agency–one that survives, or is triggered by, the principal's incapacity, and 2) validation of post-mortem exercise of powers by an agent who acts in good faith and without actual knowledge of the principal's death. The success of the Uniform Durable Power of Attorney Act is evidenced by the widespread use of durable powers in every jurisdiction, not only for incapacity planning, but also for convenience while the principal retains capacity. However, the limitations of the Uniform Durable Power of Attorney Act are evidenced by the number of states that have supplemented and revised their statutes to address myriad issues upon which the Uniform Durable Power of Attorney Act is silent. These issues include parameters for the creation and use of powers of attorney as well as guidelines for the principal, the agent, and the person who is asked to accept the agent's authority. The general provisions and definitions of Article 1 in the Uniform Power of Attorney Act address those issues.

In addition to providing greater detail than the Uniform Durable Power of Attorney Act, this Act changes two presumptions in the earlier act: 1) that a power of attorney is not durable unless it contains language to make it durable; and 2) that a later court-appointed fiduciary for the principal has the power to revoke or amend a previously executed power of attorney. Section 5B-104 of this Part reverses the non-durability presumption by stating that a power of attorney is durable unless it expressly provides that it is terminated by the incapacity of the principal. Section 5B-108 gives deference to the principal's choice of agent by providing that if a court appoints a fiduciary to manage some or all of the principal's property, the agent's authority continues unless limited, suspended, or terminated by the court.

Although the Act is primarily a default statute, Part 1 also contains rules that govern all powers of attorney subject to the Act. Examples of these rules include imposition of certain minimum fiduciary duties on an agent who has accepted appointment (Section 5B-114(a)), recognition of persons who have standing to request judicial construction of the power of attorney or review of the agent's conduct (Section 5B-116), and protections for persons who accept an acknowledged power of attorney without actual knowledge that the power of attorney

or the agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the power (Section 5B-119). In contrast with the rules of general application in Article 1, the default provisions are clearly indicated by signals such as "unless the power of attorney otherwise provides,"or "except as otherwise provided in the power of attorney." These signals alert the draftsperson to options for enlarging or limiting the Act's default terms. For example, default provisions in Part 1 state that, unless the power of attorney otherwise provides, the power of attorney is effective immediately (Section 5B-109), coagents may exercise their authority independently (Section 5B-111), and an agent is entitled to reimbursement of expenses reasonably incurred and to reasonable compensation (Section 5B-112).

SECTION 5B-101. SHORT TITLE. This [article] may be cited as the Uniform Power of Attorney Act.

Comment

This Act, which replaces the Uniform Durable Power of Attorney Act, does not contain the word "durable" in the title. Pursuant to Section 5B-104, a power of attorney created under the Act is durable unless the power of attorney provides that it is terminated by the incapacity of the principal.

SECTION 5B-102. DEFINITIONS. In this [article]:

(1) "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated.

(2) "Durable," with respect to a power of attorney, means not terminated by the principal's incapacity.

(3) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(4) "Good faith" means honesty in fact.

(5) "Incapacity" means inability of an individual to manage property or business affairs because the individual:

(A) has an impairment in the ability to receive and evaluate information or make

or communicate decisions even with the use of technological assistance; or

(B) is:

(i) missing;

(ii) detained, including incarcerated in a penal system; or

(iii) outside the United States and unable to return.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Power of attorney" means a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used.

(8) "Presently exercisable general power of appointment," with respect to property or a property interest subject to a power of appointment, means power exercisable at the time in question to vest absolute ownership in the principal individually, the principal's estate, the principal's creditors, or the creditors of the principal's estate. The term includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period only after the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified period. The term does not include a power exercisable in a fiduciary capacity or only by will.

(9) "Principal" means an individual who grants authority to an agent in a power of attorney.

(10) "Property" means anything that may be the subject of ownership, whether real or personal, or legal or equitable, or any interest or right therein.

(11) "Stocks and bonds" means stocks, bonds, mutual funds, and all other types of securities and financial instruments, whether held directly, indirectly, or in any other manner.

The term does not include commodity futures contracts and call or put options on stocks or stock indexes.

Comment

Although most of the definitions in Section 5B-102 are self-explanatory, a few of the terms warrant further comment.

"Agent" replaces the term "attorney in fact" used in the Uniform Durable Power of Attorney Act to avoid confusion in the lay public about the meaning of the term and the difference between an attorney in fact and an attorney at law. Agent was also used in the Uniform Statutory Form Power of Attorney Act which this Act supersedes.

"Incapacity" replaces the term "disability" used in the Uniform Durable Power of Attorney Act in recognition that disability does not necessarily render an individual incapable of property and business management. The definition of incapacity stresses the operative consequences of the individual's impairment–inability to manage property and business affairs–rather than the impairment itself. The definition of incapacity in the Act is also consistent with the standard for appointment of a conservator under Section 401 of the Uniform Guardianship and Protective Proceedings Act as amended in 1997 (Section 5-401 of this Code).

The definition of "power of attorney" clarifies that the term applies to any grant of authority in a writing or other record from a principal to an agent which appears from the grant to be a power of attorney, without regard to whether the words "power of attorney" are actually used in the grant.

"Presently exercisable general power of appointment" is defined to clarify that where the phrase appears in the Act it does not include a power exercisable by the principal in a fiduciary capacity or exercisable only by will. *Cf.* Restatement (Third) of Property (Wills and Don. Trans.) § 19.8 cmt. d (Tentative Draft No. 5, approved 2006) (noting that unless the donor of a presently exercisable power of attorney has manifested a contrary intent, it is assumed that the donor intends that the donee's agent be permitted to exercise the power for the benefit of the donee). Including in a power of attorney the authority to exercise a presently exercisable general power of appointment held by the principal is consistent with the objective of giving an agent comprehensive management authority over the principal's property and financial affairs. The term appears in Section 5B-211 (Estates, Trusts, and Other Beneficial Interests) in the context of authority to exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal (*see* Section 5B-211(b)(3)), and in Section 5B-217 (Gifts) in the context of authority to exercise for the benefit of someone else a presently exercisable general power of appointment held by the principal (*see* Section 5B-217(b)(1)). The term is also incorporated by reference when using the statutory form in Section 5B-301 to grant authority with respect to "Estates, Trusts, and Other Beneficial Interests" or authority with respect to "Gifts." If a principal wishes to delegate authority to exercise a power that the principal holds in a fiduciary capacity, Section 5B-201(a)(7) requires that the power of attorney contain an express grant of such authority. Furthermore, delegation of a power held in a fiduciary capacity is possible only if the principal has authority to delegate the power, and the

agent's authority is necessarily limited by whatever terms govern the principal's ability to exercise the power.

SECTION 5B-103. APPLICABILITY. This [article] applies to all powers of attorney except:

(1) a power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction;

(2) a power to make health-care decisions;

(3) a proxy or other delegation to exercise voting rights or management rights with respect to an entity; and

(4) a power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.

Comment

The Uniform Power of Attorney Act is intended to be comprehensive with respect to delegation of surrogate decision making authority over an individual's property and property interests, whether for the purpose of incapacity planning or mere convenience. Given that an agent will likely exercise authority at times when the principal cannot monitor the agent's conduct, the Act specifies minimum agent duties and protections for the principal's benefit. These provisions, however, may not be appropriate for all delegations of authority that might otherwise be included within the definition of a power of attorney. Section 5B-103 lists delegations of authority that are excluded from the Act because the subject matter of the delegation, the objective of the delegation, the agent's role with respect to the delegation, or a combination of the foregoing, would make application of the Act's provisions inappropriate.

Paragraph (1) excludes a power to the extent that it is coupled with an interest in the subject of the power. This exclusion addresses situations where, due to the agent's interest in the subject matter of the power, the agent is not intended to act as the principal's fiduciary. S*ee* Restatement (Third) of Agency § 3.12 (2006) and M.T. Brunner, Annotation, *What Constitutes Power Coupled with Interest within Rule as to Termination of Agency*, 28 A.L.R.2d 1243 (1953). Common examples of powers coupled with an interest include powers granted to a creditor to perfect or protect title in, or to sell, pledged collateral. While the example of "a power given to or for the benefit of a creditor in connection with a credit transaction" is highlighted in paragraph (1), it is not meant to exclude application of paragraph (1) to other contexts in which a power may be coupled with an interest, such as a power held by an insurer to settle or confess judgment on behalf of an insured. S*ee, e.g., Hayes v. Gessner*, 52 N.E.2d

968 (Mass. 1944).

Paragraph (2) excludes from the Act delegations of authority to make health-care decisions for the principal. Such delegations are covered under other law of the jurisdiction. The Act recognizes, however, that matters of financial management and health-care decision making are often interdependent. The Act consequently provides in Section 5B-114(b)(5) a default rule that an agent under the Act must cooperate with the principal's health-care decision maker.

Likewise, paragraph (3) excludes from the Act a proxy or other delegation to exercise voting rights or management rights with respect to an entity. The rules with respect to those rights are typically controlled by entity-specific statutes within a jurisdiction. *See, e.g.,* Model Bus. Corp. Act § 7.22 (2002); Unif. Ltd. Partnership Act § 118 (2001); and Unif. Ltd. Liability Co. Act § 404(e) (1996). Notwithstanding the exclusion of such delegations from the operation of this Act, Section 5B-209 contemplates that a power granted to an agent with respect to operation of an entity or business includes the authority to "exercise in person or by proxy . . . a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds . . . ."(*see* paragraph (5) of Section 209). Thus, while a person that holds only a proxy pursuant to an entity voting statute will not be subject to the provisions of this Act, an agent that is granted Section 5B-209 authority is subject to the Act because the principal has given the agent authority that is greater than that of a mere voting proxy. In fact, typical entity statutes contemplate that a principal's agent or "attorney in fact" may appoint a proxy on behalf of the principal. *See, e.g.,* Model Bus. Corp. Act § 7.22 (2002); Unif. Ltd. Partnership Act § 118 (2001); and Unif. Ltd. Liability Co. Act § 404(e) (1996).

Paragraph (4) excludes from the Act any power created on a governmental form for a governmental purpose. Like the excluded powers in paragraphs (2) and (3), the authority for a power created on a governmental form emanates from other law and is generally for a limited purpose. Notwithstanding this exclusion, the Act specifically provides in paragraph (7) of Section 5B-203 that a grant of authority to an agent includes, with respect to that subject matter, authority to "prepare, execute, and file a record, report, or other document to safeguard or promote the principal's interest under a statute or governmental regulation." Section 5B-203, paragraph (8), further clarifies that the agent has the authority to "communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality, on behalf of the principal." The intent of these provisions is to minimize the need for a special power on a governmental form with respect to any subject matter over which an agent is granted authority under the Act.

SECTION 5B-104. POWER OF ATTORNEY IS DURABLE. A power of attorney created under this [article] is durable unless it expressly provides that it is terminated by the incapacity of the principal.

Comment

Section 5B-104 establishes that a power of attorney created under the Act is durable

unless it expressly states otherwise. This default rule is the reverse of the approach under the Uniform Durable Power of Attorney Act and based on the assumption that most principals prefer durability as a hedge against the need for guardianship. *See also* Section 5B-107 Comment (noting that the default rules of the jurisdiction's law under which a power of attorney is created, including the default rule for durability, govern the meaning and effect of a power of attorney).

SECTION 5B-105. EXECUTION OF POWER OF ATTORNEY. A power of attorney must be signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney. A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments.

Comment

While notarization of the principal's signature is not required to create a valid power of attorney, this section strongly encourages the practice by according acknowledged signatures a statutory presumption of genuineness. Furthermore, because Section 5B-119 (Acceptance of and Reliance Upon Acknowledged Power of Attorney) and alternative Sections 5B-120 (Alternative A–Liability for Refusal to Accept Acknowledged Power of Attorney, and Alternative B–Liability for Refusal to Accept Acknowledged Statutory Form Power of Attorney) do not apply to unacknowledged powers, persons who are presented with an unacknowledged power of attorney may be reluctant to accept it. As a practical matter, an acknowledged signature is required if the power of attorney will be recorded by the agent in conjunction with the execution of real estate documents on behalf of the principal. *See* R.P.D., Annotation, *Recording Laws as Applied to Power of Attorney under which Deed or Mortgage is Executed*, 114 A.L.R. 660 (1938).

This section, at a minimum, requires that the power of attorney be signed by the principal or by another individual who the principal has directed to sign the principal's name. If another individual is directed to sign the principal's name, the signing must occur in the principal's "conscious presence." The 1990 amendments to the Uniform Probate Code codified the "conscious presence" test for the execution of wills (Section 2-502(a)(2)), which generally requires that the signing is sufficient if it takes place within the range of the senses–usually sight or hearing–of the individual who directed that another sign the individual's name. *See* Unif. Probate Code § 2-502 cmt. (2003). For a discussion of acknowledgment of a signature by an individual whose name is signed by another, see R.L.M., Annotation, *Formal Acknowledgment of Instrument by One Whose Name is Signed thereto by Another as an Adoption of the Signature,* 57 A.L.R. 525 (1928).

SECTION 5B-106. VALIDITY OF POWER OF ATTORNEY.

(a) A power of attorney executed in this state on or after [the effective date of this [article]] is valid if its execution complies with Section 5B-105.

(b) A power of attorney executed in this state before [the effective date of this [article]] is valid if its execution complied with the law of this state as it existed at the time of execution.

(c) A power of attorney executed other than in this state is valid in this state if, when the power of attorney was executed, the execution complied with:

(1) the law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to Section 5B-107; or

(2) the requirements for a military power of attorney pursuant to 10 U.S.C. Section 1044b [, as amended].

(d) Except as otherwise provided by statute other than this [article], a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.

Legislative Note: *The brackets in subsections (a) and (b) of this section indicate where an enacting jurisdiction may elect to insert the actual effective date of the Act.*

Comment

One of the purposes of the Uniform Power of Attorney Act is promotion of the portability and use of powers of attorney. Section 5B-106 makes clear that the Act does not affect the validity of pre-existing powers of attorney executed under prior law in the enacting jurisdiction, powers of attorney validly created under the law of another jurisdiction, and military powers of attorney. While the effect of this section is to recognize the validity of powers of attorney created under other law, it does not abrogate the traditional grounds for contesting the validity of execution such as forgery, fraud, or undue influence.

This section also provides that unless another law in the jurisdiction requires presentation of the original power of attorney, a photocopy or electronically transmitted copy has the same effect as the original. An example of another law that might require presentation of the original power of attorney is the jurisdiction's recording act. *See, e.g.,* Restatement (Third) of Property (Wills & Don. Trans.) § 6.3 cmt. e (2003) (noting that in order to record a deed, "some states require that the document of transfer be signed, sealed, attested, and

acknowledged").

SECTION 5B-107. MEANING AND EFFECT OF POWER OF ATTORNEY. The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.

Comment

This section recognizes that a foreign power of attorney, or one executed before the effective date of the Uniform Power of Attorney Act, may have been created under different default rules than those in this Act. Section 5B-107 provides that the meaning and effect of a power of attorney is to be determined by the law under which it was created. For example, the law in another jurisdiction may provide for different default rules with respect to durability of a power of attorney (*see* Section 5B-104), the authority of coagents (*see* Section 5B-111) or the scope of specific authority such as the authority to make gifts (*see* Section 5B-217). Section 5B-107 clarifies that the principal's intended grant of authority will be neither enlarged nor narrowed by virtue of the agent using the power in a different jurisdiction. For a discussion of the issues that can arise with inter-jurisdictional use of powers of attorney, see Linda S. Whitton, *Crossing State Lines with Durable Powers*, Prob. & Prop., Sept./Oct. 2003, at 28.

This section also establishes an objective means for determining what jurisdiction's law the principal intended to govern the meaning and effect of a power of attorney. The phrase, "the law of the jurisdiction indicated in the power of attorney," is intentionally broad, and includes any statement or reference in a power of attorney that indicates the principal's choice of law. Examples of an indication of jurisdiction include a reference to the name of the jurisdiction in the title or body of the power of attorney, citation to the jurisdiction's power of attorney statute, or an explicit statement that the power of attorney is created or executed under the laws of a particular jurisdiction. In the absence of an indication of jurisdiction in the power of attorney, Section 5B-107 provides that the law of the jurisdiction in which the power of attorney was executed controls. The distinction between "the law of the jurisdiction indicated in the power of attorney" and "the law of the jurisdiction in which the power of attorney was executed" is an important one. The common practice of property ownership in more than one jurisdiction increases the likelihood that a principal may execute in one jurisdiction a power of attorney that was created and intended to be interpreted under the laws of another jurisdiction. A clear indication of the jurisdiction's law that is intended to govern the meaning and effect of a power of attorney is therefore advisable in all powers of attorney. *See, e.g.,* Section 5B-301 (providing for the name of the jurisdiction to appear in the title of the statutory form power of attorney).

SECTION 5B-108. NOMINATION OF [CONSERVATOR OR GUARDIAN]; RELATION OF AGENT TO COURT-APPOINTED FIDUCIARY.

(a) In a power of attorney, a principal may nominate a [conservator or guardian] of the principal's estate or [guardian] of the principal's person for consideration by the court if protective proceedings for the principal's estate or person are begun after the principal executes the power of attorney. [Except for good cause shown or disqualification, the court shall make its appointment in accordance with the principal's most recent nomination.]

(b) If, after a principal executes a power of attorney, a court appoints a [conservator or guardian] of the principal's estate or other fiduciary charged with the management of some or all of the principal's property, the agent is accountable to the fiduciary as well as to the principal. [The power of attorney is not terminated and the agent's authority continues unless limited, suspended, or terminated by the court.]

Legislative Note: *The brackets in this section indicate areas where an enacting jurisdiction should reference its respective guardianship, conservatorship, or other protective proceedings statutes and amend, if necessary for consistency, the terminology and substance of the bracketed language.*

Comment

Section 5B-108(b) is a departure from the Uniform Durable Power of Attorney Act which gave a court-appointed fiduciary the same power to revoke or amend a power of attorney as the principal would have if not incapacitated. *See* Unif. Durable Power of Atty. Act § 3(a) (1987). In contrast, this Act gives deference to the principal's choice of agent by providing that the agent's authority continues, notwithstanding the later court appointment of a fiduciary, unless the court acts to limit or terminate the agent's authority. This approach assumes that the later-appointed fiduciary's authority should supplement, not truncate, the agent's authority. If, however, a fiduciary appointment is required because of the agent's inadequate performance or breach of fiduciary duties, the court, having considered this evidence during the appointment proceedings, may limit or terminate the agent's authority contemporaneously with appointment of the fiduciary. Section 5B-108(b) is consistent with the state legislative trend that has departed from the Uniform Durable Power of Attorney Act. *See, e.g.,* 755 Ill. Comp. Stat. Ann. 45/2-10 (West 1992); Ind. Code Ann. § 30-5-3-4 (West 1994); Kan. Stat. Ann. § 58-662 (2005); Mo. Ann. Stat. § 404.727 (West 2001); N.J. Stat. Ann. § 46:2B-8.4 (West 2003); N.M. Stat. Ann. § 45-5-503A (LexisNexis 2004); Utah Code Ann. § 75-5-501 (Supp. 2006); Vt. Stat. Ann. tit. 14, § 3509(a) (2002); Va. Code Ann. § 11-9.1B (2006). Section 108(b) is also consistent with the Uniform Health-Care Decisions Act § 6(a) (1993), which provides that a guardian may not revoke the ward's advance health-care directive unless the court appointing the guardian expressly so authorizes. Furthermore, it is consistent with the Uniform Guardianship and Protective Proceedings Act (1997), which provides that a guardian or conservator may not

revoke the ward's or protected person's power of attorney for health-care or financial management without first obtaining express authority of the court. *See* Unif. Guardianship & Protective Proc. Act § 316(c) (guardianship), § 411(d) (protective proceedings)(Sections 316(c) and 411(d) of this Code).

Deference for the principal's autonomous choice is evident both in the presumption that an agent's authority continues unless limited or terminated by the court, and in the directive that the court shall appoint a fiduciary in accordance with the principal's most recent nomination *(see* subsection (a)). Typically, a principal will nominate as conservator or guardian the same individual named as agent under the power of attorney. Favoring the principal's choice of agent and nominee, an approach consistent with most statutory hierarchies for guardian selection (*see* Unif. Guardianship & Protective Proc. Act § 310(a)(2) (1997)), also discourages guardianship petitions filed for the sole purpose of thwarting the agent's authority to gain control over a vulnerable principal. *See* Unif. Guardianship & Protective Proc. Act § 310 cmt. (1997). *See also* Linda S. Ershow-Levenberg, *When Guardianship Actions Violate the Constitutionally-Protected Right of Privacy*, NAELA News, Apr. 2005, at 1 (arguing that appointment of a guardian when there is a valid power of attorney in place violates the alleged incapacitated person's constitutionally protected rights of privacy and association).

SECTION 5B-109. WHEN POWER OF ATTORNEY EFFECTIVE.

(a) A power of attorney is effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.

(b) If a power of attorney becomes effective upon the occurrence of a future event or contingency, the principal, in the power of attorney, may authorize one or more persons to determine in a writing or other record that the event or contingency has occurred.

(c) If a power of attorney becomes effective upon the principal's incapacity and the principal has not authorized a person to determine whether the principal is incapacitated, or the person authorized is unable or unwilling to make the determination, the power of attorney becomes effective upon a determination in a writing or other record by:

(1) a physician [or licensed psychologist] that the principal is incapacitated within the meaning of Section 5B-102(5)(A); or

(2) an attorney at law, a judge, or an appropriate governmental official that the

principal is incapacitated within the meaning of Section 5B-102(5)(B).

(d) A person authorized by the principal in the power of attorney to determine that the principal is incapacitated may act as the principal's personal representative pursuant to the Health Insurance Portability and Accountability Act, Sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, [as amended,] and applicable regulations, to obtain access to the principal's health-care information and communicate with the principal's health-care provider.

Legislative Note: *The phrase "or licensed psychologist" is bracketed in subsection (c)(1) to indicate where an enacting jurisdiction should insert the appropriate designation for the mental health professional or professionals in that jurisdiction who are qualified to make capacity determinations. An enacting jurisdiction should also review its respective guardianship, conservatorship, or other protective proceedings statutes and amend, if necessary for consistency, the definition of incapacity.*

Comment

This section establishes a default rule that a power of attorney is effective when executed. If the principal chooses to create what is commonly known as a "springing" or contingent power of attorney–one that becomes effective at a future date or upon a future event or contingency–the principal may authorize the agent or someone else to provide written verification that the event or contingency has occurred (subsection (b)). Because the person authorized to verify the principal's incapacitation will likely need access to the principal's health information, subsection (d) qualifies that person to act as the principal's "personal representative" for purposes of the Health Insurance Portability and Accountability Act (HIPAA). *See* 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that for purposes of disclosing an individual's protected health information, "a covered entity must . . . treat a personal representative as the individual"). Section 5B-109 does not, however, empower the agent to make health-care decisions for the principal. *See* Section 5B-103 and comment (discussing exclusion from this Act of powers to make health-care decisions).

The default rule reflects a "best practices" philosophy that any agent who can be trusted to act for the principal under a springing power of attorney should be trustworthy enough to hold an immediate power. Survey evidence suggests, however, that a significant number of principals still prefer springing powers, most likely to maintain privacy in the hope that they will never need a surrogate decision maker. *See* Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis,* National Conference of Commissioners on Uniform State Laws, 6-7 (2002), http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm (reporting that 23% of lawyer respondents found their clients preferred springing powers, 61% reported a preference for immediate powers, and 16% saw no trend; however, 89% stated that a power of attorney statute should authorize springing powers).

If the principal's incapacity is the trigger for a springing power of attorney and the principal has not authorized anyone to make that determination, or the authorized person is unable or unwilling to make the determination, this section provides a default mechanism to trigger the power. Incapacity based on the principal's impairment may be verified by a physician or licensed psychologist (subsection (c)(1)), and incapacity based on the principal's unavailability (*i.e.,* the principal is missing, detained, or unable to return to the United States) may be verified by an attorney at law, judge, or an appropriate governmental official (subsection (c)(2)). Examples of appropriate governmental officials who may be in a position to determine that the principal is incapacitated within the meaning of Section 5B-102(5)(B) include an officer acting under authority of the United States Department of State or uniformed services of the United States or a sworn federal or state law enforcement officer. The default mechanism for triggering a power of attorney is available only when no incapacity determination has been made. It is not available to challenge the determination made by the principal's authorized designee.

SECTION 5B-110. TERMINATION OF POWER OF ATTORNEY OR AGENT'S AUTHORITY.

(a) A power of attorney terminates when:

(1) the principal dies;

(2) the principal becomes incapacitated, if the power of attorney is not durable;

(3) the principal revokes the power of attorney;

(4) the power of attorney provides that it terminates;

(5) the purpose of the power of attorney is accomplished; or

(6) the principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

(b) An agent's authority terminates when:

(1) the principal revokes the authority;

(2) the agent dies, becomes incapacitated, or resigns;

(3) an action is filed for the [dissolution] or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides; or

(4) the power of attorney terminates.

(c) Unless the power of attorney otherwise provides, an agent's authority is exercisable until the authority terminates under subsection (b), notwithstanding a lapse of time since the execution of the power of attorney.

(d) Termination of an agent's authority or of a power of attorney is not effective as to the agent or another person that, without actual knowledge of the termination, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(e) Incapacity of the principal of a power of attorney that is not durable does not revoke or terminate the power of attorney as to an agent or other person that, without actual knowledge of the incapacity, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(f) The execution of a power of attorney does not revoke a power of attorney previously executed by the principal unless the subsequent power of attorney provides that the previous power of attorney is revoked or that all other powers of attorney are revoked.

Legislative Note: *The word "dissolution" is bracketed in subsection (b)(3) to indicate where an enacting jurisdiction should insert that jurisdiction's term for divorce or marital dissolution.*

Comment

This section addresses termination of a power of attorney or an agent's authority under a power of attorney. It first lists termination events (*see* subsections (a) and (b)), and then lists circumstances that, in contrast, either do not invalidate the power of attorney (*see* subsections (c) and (f)) or the actions taken pursuant to the power of attorney (*see* subsections (d) and (e)).

Subsection (c) provides that a power of attorney under the Act does not become "stale." Unless a power of attorney provides for termination upon a certain date or after the passage of a period of time, lapse of time since execution is irrelevant to validity, a concept carried over from the Uniform Durable Power of Attorney Act. *See* Unif. Durable Power of Atty. Act § 1 (as amended in 1987). Similarly, subsection (f) clarifies that a subsequently executed power of attorney will not revoke a prior power of attorney by virtue of inconsistency alone. To effect a revocation, a subsequently executed power of attorney must expressly revoke a previously

executed power of attorney or state that all other powers of attorney are revoked. The requirement of express revocation prevents inadvertent revocation when the principal intends for one agent to have limited authority that overlaps with broader authority held by another agent. For example, the principal who has given one agent a very broad power of attorney, including general authority with respect to real property, may later wish to give another agent limited authority to execute closing documents with respect to out-of-town real estate.

Subsections (d) and (e) emphasize that even a termination event is not effective as to the agent or person who, without actual knowledge of the termination event, acts in good faith under the power of attorney. For example, the principal's death terminates a power of attorney (*see* subsection (a)(1)), but an agent who acts in good faith under a power of attorney without actual knowledge of the principal's death will bind the principal's successors in interest with that action (*see* subsection (d)). The same result is true if the agent knows of the principal's death, but the person who accepts the agent's apparent authority has no actual knowledge of the principal's death. *See* Restatement (Third) of Agency § 3.11 (2006) (stating that "termination of actual authority does not by itself end any apparent authority held by an agent"). *See also* Section 5B-119(c) (stating that "[a] person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is . . . terminated . . . may rely upon the power of attorney as if the power of attorney were . . . still in effect . . . ."). These concepts are also carried forward from the Uniform Durable Power of Attorney Act. *See* Unif. Durable Power Atty. Act § 4 (1987).

Of special note in the list of termination events is subsection (b)(3) which provides that a spouse-agent's authority is revoked when an action is filed for the dissolution or annulment of the agent's marriage to the principal, or their legal separation. Although the filing of an action for dissolution or annulment might render a principal particularly vulnerable to self-interested actions by a spouse-agent, subsection (b)(3) is not mandatory and may be overridden in the power of attorney. There may be special circumstances precipitating the dissolution, such as catastrophic illness and the need for public benefits, that would prompt the principal to specify that the agent's authority continues notwithstanding dissolution, annulment or legal separation.

SECTION 5B-111. COAGENTS AND SUCCESSOR AGENTS.

(a) A principal may designate two or more persons to act as coagents. Unless the power of attorney otherwise provides, each coagent may exercise its authority independently.

(b) A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. A principal may grant authority to designate one or more successor agents to an agent or other person designated by name, office, or function. Unless the power of attorney otherwise provides, a successor agent:

(1) has the same authority as that granted to the original agent; and

(2) may not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.

(c) Except as otherwise provided in the power of attorney and subsection (d), an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent.

(d) An agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal's best interest. An agent that fails to notify the principal or take action as required by this subsection is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action.

Comment

This section provides several default rules that merit careful consideration by the principal. Subsection (a) states that if a principal names coagents, each coagent may exercise its authority independently unless otherwise directed in the power of attorney. The Act adopts this default position to discourage the practice of executing separate, co-extensive powers of attorney in favor of different agents, and to facilitate transactions with persons who are reluctant to accept a power of attorney from only one of two or more named agents. This default rule should not, however, be interpreted as encouraging the practice of naming coagents. For a principal who can still monitor the activities of an agent, naming coagents multiplies monitoring responsibilities and significantly increases the risk that inconsistent actions will be taken with the principal's property. For the incapacitated principal, the risk is even greater that coagents will use the power of attorney to vie for control of the principal and the principal's property. Although the principal can override the default rule by requiring coagents to act by majority or unanimous consensus, such a requirement impedes use of the power of attorney, especially among agents who do not share close physical or philosophical proximity. A more prudent practice is generally to name one original agent and one or more successor agents. If desirable, a principal may give the original agent authority to delegate the agent's authority during periods when the agent is temporarily unavailable to serve (*see* Section 5B-201(a)(5)).

Subsection (b) states that unless a power of attorney otherwise provides, a successor agent has the same authority as that granted to the original agent. While this default provision ensures that the scope of authority granted to the original agent can be carried forward by

successors, a principal may want to consider whether a successor agent is an appropriate person to exercise all of the authority given to the original agent. For example, authority to make gifts, to create, amend, or revoke an inter vivos trust, or to create or change survivorship and beneficiary designations (*see* Section 5B-201(a)) may be appropriate for a spouse-agent, but not for an adult child who is named as the successor agent.

Subsection (c) provides a default rule that an agent is not liable for the actions of another agent unless the agent participates in or conceals the breach of fiduciary duty committed by that other agent. Consequently, absent specification to the contrary in the power of attorney, an agent has no duty to monitor another agent's conduct. However, subsection (d) does require that an agent that has actual knowledge of a breach or imminent breach of fiduciary duty must notify the principal, and if the principal is incapacitated, take reasonably appropriate action to safeguard the principal's best interest. Subsection (d) provides that if an agent fails to notify the principal or to take action to safeguard the principal's best interest, that agent is only liable for the reasonably foreseeable damages that could have been avoided had the agent provided the required notification.

SECTION 5B-112. REIMBURSEMENT AND COMPENSATION OF AGENT.

Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances.

Comment

This section provides a default rule that an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to reasonable compensation. While it is unlikely that a principal would choose to alter the default rule as to expenses, a principal's circumstances may warrant including limitations in the power of attorney as to the categories of expenses the agent may incur; likewise, the principal may choose to specify the terms of compensation rather than leave that determination to a reasonableness standard. Although many family-member agents serve without compensation, payment of compensation to the agent may be advantageous to the principal in circumstances where the principal needs to spend down income or resources to meet qualifications for public benefits.

SECTION 5B-113. AGENT'S ACCEPTANCE. Except as otherwise provided in the power of attorney, a person accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.

Comment

This section establishes a default rule for agent acceptance of appointment under a power of attorney. Unless a different method is provided in the power of attorney, an agent's acceptance occurs upon exercise of authority, performance of duties, or any other assertion or conduct indicating acceptance. Acceptance is the critical reference point for commencement of the agency relationship and the imposition of fiduciary duties (*see* Section 5B-114(a)). Because a person may be unaware that the principal has designated the person as an agent in a power of attorney, clear demarcation of when an agency relationship commences is necessary to protect both the principal and the agent. *See* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 41 (2001) (noting that "fiduciary duties should be imposed only to the extent the attorney-in-fact knows of the role, is able to accept responsibility, and affirmatively accepts"). The Act also provides a default method for agent resignation (*see* Section 5B-118), which terminates the agency relationship (*see* Section 5B-110(b)(2)).

SECTION 5B-114. AGENT'S DUTIES.

(a) Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall:

(1) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;

(2) act in good faith; and

(3) act only within the scope of authority granted in the power of attorney.

(b) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:

(1) act loyally for the principal's benefit;

(2) act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;

(3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;

(4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

(5) cooperate with a person that has authority to make health-care decisions for

the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and

(6) attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

(A) the value and nature of the principal's property;

(B) the principal's foreseeable obligations and need for maintenance;

(C) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and

(D) eligibility for a benefit, a program, or assistance under a statute or regulation.

(c) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

(d) An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.

(e) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

(f) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.

(g) An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act,

error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person.

(h) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.

Comment

Although well settled that an agent under a power of attorney is a fiduciary, there is little clarity in state power of attorney statutes about what that means. *See generally* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1 (2001); Carolyn L. Dessin, *Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role*, 75 Neb. L. Rev. 574 (1996). Among states that address agent duties, the standard of care varies widely and ranges from a due care standard (*see, e.g.*, 755 Ill. Comp. Stat. Ann. 45/2-7 (West 1992); Ind. Code Ann. § 30-5-6-2 (West 1994)) to a trustee-type standard (*see, e.g.,* Fla. Stat. Ann. § 709.08(8) (West 2000 & Supp. 2006); Mo. Ann. Stat. § 404.714 (West 2001)). Section 5B-114 clarifies agent duties by articulating minimum mandatory duties (subsection (a)) as well as default duties that can be modified or omitted by the principal (subsection (b)).

The mandatory duties–acting in accordance with the principal's reasonable expectations, if known, and otherwise in the principal's best interest; acting in good faith; and acting only within the scope of authority granted–may not be altered in the power of attorney. Establishing the principal's reasonable expectations as the primary guideline for agent conduct is consistent with a policy preference for "substituted judgment" over "best interest" as the surrogate decision-making standard that better protects an incapacitated person's self-determination interests. *See* Wingspan–The Second National Guardianship Conference, *Recommendations*, 31 Stetson L. Rev. 595, 603 (2002). *See also* Unif. Guardianship & Protective Proc. Act § 314(a) (1997) (Section 314(a) of this Code).

The Act does not require, nor does common practice dictate, that the principal state expectations or objectives in the power of attorney. In fact, one of the advantages of a power of attorney over a trust or guardianship is the flexibility and informality with which an agent may

exercise authority and respond to changing circumstances. However, when a principal's subjective expectations are potentially inconsistent with an objective best interest standard, good practice suggests memorializing those expectations in a written and admissible form as a precaution against later challenges to the agent's conduct (*see* Section 5B-116).

If a principal's expectations potentially conflict with a default duty under the Act, then stating the expectations in the power of attorney, or altering the default rule to accommodate the expectations, or both, is advisable. For example, a principal may want to invest in a business owned by a family member who is also the agent in order to improve the economic position of the agent and the agent's family. Without the principal's clear expression of this objective, investment by the agent of the principal's property in the agent's business may be viewed as breaching the default duty to act loyally for the principal's benefit (subsection (b)(1)) or the default duty to avoid conflicts of interest that impair the agent's ability to act impartially for the principal's best interest (subsection (b)(2)).

Two default duties in this section protect the principal's previously-expressed choices. These are the duty to cooperate with the person authorized to make health-care decisions for the principal (subsection (b)(5)) and the duty to preserve the principal's estate plan (subsection (b)(6)). However, an agent has a duty to preserve the principal's estate plan only to the extent the plan is actually known to the agent and only if preservation of the estate plan is consistent with the principal's best interest. Factors relevant to determining whether preservation of the estate plan is in the principal's best interest include the value of the principal's property, the principal's need for maintenance, minimization of taxes, and eligibility for public benefits. The Act protects an agent from liability for failure to preserve the estate plan if the agent has acted in good faith (subsection (c)).

Subsection (d) provides that an agent acting with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has a conflict of interest. This position is a departure from the traditional common law duty of loyalty which required an agent to act solely for the benefit of the principal. *See* Restatement (Second) of Agency § 387 (1958); *see also* Unif. Trust Code § 802(a) (2003) (requiring a trustee to administer a trust "solely in the interests" of the beneficiary). Subsection (d) is modeled after state statutes which provide that loyalty to the principal can be compatible with an incidental benefit to the agent. *See* Cal. Prob. Code § 4232(b) (West Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/2-7 (West 1992); Ind. Code Ann. § 30-5-9-2 (West 1994 & Supp. 2005). The Restatement (Third) of Agency § 8.01 (2006) also contemplates that loyal service to the principal may be concurrently beneficial to the agent (*see* Reporter's note a). *See also* John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 943 (2005) (arguing that the sole interest test for loyalty should be replaced by the best interest test). The public policy which favors best interest over sole interest as the benchmark for agent loyalty comports with the practical reality that most agents under powers of attorney are family members who have inherent conflicts of interest with the principal arising from joint property ownership or inheritance expectations.

Subsection (e) provides additional protection for a principal who has selected an agent with special skills or expertise by requiring that such skills or expertise be considered when evaluating the agent's conduct. If a principal chooses to appoint a family member or close

friend to serve as an agent, but does not intend that agent to serve under a higher standard because of special skills or expertise, the principal should consider including an exoneration provision within the power of attorney (*see* comment to Section 5B-115).

Subsections (f) and (g) state protections for an agent that are similar in scope to those applicable to a trustee. Subsection (f) holds an agent harmless for decline in the value of the principal's property absent a breach of fiduciary duty (*cf.* Unif. Trust Code § 1003(b) (2003)). Subsection (g) holds an agent harmless for the conduct of a person to whom the agent has delegated authority, or who has been engaged by the agent on the principal's behalf, provided the agent has exercised care, competence, and diligence in selecting and monitoring the person (*cf.* Unif. Trust Code § 807(c) (2003).

Subsection (h) codifies the agent's common law duty to account to a principal (*see* Restatement (Third) of Agency § 8.12 (2006); Restatement (First) of Agency § 382 (1933)). Rather than create an affirmative duty of periodic accounting, subsection (h) states that the agent is not required to disclose receipts, disbursements or transactions unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal. If the principal is deceased, the principal's personal representative or successor in interest may request an agent to account. While there is no affirmative duty to account unless ordered by the court or requested by one of the foregoing persons, subsection (b)(4) does create a default duty to keep records.

The narrow categories of persons that may request an agent to account are consistent with the premise that a principal with capacity should control to whom the details of financial transactions are disclosed. If a principal becomes incapacitated or dies, then the principal's fiduciary or personal representative may succeed to that monitoring function. The inclusion of a governmental agency (such as Adult Protective Services) in the list of persons that may request an agent to account is patterned after state legislative trends and is a response to growing national concern about financial abuse of vulnerable persons. *See* 755 Ill. Comp. Stat. Ann. 45/2-7.5 (West Supp. 2006 & 2006 Ill. Legis. Serv. 1754); 20 Pa. Cons. Stat. Ann. § 5604(d) (West 2005); Vt. Stat. Ann. tit.14, § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228). *See generally* Donna J. Rabiner, David Brown & Janet O'Keeffe, *Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them*, 16 J. Elder Abuse & Neglect 65 (2004). As an additional protective counter-measure to the narrow categories of persons who may request an agent to account, the Act contains a broad standing provision for seeking judicial review of an agent's conduct. *See* Section 5B-116 and Comment.

SECTION 5B-115. EXONERATION OF AGENT. A provision in a power of attorney relieving an agent of liability for breach of duty is binding on the principal and the principal's successors in interest except to the extent the provision:

(1) relieves the agent of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the

best interest of the principal; or

(2) was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

Comment

This section permits a principal to exonerate an agent from liability for breach of fiduciary duty, but prohibits exoneration for a breach committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal. The mandatory minimum standard of conduct required of an agent is equivalent to the good faith standard applicable to trustees. A trustee's failure to adhere to that standard cannot be excused by language in the trust instrument. *See* Unif. Trust Code § 1008 cmt. (2003) (noting that "a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries"). *See also* Section 5B-102(4) (defining good faith for purposes of the Act as "honesty in fact"). Section 5B-115 provides, as an additional measure of protection for the principal, that an exoneration provision is not binding if it was inserted as the result of abuse of a confidential or fiduciary relationship with the principal. While as a matter of good practice an exoneration provision should be the exception rather than the rule, its inclusion in a power of attorney may be useful in meeting particular objectives of the principal. For example, if the principal is concerned that contentious family members will attack the agent's conduct in order to gain control of the principal's assets, an exoneration provision may deter such action or minimize the likelihood of success on the merits.

SECTION 5B-116. JUDICIAL RELIEF.

(a) The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief:

(1) the principal or the agent;

(2) a guardian, conservator, or other fiduciary acting for the principal;

(3) a person authorized to make health-care decisions for the principal;

(4) the principal's spouse, parent, or descendant;

(5) an individual who would qualify as a presumptive heir of the principal;

(6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;

(7) a governmental agency having regulatory authority to protect the welfare of the principal;

(8) the principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and

(9) a person asked to accept the power of attorney.

(b) Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

Comment

The primary purpose of this section is to protect vulnerable or incapacitated principals against financial abuse. Subsection (a) sets forth broad categories of persons who have standing to petition the court for construction of the power of attorney or review of the agent's conduct, including in the list a "person that demonstrates sufficient interest in the principal's welfare" (subsection (a)(8)). Allowing any person with sufficient interest to petition the court is the approach taken by the majority of states that have standing provisions. *See* Cal. Prob. Code § 4540 (West Supp. 2006); Colo. Rev. Stat. Ann. § 15-14-609 (West 2005); 755 Ill. Comp. Stat. Ann. 45/2-10 (West 1992); Ind. Code Ann. § 30-5-3-5 (West 1994); Kan. Stat. Ann.§ 58-662 (2005); Mo. Ann. Stat. § 404.727 (West 2001); N.H. Rev. Stat. Ann. § 506:7 (LexisNexis 1997 & Supp. 2005); Wash. Rev. Code Ann. § 11.94.100 (Supp. 2006); Wis. Stat. Ann. § 243.07(6r) (West 2001). *But cf.* 20 Pa. Cons. Stat. Ann. § 5604 (West 2005) (limiting standing to an agency acting pursuant to the Older Adults Protective Services Act); Vt. Stat. Ann. tit.14, § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228) (limiting standing to the commissioner of disabilities, aging, and independent living).

In addition to providing a means for detecting and redressing financial abuse by agents, this section protects the self-determination rights of principals. Subsection (b) states that the court must dismiss a petition upon the principal's motion unless the court finds that the principal lacks the capacity to revoke the agent's authority or the power of attorney. Contrasted with the breadth of Section 5B-116 is Section 5B-114(h) which narrowly limits the persons who can request an agent to account for transactions conducted on the principal's behalf. The rationale for narrowly restricting who may request an agent to account is the preservation of the principal's financial privacy. *See* Section 5B-114 Comment. Section 5B-116 operates as a check-and-balance on the narrow scope of Section 5B-114(h) and provides what, in many circumstances, may be the only means to detect and stop agent abuse of an incapacitated principal.

SECTION 5B-117. AGENT'S LIABILITY. An agent that violates this [article] is

liable to the principal or the principal's successors in interest for the amount required to:

(1) restore the value of the principal's property to what it would have been had the violation not occurred; and

(2) reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.

Comment

This section provides that an agent's liability for violating the Act includes not only the amount necessary to restore the principal's property to what it would have been had the violation not occurred, but also any amounts for attorney's fees and costs advanced from the principal's property on the agent's behalf. This section does not, however, limit the agent's liability exposure to these amounts. Pursuant to Section 5B-123, remedies under the Act are not exclusive. If a jurisdiction has enacted separate statutes to deal with financial abuse, an agent may face additional civil or criminal liability. For a discussion of state statutory responses to financial abuse, see Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 McGeorge L. Rev. 267 (2003).

SECTION 5B-118. AGENT'S RESIGNATION; NOTICE. Unless the power of attorney provides a different method for an agent's resignation, an agent may resign by giving notice to the principal and, if the principal is incapacitated:

(1) to the [conservator or guardian], if one has been appointed for the principal, and a coagent or successor agent; or

(2) if there is no person described in paragraph (1), to:

(A) the principal's caregiver;

(B) another person reasonably believed by the agent to have sufficient interest in the principal's welfare; or

(C) a governmental agency having authority to protect the welfare of the principal.

Legislative Note: *The brackets in this section indicate where the enacting jurisdiction should review its respective guardianship, conservatorship, or other protective proceedings statutes and amend, if necessary for consistency, the bracketed language.*

Comment

Section 5B-118 provides a default procedure for an agent's resignation. An agent who no longer wishes to serve should formally resign in order to establish a clear demarcation of the end of the agent's authority and to minimize gaps in fiduciary responsibility before a successor accepts the office. If the principal still has capacity when the agent wishes to resign, this section requires only that the agent give notice to the principal. If, however, the principal is incapacitated, the agent must, in addition to giving notice to the principal, give notice as set forth in paragraphs (1) or (2).

Paragraph (1) provides that notice must be given to a fiduciary, if one has been appointed, and to a coagent or successor agent, if any. If the principal does not have an appointed fiduciary and no coagent or successor agent is named in the power of attorney, then the agent may choose among the notice options in paragraph (2). Paragraph (2) permits the resigning agent to give notice to the principal's caregiver, a person reasonably believed to have sufficient interest in the principal's welfare, or a governmental agency having authority to protect the welfare of the principal. The choice among these options is intentionally left to the agent's discretion and is governed by the same standards as apply to other agent conduct. *See* Section 5B-114(a) (requiring the agent to act in accordance with the principal's reasonable expectations, if known, and otherwise in the principal's best interest).

SECTION 5B-119. ACCEPTANCE OF AND RELIANCE UPON ACKNOWLEDGED POWER OF ATTORNEY.

(a) For purposes of this section and Section 5B-120, "acknowledged" means purportedly verified before a notary public or other individual authorized to take acknowledgements.

(b) A person that in good faith accepts an acknowledged power of attorney without actual knowledge that the signature is not genuine may rely upon the presumption under Section 5B-105 that the signature is genuine.

(c) A person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely upon the power of attorney as if the power of attorney were genuine, valid and still in effect, the agent's authority were genuine, valid and still in effect, and the agent had not exceeded and had properly exercised the authority.

(d) A person that is asked to accept an acknowledged power of attorney may request, and rely upon, without further investigation:

(1) an agent's certification under penalty of perjury of any factual matter concerning the principal, agent, or power of attorney;

(2) an English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English; and

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

(e) An English translation or an opinion of counsel requested under this section must be provided at the principal's expense unless the request is made more than seven business days after the power of attorney is presented for acceptance.

(f) For purposes of this section and Section 5B-120, a person that conducts activities through employees is without actual knowledge of a fact relating to a power of attorney, a principal, or an agent if the employee conducting the transaction involving the power of attorney is without actual knowledge of the fact.

Comment

This section protects persons who in good faith accept an acknowledged power of attorney. Section 5B-119 does not apply to unacknowledged powers of attorney. *See* Section 5B-105 (providing that the signature on a power of attorney is presumed genuine if acknowledged). Subsection (a) states that for purposes of this section and Section 5B-120 "acknowledged" means "purportedly" verified before an individual authorized to take acknowledgments. The purpose of this definition is to protect a person that in good faith accepts an acknowledged power of attorney without knowledge that it contains a forged signature or a latent defect in the acknowledgment. *See, e.g.,* Cal. Prob. Code § 4303(a)(2) (West Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/2-8 (Supp. 2006); Ind. Code Ann. § 30-5-8-2 (West 1994); N.C. Gen. Stat. § 32A-40 (2005). The Act places the risk that a power of attorney is invalid upon the principal rather than the person that accepts the power of attorney. This approach promotes acceptance of powers of attorney, which is essential to their effectiveness as an alternative to guardianship. The national survey conducted by the Joint Editorial Board for

Uniform Trust and Estate Acts (*see* Prefatory Note) found that a majority of respondents had difficulty obtaining acceptance of powers of attorney. Sixty-three percent reported occasional difficulty and seventeen percent reported frequent difficulty. Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis*, National Conference of Commissioners on Uniform State Laws 12-13 (2002), *available at* http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm.

Section 5B-119 permits a person to rely in good faith on the validity of the power of attorney, the validity of the agent's authority, and the propriety of the agent's exercise of authority, unless the person has actual knowledge to the contrary (subsection (c)). Although a person is not required to investigate whether a power of attorney is valid or the agent's exercise of authority proper, subsection (d) permits a person to request an agent's certification of any factual matter (*see* Section 5B-302 for a sample certification form) and an opinion of counsel as to any matter of law. If the power of attorney contains, in whole or part, language other than English, an English translation may also be requested. Further protection is provided in subsection (f) for persons that conduct activities through employees. Subsection (f) states that for purposes of Sections 5B-119 and 5B-120, a person is without actual knowledge of a fact if the employee conducting the transaction is without actual knowledge of the fact.

Alternative A

SECTION 5B-120. LIABILITY FOR REFUSAL TO ACCEPT ACKNOWLEDGED POWER OF ATTORNEY.

(a) Except as otherwise provided in subsection (b):

(1) a person shall either accept an acknowledged power of attorney or request a certification, a translation, or an opinion of counsel under Section 5B-119(d) no later than seven business days after presentation of the power of attorney for acceptance;

(2) if a person requests a certification, a translation, or an opinion of counsel under Section 119(d), the person shall accept the power of attorney no later than five business days after receipt of the certification, translation, or opinion of counsel; and

(3) a person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented.

(b) A person is not required to accept an acknowledged power of attorney if:

(1) the person is not otherwise required to engage in a transaction with the

principal in the same circumstances;

(2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;

(3) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;

(4) a request for a certification, a translation, or an opinion of counsel under Section 5B-119(d) is refused;

(5) the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under Section 5B-119(d) has been requested or provided; or

(6) the person makes, or has actual knowledge that another person has made, a report to the [local adult protective services office] stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

(c) A person that refuses in violation of this section to accept an acknowledged power of attorney is subject to:

(1) a court order mandating acceptance of the power of attorney; and

(2) liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

Legislative Note: *Section 5B-120 enumerates the bases for legitimate refusals of a power of attorney as well as sanctions for refusals that violate the Act. Alternatives A and B are identical except that Alternative B applies only to acknowledged statutory form powers of attorney while Alternative A applies to all acknowledged powers of attorney.*

Under both alternatives, the phrase "local adult protective services office" is bracketed to indicate where an enacting jurisdiction should insert the appropriate designation for the governmental agency with regulatory authority to protect the welfare of the principal.

Comment to Alternative A

As a complement to Section 5B-119, Section 5B-120 enumerates the bases for legitimate refusals of a power of attorney as well as sanctions for refusals that violate the Act. Like Section 5B-119, Section 5B-120 does not apply to unacknowledged powers of attorney. Enacting jurisdictions are provided a choice between alternative Sections 5B-120. Alternatives A and B are identical except that Alternative B applies only to acknowledged statutory form powers of attorney while Alternative A applies to all acknowledged powers of attorney.

Subsection (b) of Alternative A provides the bases upon which an acknowledged power of attorney may be refused without liability. The last paragraph of subsection (b) permits refusal of an otherwise valid acknowledged power of attorney that does not meet any of the other bases for refusal if the person in good faith believes that the principal is subject to abuse by the agent or someone acting in concert with the agent (paragraph (6)). A refusal under this paragraph is protected if the person makes, or knows another person has made, a report to the governmental agency authorized to protect the welfare of the principal. Pennsylvania has a similar provision. *See* 20 Pa. Cons. Stat. Ann. § 5608(a) (West 2005).

Unless a basis exists in subsection (b) for refusing an acknowledged power of attorney, subsection (a) requires that, within seven business days after the power of attorney is presented, a person must either accept the power of attorney or request a certification, a translation, or an opinion of counsel pursuant to Section 5B-119. If a request under Section 5B-119 is made, the person must decide to accept or reject the power of attorney no later than five business days after receipt of the requested document (subsection (a)(2)). Provided no basis exists for refusing the power of attorney, subsection (a)(3) prohibits a person from requesting an additional or different form of power of attorney for authority granted in the power of attorney presented.

Subsection (c) of Alternative A provides that a person that refuses an acknowledged power of attorney in violation of Section 5B-120 is subject to a court order mandating acceptance and to reasonable attorney's fees and costs incurred in the action to confirm the validity of the power of attorney or to mandate acceptance. Statutory liability for unreasonable refusal of a power of attorney is based on a growing state legislative trend. *See, e.g.*, Alaska Stat. § 13.26.353(c) (2004); Cal. Prob. Code § 4306(a) (West Supp. 2006); Fla. Stat. Ann. § 709.08(11) (West 2000 & Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/ 2-8 (West 1992); Ind. Code Ann. § 30-5-9-9 (West Supp. 2005); Minn. Stat. Ann. § 523.20 (West 2006); N.Y. Gen. Oblig. Law § 5-1504 (McKinney 2001); N.C. Gen. Stat. § 32A-41 (2005); 20 Pa. Cons. Stat. Ann. § 5608 (West 2005); S.C. Code Ann. § 62-5-501(F)(1) (Supp. 2005).

Alternative B

SECTION 5B-120. LIABILITY FOR REFUSAL TO ACCEPT

ACKNOWLEDGED STATUTORY FORM POWER OF ATTORNEY.

(a) In this section, "statutory form power of attorney" means a power of attorney substantially in the form provided in Section 5B-301 or that meets the requirements for a military power of attorney pursuant to 10 U.S.C. Section 1044b [, as amended].

(b) Except as otherwise provided in subsection (c):

(1) a person shall either accept an acknowledged statutory form power of attorney or request a certification, a translation, or an opinion of counsel under Section 5B-119(d) no later than seven business days after presentation of the power of attorney for acceptance;

(2) if a person requests a certification, a translation, or an opinion of counsel under Section 5B-119(d), the person shall accept the statutory form power of attorney no later than five business days after receipt of the certification, translation, or opinion of counsel; and

(3) a person may not require an additional or different form of power of attorney for authority granted in the statutory form power of attorney presented.

(c) A person is not required to accept an acknowledged statutory form power of attorney if:

(1) the person is not otherwise required to engage in a transaction with the principal in the same circumstances;

(2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;

(3) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;

(4) a request for a certification, a translation, or an opinion of counsel under Section 5B-119(d) is refused;

(5) the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under Section 5B-119(d) has been requested or provided; or

(6) the person makes, or has actual knowledge that another person has made, a report to the [local adult protective services office] stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

(d) A person that refuses in violation of this section to accept an acknowledged statutory form power of attorney is subject to:

(1) a court order mandating acceptance of the power of attorney; and

(2) liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

Legislative Note: *Section 5B-120 enumerates the bases for legitimate refusals of a power of attorney as well as sanctions for refusals that violate the Act. Alternatives A and B are identical except that Alternative B applies only to acknowledged statutory form powers of attorney while Alternative A applies to all acknowledged powers of attorney.*

Under both alternatives, the phrase "local adult protective services office" is bracketed to indicate where an enacting jurisdiction should insert the appropriate designation for the governmental agency with regulatory authority to protect the welfare of the principal.

Comment to Alternative B

As a complement to Section 5B-119, Section 5B-120 enumerates the bases for legitimate refusals of a power of attorney as well as sanctions for refusals that violate the Act. Like Section 5B-119, Section 5B-120 does not apply to unacknowledged powers of attorney. Enacting jurisdictions are provided a choice between alternative Sections 5B-120. Alternatives A and B are identical except that Alternative B applies only to acknowledged statutory form powers of attorney while Alternative A applies to all acknowledged powers of attorney.

Subsection (a) of Alternative B defines "statutory form power of attorney" as a power of

attorney substantially in the form provided in Section 5B-301 or one that meets the requirements for a military power of attorney.

Subsection (c) of Alternative B provides the bases upon which an acknowledged statutory form power of attorney may be refused without liability. The last paragraph of subsection (c) permits refusal of an otherwise valid acknowledged statutory form power of attorney that does not meet any of the other bases for refusal if the person in good faith believes that the principal is subject to abuse by the agent or someone acting in concert with the agent (paragraph (6)). A refusal under this paragraph is protected if the person makes, or knows another person has made, a report to the governmental agency authorized to protect the welfare of the principal. Pennsylvania has a similar provision. *See* 20 Pa. Cons. Stat. Ann. § 5608(a) (West 2005).

Unless a basis exists in subsection (c) for refusing an acknowledged statutory form power of attorney, subsection (b) requires that, within seven business days after the power of attorney is presented, a person must either accept the power of attorney or request a certification, a translation, or an opinion of counsel pursuant to Section 5B-119. If a request under Section 5B-119 is made, the person must decide to accept or reject the power of attorney no later than five business days after receipt of the requested document (subsection (b)(2)). Provided no basis exists for refusing the power of attorney, subsection (b)(3) prohibits a person from requesting an additional or different form of power of attorney for authority granted in the power of attorney presented.

Subsection (d) of Alternative B provides that a person that refuses an acknowledged statutory form power of attorney in violation of Section 5B-120 is subject to a court order mandating acceptance and to reasonable attorney's fees and costs incurred in the action to confirm the validity of the power of attorney or to mandate acceptance. Statutory liability for unreasonable refusal of a power of attorney is based on a growing state legislative trend. *See, e.g.*, Alaska Stat. § 13.26.353(c) (2004); Cal. Prob. Code § 4306(a) (West Supp. 2006); Fla. Stat. Ann. § 709.08(11) (West 2000 & Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/ 2-8 (West 1992); Ind. Code Ann. § 30-5-9-9 (West Supp. 2005); Minn. Stat. Ann. § 523.20 (West 2006); N.Y. Gen. Oblig. Law § 5-1504 (McKinney 2001); N.C. Gen. Stat. § 32A-41 (2005); 20 Pa. Cons. Stat. Ann. § 5608 (West 2005); S.C. Code Ann. § 62-5-501(F)(1) (Supp. 2005).

End of Alternatives

SECTION 5B-121. PRINCIPLES OF LAW AND EQUITY. Unless displaced by a provision of this [article], the principles of law and equity supplement this [article].

Comment

The Act is supplemented by common law, including the common law of agency, where provisions of the Act do not displace relevant common law principles. The common law of agency is articulated in the Restatement of Agency and includes contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. The common law also includes the traditional and broad

equitable jurisdiction of the court, which this Act in no way restricts.

The statutory text of the Uniform Power of Attorney Act is also supplemented by these comments, which, like the comments to any Uniform Act, may be relied on as a guide for interpretation. *See* Acierno v. Worthy Bros. Pipeline Corp., 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code); Yale University v. Blumenthal, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); 2B Norman Singer, Southerland Statutory Construction § 52.5 (6th ed. 2000).

SECTION 5B-122. LAWS APPLICABLE TO FINANCIAL INSTITUTIONS AND ENTITIES. This [article] does not supersede any other law applicable to financial institutions or other entities, and the other law controls if inconsistent with this [article].

Comment

This section addresses concerns of representatives from the banking and insurance industries that there may be regulations which govern those entities that conflict with provisions of this Act. Although no specific conflicts were identified during the drafting process, Section 5B-122 provides that in the event a law applicable to a financial institution or other entity is inconsistent with this Act, the other law will supersede this Act to the extent of the inconsistency. This concern about inconsistency with the requirements of other law is already substantially addressed in Section 5B-120, which provides, in pertinent part, that a person is not required to accept a power of attorney if, "the person is not otherwise required to engage in a transaction with the principal in the same circumstances," or "engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law."

SECTION 5B-123. REMEDIES UNDER OTHER LAW. The remedies under this [article] are not exclusive and do not abrogate any right or remedy under the law of this state other than this [article].

Comment

The remedies under the Act are not intended to be exclusive with respect to causes of action that may accrue in relation to a power of attorney. The Act applies to many persons, individual and entity (*see* Section 5B-102(6) (defining "person" for purposes of the Act)), that may serve as agents or that may be asked to accept a power of attorney. Likewise, the Act applies to many subject areas (*see* Part 2) over which principals may delegate authority to agents. Remedies under other laws which govern such persons and subject matters should be considered by aggrieved parties in addition to remedies available under this Act. *See, e.g.,* Section 5B-117 Comment.

[PART] 2

AUTHORITY

General Comment

Part 2 is based in part on the predecessor Uniform Statutory Form Power of Attorney Act, approved in 1988. It provides the default statutory construction for authority granted in a power of attorney. Sections 5B-204 through 5B-217 describe authority with respect to various subject matters. These descriptions may be incorporated by reference in the optional statutory form (Section 5B-301) or in an individually drafted power of attorney. Incorporation is accomplished either by referring to the descriptive term for the subject or by providing a citation to the section in which the authority is described (Section 5B-202). A principal may also modify any authority incorporated by reference (Section 5B-202(c)). Section 5B-203 supplements Sections 5B-204 through 5B-217 by providing general terms of construction that apply to all grants of authority under those sections unless otherwise indicated in the power of attorney.

Most of the language in Sections 5B-204 through 5B-216 of Part 2 comes directly from the Uniform Statutory Form Power of Attorney Act. The language has been revised where necessary to reflect modern custom and practice. Where significant changes have been made, they are noted in a comment to the relevant section. In general, there are two important differences between the statutory treatment of authority in this Act and in the Uniform Statutory Form Power of Attorney Act. First, this Act includes a section that provides a default rule for the parameters of gift making authority (Section 5B-217). Second, this Act identifies specific acts that may be authorized only by an express grant in the power of attorney (Section 5B-201(a)). Express authorization for the acts listed in Section 5B-201(a) is required because of the risk those acts pose to the principal's property and estate plan. The purpose of Section 5B-201(a) is to make clear that authority for these acts may not be inferred from a grant of general authority.

SECTION 5B-201. AUTHORITY THAT REQUIRES SPECIFIC GRANT; GRANT OF GENERAL AUTHORITY.

(a) An agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:

(1) create, amend, revoke, or terminate an inter vivos trust;

(2) make a gift;

(3) create or change rights of survivorship;

(4) create or change a beneficiary designation;

(5) delegate authority granted under the power of attorney;

(6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; [or]

(7) exercise fiduciary powers that the principal has authority to delegate[; or

(8) disclaim property, including a power of appointment].

(b) Notwithstanding a grant of authority to do an act described in subsection (a), unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or descendant of the principal, may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

(c) Subject to subsections (a), (b), (d), and (e), if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in Sections 5B-204 through 5B-216.

(d) Unless the power of attorney otherwise provides, a grant of authority to make a gift is subject to Section 5B-217.

(e) Subject to subsections (a), (b), and (d), if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.

(f) Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in this state and whether or not the authority is exercised or the power of attorney is executed in this state.

(g) An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if

the principal had performed the act.

Legislative Note: *The phrase "or disclaim property, including a power of appointment" is in brackets in subsection (a) and should be deleted if under the law of the enacting jurisdiction a fiduciary has authority to disclaim an interest in, or power over, property and the jurisdiction does not wish to restrict that authority by the Uniform Power of Attorney Act. See Unif. Disclaimer of Property Interests Acts § 5(b) (2006) (providing, "[e]xcept to the extent a fiduciary's right to disclaim is expressly restricted or limited by another statute of this State or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or part, any interest in or power over property, including a power of appointment . . . ."). See also Section 5B-301 Legislative Note.*

Comment

This section distinguishes between grants of specific authority that require express language in a power of attorney and grants of general authority. Section 5B-201(a) enumerates the acts that require an express grant of specific authority and which may not be inferred from a grant of general authority. This approach follows a growing trend among states to require express specific authority for such actions as making a gift, creating or revoking a trust, and using other non-probate estate planning devices such as survivorship interests and beneficiary designations. *See*, *e.g.,* Cal. Prob. Code § 4264 (West Supp. 2006); Kan. Stat. Ann. § 58-654(f) (2005); Mo. Ann. Stat. § 404.710 (West 2001); Wash. Rev. Code Ann. § 11.94.050 (West Supp. 2006). The rationale for requiring a grant of specific authority to perform the acts enumerated in subsection (a) is the risk those acts pose to the principal's property and estate plan. Although risky, such authority may nevertheless be necessary to effectuate the principal's property management and estate planning objectives. Ideally, these are matters about which the principal will seek advise before granting authority to an agent.

The Act does not contain statutory construction language for any of the acts enumerated in subsection (a) other than the making of gifts (*see* Section 5B-217). Because a gift of the principal's property reduces the principal's estate, the Act, like a number of state statutes, sets default per-donee limits on gift amounts. *See, e.g.*, N.Y. Gen. Oblig. Law § 5-1502M (McKinney 2001); 20 Pa. Cons. Stat. Ann. § 5603(a)(2)(ii) (West 2005). However, as with any authority incorporated by reference in a power of attorney, the principal may enlarge or restrict the default parameters set by the Act.

With respect to other acts listed in Section 5B-201(a), the Act contemplates that the principal will specify any special instructions in the power of attorney to further define or limit the authority granted. For example, if a principal grants authority to create or change rights of survivorship (subsection (a)(3)) or beneficiary designations (subsection (a)(4)) the principal may choose to restrict that authority to specifically identified property interests, accounts, or contracts. Principals should carefully consider not only whether to authorize any of the acts listed in Section 5B-201(a), but also whether to limit the scope of such actions.

Subsection (b) contains an additional safeguard for the principal. It establishes as a default rule that an agent who is not an ancestor, spouse, or descendant of the principal may not exercise authority to create in the agent or in an individual the agent is legally obligated to

support, an interest in the principal's property. For example, a non-relative agent with gift making authority could not make a gift to the agent or a dependant of the agent without the principal's express authority in the power of attorney. In contrast, a spouse-agent with express gift-making authority could implement the principal's expectation that annual family gifts be continued without additional authority in the power of attorney.

Notwithstanding a grant of authority to perform any of the enumerated acts in subsection (a), an agent is bound by the mandatory fiduciary duties set forth in Section 5B-114(a) as well as the default duties that the principal has not modified. For a list of these default rules, see Section 5B-301 Comment. If the principal's expectations for the performance of authorized acts potentially conflict with those duties, then clarification of the principal's expectations, modification of the default duties, or both, may be advisable. *See* Section 5B-114 Comment.

Authority for acts and subject matters other than those listed in Section 5B-201(a) may be granted either through incorporation by reference (*see* Section 5B-202) or, if the principal wishes to grant comprehensive general authority, by a grant of authority to do all the acts that a principal could do. A broad grant of general authority is interpreted under the Act as including all of the subject matters and authority described in Sections 5B-204 through 5B-216 (*see* subsection (c)).

SECTION 5B-202. INCORPORATION OF AUTHORITY.

(a) An agent has authority described in this [article] if the power of attorney refers to general authority with respect to the descriptive term for the subjects stated in Sections 5B-204 through 5B-217 or cites the section in which the authority is described.

(b) A reference in a power of attorney to general authority with respect to the descriptive term for a subject in Sections 5B-204 through 5B-217 or a citation to a section of Sections 5B-204 through 5B-217 incorporates the entire section as if it were set out in full in the power of attorney.

(c) A principal may modify authority incorporated by reference.

Comment

This section provides two methods for incorporating into a power of attorney the Act's statutory construction for authority over various subject matters. A reference in a power of attorney to the descriptive term for a subject in Sections 5B-204 through 5B-217, or to the section number, incorporates the entire statutory section as if it were set out in full in the power of attorney. Subsection (c) provides that a principal may modify any authority incorporated by reference. The optional statutory form power of attorney provided in Section 5B-301 uses the

descriptive terms in Sections 5B-204 through 5B-217 to incorporate statutory construction for authority granted on the form and provides a "Special Instructions" section where the principal may modify any authority incorporated by reference.

SECTION 5B-203. CONSTRUCTION OF AUTHORITY GENERALLY. Except as otherwise provided in the power of attorney, by executing a power of attorney that incorporates by reference a subject described in Sections 5B-204 through 5B-217 or that grants to an agent authority to do all acts that a principal could do pursuant to Section 5B-201(c), a principal authorizes the agent, with respect to that subject, to:

(1) demand, receive, and obtain by litigation or otherwise, money or another thing of value to which the principal is, may become, or claims to be entitled, and conserve, invest, disburse, or use anything so received or obtained for the purposes intended;

(2) contract in any manner with any person, on terms agreeable to the agent, to accomplish a purpose of a transaction and perform, rescind, cancel, terminate, reform, restate, release, or modify the contract or another contract made by or on behalf of the principal;

(3) execute, acknowledge, seal, deliver, file, or record any instrument or communication the agent considers desirable to accomplish a purpose of a transaction, including creating at any time a schedule listing some or all of the principal's property and attaching it to the power of attorney;

(4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to a claim existing in favor of or against the principal or intervene in litigation relating to the claim;

(5) seek on the principal's behalf the assistance of a court or other governmental agency to carry out an act authorized in the power of attorney;

(6) engage, compensate, and discharge an attorney, accountant, discretionary investment manager, expert witness, or other advisor;

(7) prepare, execute, and file a record, report, or other document to safeguard or promote the principal's interest under a statute or regulation;

(8) communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality, on behalf of the principal;

(9) access communications intended for, and communicate on behalf of the principal, whether by mail, electronic transmission, telephone, or other means; and

(10) do any lawful act with respect to the subject and all property related to the subject.

Comment

This section is based on Section 3 of the Uniform Statutory Form Power of Attorney Act. It describes incidental types of authority that accompany all authority granted to an agent under each of Sections 5B-204 through 5B-217, unless this incidental authority is modified in the power of attorney. The actions authorized in Section 5B-203 are of the type often necessary for the exercise or implementation of authority over the subjects described in Sections 5B-204 through 5B-217. *See* Unif. Statutory Form Power of Atty. Act prefatory note (1988). Paragraph (10), which states that an agent is authorized to "do any lawful act with respect to the subject and all property related to the subject," emphasizes that a grant of general authority is intended to be comprehensive unless otherwise limited by the Act or the power of attorney. Paragraphs (8) and (9) were added to the section to clarify that this comprehensive authority includes authorization to communicate with government employees on behalf of the principal, to access communications intended for the principal, and to communicate on behalf of the principal using all modern means of communication.

SECTION 5B-204. REAL PROPERTY. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to real property authorizes the agent to:

(1) demand, buy, lease, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject an interest in real property or a right incident to real property;

(2) sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; retain title for security; encumber; partition; consent to partitioning; subject to an easement or covenant; subdivide; apply for zoning or other governmental permits; plat or consent to platting; develop; grant an option concerning; lease;

sublease; contribute to an entity in exchange for an interest in that entity; or otherwise grant or dispose of an interest in real property or a right incident to real property;

(3) pledge or mortgage an interest in real property or right incident to real property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(4) release, assign, satisfy, or enforce by litigation or otherwise a mortgage, deed of trust, conditional sale contract, encumbrance, lien, or other claim to real property which exists or is asserted;

(5) manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the principal, including:

(A) insuring against liability or casualty or other loss;

(B) obtaining or regaining possession of or protecting the interest or right by litigation or otherwise;

(C) paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with them; and

(D) purchasing supplies, hiring assistance or labor, and making repairs or alterations to the real property;

(6) use, develop, alter, replace, remove, erect, or install structures or other improvements upon real property in or incident to which the principal has, or claims to have, an interest or right;

(7) participate in a reorganization with respect to real property or an entity that owns an interest in or right incident to real property and receive, and hold, and act with respect to stocks and bonds or other property received in a plan of reorganization, including:

(A) selling or otherwise disposing of them;

(B) exercising or selling an option, right of conversion, or similar right with respect to them; and

(C) exercising any voting rights in person or by proxy;

(8) change the form of title of an interest in or right incident to real property; and

(9) dedicate to public use, with or without consideration, easements or other real property in which the principal has, or claims to have, an interest.

SECTION 5B-205. TANGIBLE PERSONAL PROPERTY. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to tangible personal property authorizes the agent to:

(1) demand, buy, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject ownership or possession of tangible personal property or an interest in tangible personal property;

(2) sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; create a security interest in; grant options concerning; lease; sublease; or, otherwise dispose of tangible personal property or an interest in tangible personal property;

(3) grant a security interest in tangible personal property or an interest in tangible personal property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(4) release, assign, satisfy, or enforce by litigation or otherwise, a security interest, lien, or other claim on behalf of the principal, with respect to tangible personal property or an interest in tangible personal property;

(5) manage or conserve tangible personal property or an interest in tangible personal property on behalf of the principal, including:

(A) insuring against liability or casualty or other loss;

(B) obtaining or regaining possession of or protecting the property or interest, by litigation or otherwise;

(C) paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments;

(D) moving the property from place to place;

(E) storing the property for hire or on a gratuitous bailment; and

(F) using and making repairs, alterations, or improvements to the property; and

(6) change the form of title of an interest in tangible personal property.

SECTION 5B-206. STOCKS AND BONDS. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to stocks and bonds authorizes the agent to:

(1) buy, sell, and exchange stocks and bonds;

(2) establish, continue, modify, or terminate an account with respect to stocks and bonds;

(3) pledge stocks and bonds as security to borrow, pay, renew, or extend the time of payment of a debt of the principal;

(4) receive certificates and other evidences of ownership with respect to stocks and bonds; and

(5) exercise voting rights with respect to stocks and bonds in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

Comment

The substance of this section remains unchanged from Section 6 the Uniform Statutory Form Power of Attorney Act; however, the wording is revised to reflect that "stocks and bonds" is now a defined term in the Act. *See* Section 5B-102(11).

SECTION 5B-207. COMMODITIES AND OPTIONS. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to commodities and options authorizes the agent to:

(1) buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call or put options on stocks or stock indexes traded on a regulated option exchange; and

(2) establish, continue, modify, and terminate option accounts.

SECTION 5B-208. BANKS AND OTHER FINANCIAL INSTITUTIONS. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to banks and other financial institutions authorizes the agent to:

(1) continue, modify, and terminate an account or other banking arrangement made by or on behalf of the principal;

(2) establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, or other financial institution selected by the agent;

(3) contract for services available from a financial institution, including renting a safe deposit box or space in a vault;

(4) withdraw, by check, order, electronic funds transfer, or otherwise, money or property of the principal deposited with or left in the custody of a financial institution;

(5) receive statements of account, vouchers, notices, and similar documents from a financial institution and act with respect to them;

(6) enter a safe deposit box or vault and withdraw or add to the contents;

(7) borrow money and pledge as security personal property of the principal necessary to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(8) make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or nonnegotiable paper of the principal or payable to the principal or the principal's order, transfer money, receive the cash or other proceeds of those transactions, and accept a draft drawn by a person upon the principal and pay it when due;

(9) receive for the principal and act upon a sight draft, warehouse receipt, or other document of title whether tangible or electronic, or other negotiable or nonnegotiable instrument;

(10) apply for, receive, and use letters of credit, credit and debit cards, electronic transaction authorizations, and traveler's checks from a financial institution and give an indemnity or other agreement in connection with letters of credit; and

(11) consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

SECTION 5B-209. OPERATION OF ENTITY OR BUSINESS. Subject to the terms of a document or an agreement governing an entity or an entity ownership interest, and unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to operation of an entity or business authorizes the agent to:

(1) operate, buy, sell, enlarge, reduce, or terminate an ownership interest;

(2) perform a duty or discharge a liability and exercise in person or by proxy a right, power, privilege, or option that the principal has, may have, or claims to have;

(3) enforce the terms of an ownership agreement;

(4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party because of an ownership interest;

(5) exercise in person or by proxy, or enforce by litigation or otherwise, a right, power,

privilege, or option the principal has or claims to have as the holder of stocks and bonds;

(6) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party concerning stocks and bonds;

(7) with respect to an entity or business owned solely by the principal:

(A) continue, modify, renegotiate, extend, and terminate a contract made by or on behalf of the principal with respect to the entity or business before execution of the power of attorney;

(B) determine:

(i) the location of its operation;

(ii) the nature and extent of its business;

(iii) the methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation;

(iv) the amount and types of insurance carried; and

(v) the mode of engaging, compensating, and dealing with its employees and accountants, attorneys, or other advisors;

(C) change the name or form of organization under which the entity or business is operated and enter into an ownership agreement with other persons to take over all or part of the operation of the entity or business; and

(D) demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the entity or business and control and disburse the money in the operation of the entity or business;

(8) put additional capital into an entity or business in which the principal has an interest;

(9) join in a plan of reorganization, consolidation, conversion, domestication, or merger of the entity or business;

(10) sell or liquidate all or part of an entity or business;

(11) establish the value of an entity or business under a buy-out agreement to which the principal is a party;

(12) prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to an entity or business and make related payments; and

(13) pay, compromise, or contest taxes, assessments, fines, or penalties and perform any other act to protect the principal from illegal or unnecessary taxation, assessments, fines, or penalties, with respect to an entity or business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

Comment

The substance of this section remains unchanged from Section 9 of the Uniform Statutory Form Power of Attorney Act; however, the wording is updated to encompass all modern business and entity forms, including limited liability companies, limited liability partnerships, and entities that may be organized other than for a business purpose.

SECTION 5B- 210. INSURANCE AND ANNUITIES. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to insurance and annuities authorizes the agent to:

(1) continue, pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract procured by or on behalf of the principal which insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract;

(2) procure new, different, and additional contracts of insurance and annuities for the principal and the principal's spouse, children, and other dependents, and select the amount, type

of insurance or annuity, and mode of payment;

(3) pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract of insurance or annuity procured by the agent;

(4) apply for and receive a loan secured by a contract of insurance or annuity;

(5) surrender and receive the cash surrender value on a contract of insurance or annuity;

(6) exercise an election;

(7) exercise investment powers available under a contract of insurance or annuity;

(8) change the manner of paying premiums on a contract of insurance or annuity;

(9) change or convert the type of insurance or annuity with respect to which the principal has or claims to have authority described in this section;

(10) apply for and procure a benefit or assistance under a statute or regulation to guarantee or pay premiums of a contract of insurance on the life of the principal;

(11) collect, sell, assign, hypothecate, borrow against, or pledge the interest of the principal in a contract of insurance or annuity;

(12) select the form and timing of the payment of proceeds from a contract of insurance or annuity; and

(13) pay, from proceeds or otherwise, compromise or contest, and apply for refunds in connection with, a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

Comment

This section contains a significant change from Section 10 of the Uniform Statutory Form Power of Attorney Act. The default language in the Uniform Statutory Form Power of Attorney Act permitted an agent to designate the beneficiary of an insurance contract. *See* Unif. Statutory Form Power of Atty. Act § 10(4) (1988). However, under Section 5B-210 of this Act, an agent does not have authority to "create or change a beneficiary designation" unless that authority is specifically granted to the agent pursuant to Section 5B-201(a). The authority granted under Paragraph (2) of Section 5B-210 is more limited, allowing an agent to only

"procure new, different, and additional contracts of insurance and annuities for the principal and the principal's spouse, children, and other dependents." A principal who grants authority to an agent under Section 5B-210 should therefore carefully consider whether a specific grant of authority to create or change beneficiary designations is also desirable.

SECTION 5B-211. ESTATES, TRUSTS, AND OTHER BENEFICIAL INTERESTS.

(a) In this section, "estate, trust, or other beneficial interest" means a trust, probate estate, guardianship, conservatorship, escrow, or custodianship or a fund from which the principal is, may become, or claims to be, entitled to a share or payment.

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to estates, trusts, and other beneficial interests authorizes the agent to:

(1) accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from an estate, trust, or other beneficial interest;

(2) demand or obtain money or another thing of value to which the principal is, may become, or claims to be, entitled by reason of an estate, trust, or other beneficial interest, by litigation or otherwise;

(3) exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal;

(4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal;

(5) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to remove, substitute, or surcharge

a fiduciary;

(6) conserve, invest, disburse, or use anything received for an authorized purpose; [and]

(7) transfer an interest of the principal in real property, stocks and bonds, accounts with financial institutions or securities intermediaries, insurance, annuities, and other property to the trustee of a revocable trust created by the principal as settlor [; and

(8) reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust, or other beneficial interest].

Legislative Note: *The bracketed language in paragraph (8) of subsection (b), which grants an agent a power to "reject, renounce, disclaim [or] release," should be omitted by an enacting jurisdiction if that jurisdiction elects to include bracketed paragraph (8) in Section 5B-201(a), which authorizes an agent to disclaim property, including a power of appointment, only if specifically authorized in the power of attorney. If, however, other law of the enacting jurisdiction, such as the state's disclaimer statute, authorizes an agent to disclaim an interest in, or power over, property even without specific authority and the jurisdiction does not wish to restrict that general authority, the jurisdiction should not adopt Section 5B-201(a)(8), but should enact the bracketed language in Section 5B-21l(b)(8). See Unif. Disclaimer of Property Interests Act § 5(b) (2006) (providing, "[e]xcept to the extent a fiduciary's right to disclaim is expressly restricted or limited by another statute of this State or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or part, any interest in or power over property, including a power of appointment . . . .").*

Comment

This section, which corresponds to Section 11 of the Uniform Statutory Form Power of Attorney Act, has been revised to clarify that an agent's authority includes authority to exercise, for the benefit of the principal, a presently exercisable general power of appointment held by the principal (subsection (b)(3)). "Presently exercisable general power of appointment" is defined for purposes of the Act in Section 5B-102(8).

SECTION 5B-212. CLAIMS AND LITIGATION. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to claims and litigation authorizes the agent to:

(1) assert and maintain before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, offset, recoupment, or defense, including an action to recover

property or other thing of value, recover damages sustained by the principal, eliminate or modify tax liability, or seek an injunction, specific performance, or other relief;

(2) bring an action to determine adverse claims or intervene or otherwise participate in litigation;

(3) seek an attachment, garnishment, order of arrest, or other preliminary, provisional, or intermediate relief and use an available procedure to effect or satisfy a judgment, order, or decree;

(4) make or accept a tender, offer of judgment, or admission of facts, submit a controversy on an agreed statement of facts, consent to examination, and bind the principal in litigation;

(5) submit to alternative dispute resolution, settle, and propose or accept a compromise;

(6) waive the issuance and service of process upon the principal, accept service of process, appear for the principal, designate persons upon which process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, receive, execute, and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation;

(7) act for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal or some other person, or with respect to a reorganization, receivership, or application for the appointment of a receiver or trustee which affects an interest of the principal in property or other thing of value;

(8) pay a judgment, award, or order against the principal or a settlement made in

connection with a claim or litigation; and

(9) receive money or other thing of value paid in settlement of or as proceeds of a claim or litigation.

SECTION 5B-213. PERSONAL AND FAMILY MAINTENANCE.

(a) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to personal and family maintenance authorizes the agent to:

(1) perform the acts necessary to maintain the customary standard of living of the principal, the principal's spouse, and the following individuals, whether living when the power of attorney is executed or later born:

(A) the principal's children;

(B) other individuals legally entitled to be supported by the principal; and

(C) the individuals whom the principal has customarily supported or indicated the intent to support;

(2) make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which the principal is a party;

(3) provide living quarters for the individuals described in paragraph (1) by:

(A) purchase, lease, or other contract; or

(B) paying the operating costs, including interest, amortization payments, repairs, improvements, and taxes, for premises owned by the principal or occupied by those individuals;

(4) provide normal domestic help, usual vacations and travel expenses, and funds for shelter, clothing, food, appropriate education, including postsecondary and vocational

education, and other current living costs for the individuals described in paragraph (1);

(5) pay expenses for necessary health care and custodial care on behalf of the individuals described in paragraph (1);

(6) act as the principal's personal representative pursuant to the Health Insurance Portability and Accountability Act, Sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, [as amended,] and applicable regulations, in making decisions related to the past, present, or future payment for the provision of health care consented to by the principal or anyone authorized under the law of this state to consent to health care on behalf of the principal;

(7) continue any provision made by the principal for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them, for the individuals described in paragraph (1);

(8) maintain credit and debit accounts for the convenience of the individuals described in paragraph (1) and open new accounts; and

(9) continue payments incidental to the membership or affiliation of the principal in a religious institution, club, society, order, or other organization or to continue contributions to those organizations.

(b) Authority with respect to personal and family maintenance is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to gifts under this [act].

Comment

This section, based on Section 13 of the Uniform Statutory Form Power of Attorney Act, contains three important changes. The first is clarification in subsection (a)(1) of who qualifies to benefit from payments for personal and family maintenance. Paragraph (1) states that the individuals who may benefit include not only the principal's children and other individuals legally entitled to be supported by the principal, but also "individuals whom the

principal has customarily supported or indicated the intent to support," "whether living when the power of attorney is executed or later born." This definition is broad enough to include common recipients of family support such as parents and later-born grandchildren if such support is intended by the principal.

The second important addition to Section 5B-213 is the inclusion of paragraph (6) in subsection (a) which qualifies the agent to act as the principal's "personal representative" for purposes of the Health Insurance Portability and Accountability Act (HIPAA) so that the agent can communicate with health care providers in order to pay medical bills. *See* 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that for purposes of disclosing an individual's protected health information, "a covered entity must . . . treat a personal representative as the individual"). Section 5B-213 does not, however, empower the agent to make health-care decisions for the principal. *See* Section 5B-103 and comment (discussing exclusion from this Act of powers to make health-care decisions).

The third important addition to this section is subsection (b) which provides that authority under Section 5B-213 is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to making gifts. Although payments made for the benefit of persons under Section 5B-213 may in fact be subject to gift tax treatment, subsection (b) clarifies that the authority for personal and family maintenance payments by an agent emanates from this section rather than Section 5B-217. This is an important distinction because the Act requires a grant of specific authority under Section 5B-201(a) to authorize gift making, and the default provisions of Section 5B-217 limit the amounts of those gifts. The authority to make payments under Section 5B-213 is not constrained by either of these provisions.

SECTION 5B-214. BENEFITS FROM GOVERNMENTAL PROGRAMS OR CIVIL OR MILITARY SERVICE.

(a) In this section, "benefits from governmental programs or civil or military service" means any benefit, program or assistance provided under a statute or regulation including Social Security, Medicare, and Medicaid.

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to benefits from governmental programs or civil or military service authorizes the agent to:

(1) execute vouchers in the name of the principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state to the principal, including allowances and reimbursements for

transportation of the individuals described in Section 5B-213(a)(1), and for shipment of their household effects;

(2) take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose;

(3) enroll in, apply for, select, reject, change, amend, or discontinue, on the principal's behalf, a benefit or program;

(4) prepare, file, and maintain a claim of the principal for a benefit or assistance, financial or otherwise, to which the principal may be entitled under a statute or regulation;

(5) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation concerning any benefit or assistance the principal may be entitled to receive under a statute or regulation; and

(6) receive the financial proceeds of a claim described in paragraph (4) and conserve, invest, disburse, or use for a lawful purpose anything so received.

SECTION 5B-215. RETIREMENT PLANS.

(a) In this section, "retirement plan" means a plan or account created by an employer, the principal, or another individual to provide retirement benefits or deferred compensation of which the principal is a participant, beneficiary, or owner, including a plan or account under the following sections of the Internal Revenue Code:

(1) an individual retirement account under Internal Revenue Code Section 408, 26 U.S.C. Section 408 [, as amended];

(2) a Roth individual retirement account under Internal Revenue Code Section 408A, 26 U.S.C. Section 408A [, as amended];

(3) a deemed individual retirement account under Internal Revenue Code Section 408(q), 26 U.S.C. Section 408(q) [, as amended];

(4) an annuity or mutual fund custodial account under Internal Revenue Code Section 403(b), 26 U.S.C. Section 403(b) [, as amended];

(5) a pension, profit-sharing, stock bonus, or other retirement plan qualified under Internal Revenue Code Section 401(a), 26 U.S.C. Section 401(a) [, as amended];

(6) a plan under Internal Revenue Code Section 457(b), 26 U.S.C. Section 457(b) [, as amended]; and

(7) a nonqualified deferred compensation plan under Internal Revenue Code Section 409A, 26 U.S.C. Section 409A [, as amended].

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to retirement plans authorizes the agent to:

(1) select the form and timing of payments under a retirement plan and withdraw benefits from a plan;

(2) make a rollover, including a direct trustee-to-trustee rollover, of benefits from one retirement plan to another;

(3) establish a retirement plan in the principal's name;

(4) make contributions to a retirement plan;

(5) exercise investment powers available under a retirement plan; and

(6) borrow from, sell assets to, or purchase assets from a retirement plan.

Comment

This section, based on Section 15 of the Uniform Statutory Form Power of Attorney Act, has been substantially updated to reflect changes in the laws governing retirement plans. A significant departure from the Uniform Statutory Form Power of Attorney Act is the deletion of default authority in the agent to waive the right of the principal to be a beneficiary of a joint or survivor annuity (*see* Unif. Statutory Form Power of Atty. Act § 15 (1988)). Under this Act,

the authority to waive the principal's right to be a beneficiary of a joint and survivor annuity must be given by a specific grant pursuant to Section 5B-201(a).

SECTION 5B-216. TAXES. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to taxes authorizes the agent to:

(1) prepare, sign, and file federal, state, local, and foreign income, gift, payroll, property, Federal Insurance Contributions Act, and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents, including receipts, offers, waivers, consents, including consents and agreements under Internal Revenue Code Section 2032A, 26 U.S.C. Section 2032A, [as amended,] closing agreements, and any power of attorney required by the Internal Revenue Service or other taxing authority with respect to a tax year upon which the statute of limitations has not run and the following 25 tax years;

(2) pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the Internal Revenue Service or other taxing authority;

(3) exercise any election available to the principal under federal, state, local, or foreign tax law; and

(4) act for the principal in all tax matters for all periods before the Internal Revenue Service, or other taxing authority.

SECTION 5B-217. GIFTS.

(a) In this section, a gift "for the benefit of" a person includes a gift to a trust, an account under the Uniform Transfers to Minors Act, and a tuition savings account or prepaid tuition plan as defined under Internal Revenue Code Section 529, 26 U.S.C. Section 529 [, as amended].

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to gifts authorizes the agent only to:

(1) make outright to, or for the benefit of, a person, a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code Section 2503(b), 26 U.S.C. Section 2503(b), [as amended,] without regard to whether the federal gift tax exclusion applies to the gift, or if the principal's spouse agrees to consent to a split gift pursuant to Internal Revenue Code Section 2513, 26 U.S.C. 2513, [as amended,] in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and

(2) consent, pursuant to Internal Revenue Code Section 2513, 26 U.S.C. Section 2513, [as amended,] to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.

(c) An agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors, including:

(1) the value and nature of the principal's property;

(2) the principal's foreseeable obligations and need for maintenance;

(3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;

(4) eligibility for a benefit, a program, or assistance under a statute or regulation; and

(5) the principal's personal history of making or joining in making gifts.

Comment

This section provides default limitations on an agent's authority to make a gift of the principal's property. Authority to make a gift must be made by a specific grant in a power of attorney (*see* Section 5B-201(a)(2); *see also* Section 5B-301). The mere granting to an agent of authority to make gifts does not, however, grant an agent unlimited authority. The agent's authority is subject to this section unless enlarged or further limited by an express modification in the power of attorney. Without modification, the authority of an agent under this section is limited to gifts in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion, or twice that amount if the principal and the principal's spouse consent to make a split gift.

Subsection (a) of this section clarifies the fact that a gift includes not only outright gifts, but also gifts for the benefit of a person. Subsection (a) provides examples of gifts made for the benefit of a person, but these examples are not intended to be exclusive.

Subsection (c) emphasizes that exercise of authority to make a gift, as with exercise of all authority under a power of attorney, must be consistent with the principal's objectives. If these objectives are not known, then gifts must be consistent with the principal's best interest based on all relevant factors. Subsection (c) provides examples of factors relevant to the principal's best interest, but these examples are illustrative rather than exclusive.

To the extent that a principal's objectives with respect to the making of gifts may potentially conflict with an agent's default duties under the Act, the principal should carefully consider stating those objectives in the power of attorney, or altering the default rules to accommodate the objectives, or both. *See* Section 5B-114 Comment.

[PART] 3

STATUTORY FORMS

Legislative Note: *An enacting jurisdiction should review its respective statutory requirements for acknowledgments and for the recording of documents and amend, where necessary for conformity with those requirements, the statutory forms provided in Sections 5B-301 and 5B-302.*

General Comment

Part 3 provides a concise, optional statutory form for creating a power of attorney under this Act (Section 5B-301). With the proliferation of power of attorney forms in the public domain, the advantage of a statutorily-sanctioned form is the promotion of uniformity in power of attorney practice. In states such as Illinois and New York, where state-sanctioned statutory forms have existed for many years, the statutory form is widely used by both lawyers and lay persons. The familiarity and common understanding achieved with the use of one statutory form also facilitates acceptance of powers of attorney. In the twenty years preceding this Act, the number of states with statutory forms has increased from only a few to eighteen.

In addition to the statutory form power of attorney, Part 3 provides an optional form for

agent certification of facts pertaining to a power of attorney (Section 5B-302). Pursuant to Section 5B-119, a person may request an agent to certify any factual matter concerning the principal, agent, or power of attorney. The form in Section 5B-302 is intended to facilitate agent compliance with these requests. The form lists factual matters about which persons commonly request certification (*e.g.*, the principal is alive and has not revoked the power of attorney or the agent's authority), and provides a designated space for certification of additional factual statements. Both the statutory form power of attorney and the agent certification form may be tailored to accommodate individual circumstances and objectives.

SECTION 5B-301. STATUTORY FORM POWER OF ATTORNEY. A document substantially in the following form may be used to create a statutory form power of attorney that has the meaning and effect prescribed by this [article].

[INSERT NAME OF JURISDICTION]

STATUTORY FORM POWER OF ATTORNEY

IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the Uniform Power of Attorney Act [insert citation].

This power of attorney does not authorize the agent to make health-care decisions for you.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you.

Your agent is entitled to reasonable compensation unless you state otherwise in the Special Instructions.

This form provides for designation of one agent. If you wish to name more than one agent you may name a coagent in the Special Instructions. Coagents are not required to act together unless you include that requirement in the Special Instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney becomes effective immediately unless you state otherwise in the Special Instructions.

If you have questions about the power of attorney or the authority you are granting to

your agent, you should seek legal advice before signing this form.

DESIGNATION OF AGENT

I _____ name the following
(Name of Principal)
person as my agent:

Name of Agent: _____

Agent's Address: _____

Agent's Telephone Number: _____

DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of Successor Agent: _____

Successor Agent's Address: _____

Successor Agent's Telephone Number: _____

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

Name of Second Successor Agent: _____

Second Successor Agent's Address: _____

Second Successor Agent's Telephone Number: _____

GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the Uniform Power of Attorney Act [insert citation]:

(INITIAL each subject you want to include in the agent's general authority. If you wish to grant general authority over all of the subjects you may initial "All Preceding Subjects" instead of initialing each subject.)

(___) Real Property
(___) Tangible Personal Property
(___) Stocks and Bonds
(___) Commodities and Options
(___) Banks and Other Financial Institutions

(___) Operation of Entity or Business
(___) Insurance and Annuities
(___) Estates, Trusts, and Other Beneficial Interests
(___) Claims and Litigation
(___) Personal and Family Maintenance
(___) Benefits from Governmental Programs or Civil or Military Service
(___) Retirement Plans
(___) Taxes
(___) All Preceding Subjects

GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent.)

(___) Create, amend, revoke, or terminate an inter vivos trust
(___) Make a gift, subject to the limitations of the Uniform Power of Attorney Act [insert citation to Section 217 of the act] and any special instructions in this power of attorney
(___) Create or change rights of survivorship
(___) Create or change a beneficiary designation
(___) Authorize another person to exercise the authority granted under this power of attorney
(___) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
(___) Exercise fiduciary powers that the principal has authority to delegate
[(___) Disclaim or refuse an interest in property, including a power of appointment]

LIMITATION ON AGENT'S AUTHORITY

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions.

SPECIAL INSTRUCTIONS (OPTIONAL)

You may give special instructions on the following lines:

_____
_____
_____
_____
_____
_____
_____

EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions.

NOMINATION OF [CONSERVATOR OR GUARDIAN] (OPTIONAL)

If it becomes necessary for a court to appoint a [conservator or guardian] of my estate or [guardian] of my person, I nominate the following person(s) for appointment:

Name of Nominee for [conservator or guardian] of my estate: _____

Nominee's Address: _____

Nominee's Telephone Number: _____

Name of Nominee for [guardian] of my person: _____

Nominee's Address: _____

Nominee's Telephone Number: _____

RELIANCE ON THIS POWER OF ATTORNEY

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.

SIGNATURE AND ACKNOWLEDGMENT

_____ _____

Your Signature Date

_____

Your Name Printed

_____

Your Address

_____

Your Telephone Number

State of _____

[County] of _____

This document was acknowledged before me on _____,
(Date)
by _____.
(Name of Principal)

_____ (Seal, if any)
Signature of Notary

My commission expires: _____

[This document prepared by:

_____

_____]

IMPORTANT INFORMATION FOR AGENT

Agent's Duties

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

(1) do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;
(2) act in good faith;
(3) do nothing beyond the authority granted in this power of attorney; and
(4) disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

(Principal's Name) by (Your Signature) as Agent

Unless the Special Instructions in this power of attorney state otherwise, you must also:

(1) act loyally for the principal's benefit;
(2) avoid conflicts that would impair your ability to act in the principal's best interest;
(3) act with care, competence, and diligence;
(4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
(5) cooperate with any person that has authority to make health-care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest; and
(6) attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest.

Termination of Agent's Authority

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

(1) death of the principal;
(2) the principal's revocation of the power of attorney or your authority;
(3) the occurrence of a termination event stated in the power of attorney;
(4) the purpose of the power of attorney is fully accomplished; or
(5) if you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the Special Instructions in this power of attorney state that such an action will not terminate your authority.

Liability of Agent

The meaning of the authority granted to you is defined in the Uniform Power of Attorney Act [insert citation]. If you violate the Uniform Power of Attorney Act [insert citation] or act outside the authority granted, you may be liable for any damages caused by your violation.

If there is anything about this document or your duties that you do not understand, you should seek legal advice.

Legislative Note: *The brackets which precede the words "Statutory Form Power of Attorney" indicate where the enacting jurisdiction should insert the name of the jurisdiction. An indication of the jurisdiction in a power of attorney is important to establish what law supplies the default rules and statutory definitions for interpretation of the power of attorney (see Section 5B-107 and Comment). Likewise, the brackets in the first paragraph of the "Important Information" section of the form indicate where the enacting jurisdiction should insert the citation for its codification of the Uniform Power of Attorney Act.*

In the "Grant of Specific Authority" section of the form, the phrase "Disclaim or refuse an interest in property, including a power of appointment" is in brackets and should be deleted if under the law of the enacting jurisdiction a fiduciary has authority to disclaim an interest in, or power over, property and the jurisdiction does not wish to restrict that authority by the Uniform Power of Attorney Act. See Unif. Disclaimer of Property Interests Acts § 5(b) (2006) (providing, "[e]xcept to the extent a fiduciary's right to disclaim is expressly restricted or limited by another statute of this State or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or part, any interest in or power over property, including a power of appointment . . . ."). See also Section 5B-201 Legislative Note.

The brackets in the "Nomination of Conservator or Guardian" section of the form indicate areas where an enacting jurisdiction should review its respective guardianship, conservatorship, or other protective proceedings statutes and amend, if necessary for consistency, the terminology and substance of the bracketed language.

The bracketed language "This document prepared by:" at the conclusion of the

"Signature and Acknowledgment" section of the form may be omitted or amended as necessary to conform to the jurisdiction's statutory requirements for acknowledgments or the recording of documents.

Comment

This section provides an optional form for creating a power of attorney. Any power of attorney that substantially complies with the form in Section 5B-301 constitutes a statutory form power of attorney with the meaning and effect prescribed by the Act.

The form begins with an "Important Information" section that contains instructions for the principal and concludes with an "Important Information for Agent" section that contains general information for the agent about agent duties, events that terminate an agent's authority, and agent liability. The form is constructed to guide the principal through designation of an agent, optional designation of one or more successor agents, and selection of subject areas and acts with respect to which the principal wishes to grant the agent authority. The form also contains an option for nomination of a conservator or guardian in the event later court-appointment of a fiduciary becomes necessary (*see* Section 5B-108 and Comment).

The grant of authority provisions in the form are divided into two sections: "Grant of General Authority," which corresponds to the subject areas defined in Sections 5B-204 through 5B-216 of the Act, and "Grant of Specific Authority," which corresponds to the actions for which Section 5B-201(a) requires an express grant of authority in a power of attorney. Part 2 of the Act provides statutory construction with respect to all of the subject matters in the Grant of General Authority section and for the authority to make a gift listed in the Grant of Specific Authority section. The principal may modify any authority granted in the form by using the "Special Instructions" section of the form. For example, the scope of authority to make a gift is defined by the default provisions of Section 5B-217 unless the principal expands or narrows that authority in the Special Instructions.

Cautionary language in the Grant of Specific Authority section alerts the principal to the increased risks associated with a grant of authority that could significantly reduce the principal's property or alter the principal's estate plan. The form is constructed to require that the principal initial each action over which the principal grants specific authority. The separate authorization of acts covered by Section 5B-201(a) is intended to emphasize to the principal the significance of granting such specific authority and to minimize the risk that those actions might be authorized inadvertently.

Many principals may wish to grant an agent comprehensive authority over their day-to-day affairs. If this is the case, the principal may grant authority over all of the subject areas in the Grant of General Authority section by initialing "All Preceding Subjects." Otherwise, the principal may authorize fewer than all of the subjects listed in the Grant of General Authority section by initialing only those particular subjects.

The statutory form is drafted to follow the Act's default provisions, but it does not preclude alteration of the default rules or the exercise of other options available under the Act. For example, if not altered by the Special Instructions, the default rules embodied in a statutory

form power of attorney include:

(1) the power of attorney is durable (Section 5B-104);
(2) the power of attorney is effective when executed (Section 5B-109);
(3) a spouse-agent's authority terminates upon the filing of an action for dissolution, annulment, or legal separation (Section 5B-110(b)(3));
(4) lapse of time does not affect an agent's authority (Section 5B-110(c));
(5) a successor agent has the same authority as the original agent (Section 5B-111(b));
(6) a successor agent may not act until all predecessors have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve (Section 5B-111(b));
(7) an agent is entitled to reimbursement of expenses reasonably incurred (Section 5B-112);
(8) an agent is entitled to reasonable compensation (Section 5B-112);
(9) the agent accepts appointment by exercising authority or performing duties, or by any assertion or conduct indicating acceptance (Section 5B-113);
(10) an agent has a duty to act loyally for the principal's benefit; to act so as not to create a conflict of interest that impairs the ability to act impartially in the principal's best interest; to act with care, competence, and diligence; to keep a record of receipts, disbursements, and transactions; to cooperate with the principal's health-care agent; to attempt to preserve the principal's estate plan to the extent the plan is known to the agent and if preservation is consistent with the principal's best interest; and to account if ordered by a court or requested by the principal, a fiduciary acting for the principal, a governmental agency with authority to protect the principal, or the personal representative or successor in interest of the principal's estate (Section 5B-114);
(11) an agent must give notice of resignation as specified in Section 5B-118; and
(12) an agent that is not the principal's ancestor, spouse, or descendant may not exercise authority to create in the agent, or an individual to whom the agent owes support, an interest in the principal's property (Section 5B-201(b)).

Although the statutory form does not include express prompts for deviating from the foregoing default rules, any statutorily-sanctioned deviation from the statutory form may be indicated in, or on an addendum to, the Special Instructions.

SECTION 5B-302. AGENT'S CERTIFICATION. The following optional form may be used by an agent to certify facts concerning a power of attorney.

AGENT'S CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT'S AUTHORITY

State of _____

[County] of _____]

I, _____ (Name of Agent), [certify] under penalty of perjury that _____ (Name of Principal) granted me authority as an agent or successor agent in a power of attorney dated _____.

I further [certify] that to my knowledge:

(1) the Principal is alive and has not revoked the Power of Attorney or my authority to act under the Power of Attorney and the Power of Attorney and my authority to act under the Power of Attorney have not terminated;

(2) if the Power of Attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;

(3) if I was named as a successor agent, the prior agent is no longer able or willing to serve; and

(4) _____

_____

_____

_____

_____

(Insert other relevant statements)

SIGNATURE AND ACKNOWLEDGMENT

_____

Agent's Signature Date

_____

Agent's Name Printed

_____

Agent's Address

_____

Agent's Telephone Number

This document was acknowledged before me on _____,

_____ (Date)

by _____.

_____ (Name of Agent)

_____

_____ (Seal, if any)

Signature of Notary

My commission expires: _____

[This document prepared by:

_____]

Legislative Note: *The phrase "certify" is bracketed in this section to indicate where an enacting jurisdiction should review its respective statutory requirements for acknowledgments and the recording of documents and amend, if necessary for consistency, the terminology and substance of the bracketed language. Likewise, the bracketed language "This document prepared by:" at the conclusion of the Agent's certification form may be omitted or amended as necessary to conform with the jurisdiction's statutory requirements for acknowledgments or the recording of documents.*

Comment

This section provides an optional form that may be used by an agent to certify facts concerning a power of attorney. Although the form contains statements of fact about which persons commonly request certification, other factual statements may be added to the form for the purpose of providing an agent certification pursuant to Section 5B-119.

ARTICLE VI

NONPROBATE TRANSFERS ON DEATH ~~(1989)~~

The following free-standing Acts are associated with Article VI:

Uniform Multiple Person Accounts Act
Article VI, Part 2 has also been adopted as the Uniform Multiple-Person Accounts Act.

Uniform Nonprobate Transfers on Death Act
Article VI, Part 1 has also been adopted as the Uniform Nonprobate Transfers on Death Act.

Uniform TOD Security Registration Act.
Article VI, Part 3 has also been adopted as the Uniform TOD Security Registration Act.

Uniform Real Property Transfer on Death Act (2009)
Article, Part 4 has also been adopted as the Uniform Real Property Transfer on Death Act (2009).

PREFATORY NOTE

~~This~~ The 1989 amendment of Uniform Probate Code Article VI (nonprobate transfers) ~~replaces~~ replaced former Article VI with a revised article. Part 1 (provisions relating to effect of death) of the revised article ~~is~~ was amended and relocated from former Part 2. Part 2 (multiple

person accounts) of the revised article ~~is~~ was amended and relocated from former Part 1. Finally, Part 3 (Uniform TOD Security Registration Act) of the revised article ~~is new~~ was added. This reorganization ~~allows~~ allowed for general provisions at the beginning of the article, and ~~permits~~ permitted parts to be divided into subparts that group related provisions together. This reorganization also facilitated the addition of the Uniform Real Proiperty Transfer on Death Act as Part 4.

Multiple Person Accounts

The 1989 amendment of Part 2 (multiple person accounts) of the revised article ~~simplifies~~ simplified drafting and terminology. It ~~consolidates~~ consolidated treatment of POD accounts and trust accounts so that the same rules apply to both, since both types of account operate identically and serve the same function of passing property to a beneficiary at the death of the account owner. The amendment likewise ~~eliminates~~ eliminated references to "joint" accounts, since the statute treats joint tenancy accounts and tenancy in common accounts the same for all purposes other than survivorship. Other terminological and drafting simplifications and standardizations ~~are~~ were made throughout the statute. Treatment of existing accounts is included.

The 1989 amendment ~~makes~~ made a few substantive changes in rules previously established in the multiple person account statute. The changes ~~include~~ included recognition of checks issued by an account owner before death and presented for payment after death, revision of the creditor rights procedure to enable a survivor or beneficiary to spread the burden among survivors and beneficiaries of other accounts of the decedent and to provide a uniform one year limitation period for creditors, and a provision that a financial institution must have received notice at the appropriate office and have had a reasonable time to act before it is charged with knowledge that any change in account circumstances has occurred. A provision ~~is~~ was also added that on the death of a married person, beneficial ownership of the decedent's share in a survivorship account passes to the surviving spouse who is an account party in preference to other surviving account parties.

The 1989 amendment ~~includes~~ included a number of important improvements designed to make multiple person accounts more useful. An agency designation is authorized to enable an account owner to add another person to the account as a convenience in making withdrawals without creating any ownership or survivorship interest in the person identified as an agent. Optional statutory forms for multiple person accounts are provided for the convenience and protection of financial institutions. Payment to a minor who is an account beneficiary is authorized pursuant to the Uniform Transfers to Minors Act. A provision is added to make clear that marital funds deposited in an account retain any community property incidents, and the law governing tenancy by the entireties is preserved where applicable.

The drafting committee believes that ~~this~~ the1989 amendment of the multiple person account statute is a substantial improvement in an already successful law. This part of the Uniform Probate Code is one of the most broadly accepted, having been adopted either as part of the code or independently by over half the states. This amendment draws on useful improvements made by various states that have enacted the statute, and should make the statute even more attractive.

Uniform TOD Security Registration Act

The purpose of Part 3 (Uniform TOD Security Registration Act) of the revised article is to allow the owner of securities to register the title in transfer on death (TOD) form. Mutual fund shares and accounts maintained by brokers and others to reflect a customer's holdings of securities (so called "street accounts") are also covered. The legislation enables an issuer, transfer agent, broker, or other such intermediary to transfer the securities directly to the designated transferee on the owner's death. Thus, TOD registration achieves for securities a certain parity with existing TOD and pay on death (POD) facilities for bank deposits and other assets passing at death outside the probate process.

The TOD registration under this part is designed to give the owner of securities who wishes to arrange for a nonprobate transfer at death an alternative to the frequently troublesome joint tenancy form of title. Because joint tenancy registration of securities normally entails a sharing of lifetime entitlement and control, it works satisfactorily only so long as the co owners cooperate. Difficulties arise when co owners fall into disagreement, or when one becomes afflicted or insolvent.

Use of the TOD registration form encouraged by this legislation has no effect on the registered owner's full control of the affected security during his or her lifetime. A TOD designation and any beneficiary interest arising under the designation ends whenever the registered asset is transferred, or whenever the owner otherwise complies with the issuer's conditions for changing the title form of the investment. The part recognizes, in Section 6-302, that co owners with right of survivorship may be registered as owners together with a TOD beneficiary designated to take if the registration remains unchanged until the beneficiary survives the joint owners. In such a case, the survivor of the joint owners has full control of the asset and may change the registration form as he or she sees fit after the other's death.

Implementation of the part is wholly optional with issuers. The drafting committee received the benefit of considerable advice and assistance from representatives of the mutual fund and stock transfer industries during the course of its three years of preparatory work. Accordingly, it is believed that this part takes full account of the practical requirements for efficient transfer within the securities industry.

Section 6-303 invites application of the legislation to locally owned securities though the statute may not have been locally enacted, so long as the part or similar legislation is in force in a jurisdiction of the issuer or transfer agent. Thus, if the principal jurisdictions in which securities issuers and transfer agents are sited enact the measure, its benefits will become generally available to persons domiciled in states that do not at once enact the statute.

The 1989 legislation ~~has been~~ was drafted as a separate part, hence not interpolated as an expansion of the former UPC Article VI, Part 1, treating bank accounts ("multiple party accounts"). Securities merit a distinct statutory regime, because a different principle has governed concurrent ownership of securities. By virtue either of statute or of account terms (contract), multiple party bank accounts allow any one cotenant to consume or transfer account balances. See R. Brown, The Law of Personal Property § 65, at 217 (2d ed. 1955); Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 Harv.L.Rev. 1108,

1112 (1984). The rule for securities, however, has been the rule that applies to real property: all cotenants must act together in transferring the securities. This difference in the legal regime reflects differences in function among the types of assets. Multiple party bank accounts typically arise as convenience accounts, to facilitate frequent small transactions, often on an agency basis (as when spouses or relatives share an account). Securities resemble real estate in that the values are typically large and the transactions relatively infrequent, which is why the legal regime requires the concurrence of all concurrent owners for transfers affecting such assets.

~~Recently, of course, this~~ This distinction between bank accounts and securities has begun to crumble. Banks are offering certificates of deposit of large value under the same account forms that were devised for low value convenience accounts. Meanwhile, brokerage houses with their so called cash management accounts and mutual funds with their money market accounts have rendered securities subject to small recurrent transactions. ~~In the latest developments, even~~ Even the line between real estate and bank accounts is becoming indistinct, as the "home equity line of credit" creates a check writing conduit to real estate values.

Nevertheless, even though new forms of contract have rendered the boundaries between securities and bank accounts less firm, the distinction seems intuitively correct for statutory default rules. True co-owners of securities, like owners of realty, should act together in transferring the asset.

The joint bank account and the Totten trust originated in ambiguous lifetime ownership forms, which required former UPC § 6 103 or comparable state legislation to clarity that an inter vivos transfer was not intended. In the securities field, by contrast, we start with unambiguous lifetime ownership rules. The sole purpose of the present statute is to facilitate a nonprobate TOD mechanism as an option for those owners.

For a comprehensive discussion of the issues entailed in this legislation, see Wellman, Transfer on Death Securities Registration: A New Title Form, 21 Ga. L. Rev. 709 (1987).

Uniform Real Property Transfer on Death Act (2009)

One of the main innovations in the property law of the twentieth century has been the development of asset-specific will substitutes for the transfer of property at death. By these mechanisms, an owner may designate beneficiaries to receive the property at the owner's death without waiting for probate and without the beneficiary designation needing to comply with the witnessing requirements of wills. Examples of specific assets that today routinely pass outside of probate include the proceeds of life insurance policies and pension plans, securities registered in transfer on death (TOD) form, and funds held in pay on death (POD) bank accounts.

Today, nonprobate transfers are widely accepted. The trend has largely focused on assets that are personal property, such as the assets described in the preceding paragraph. However, long-standing uniform law speaks more broadly. Section 6-101 of the Uniform Probate Code (UPC) provides: "A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan,

individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary" (emphasis supplied).

A small but growing number of jurisdictions have implemented the principle of UPC Section 6-101 by enacting statutes providing an asset-specific mechanism for the nonprobate transfer of land. This is done by permitting owners of interests in real property to execute and record a transfer on death (TOD) deed. By this deed, the owner identifies the beneficiary or beneficiaries who will succeed to the property at the owner's death. During the owner's lifetime, the beneficiaries have no interest in the property, and the owner retains full power to transfer or encumber the property or to revoke the TOD deed.

PART 4

UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT (2009)

SECTION 6-401. SHORT TITLE. This [part] may be cited as the Uniform Real Property Transfer on Death Act.

SECTION 6-402. DEFINITIONS. In this [part]:

(1) "Beneficiary" means a person that receives property under a transfer on death deed.

(2) "Designated beneficiary" means a person designated to receive property in a transfer on death deed.

(3) "Joint owner" means an individual who owns property concurrently with one or more other individuals with a right of survivorship. The term includes a joint tenant[,][and] [owner of community property with a right of survivorship[,][and tenant by the entirety]. The term does not include a tenant in common [or owner of community property without a right of survivorship].

(4) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(5) "Property" means an interest in real property located in this state which is

transferable on the death of the owner.

(6) "Transfer on death deed" means a deed authorized under this [part].

(7) "Transferor" means an individual who makes a transfer on death deed.

Comment

Paragraph (1) defines a beneficiary as a person that receives property under a transfer on death deed. This links the definition of a "beneficiary" to the definition of a "person." A beneficiary can be any person, including the trustee of a revocable trust.

Paragraph (2) defines a designated beneficiary as a person designated to receive property in a transfer on death deed. This links the definition of a "designated beneficiary" to the definition of a "person." A designated beneficiary can be any person, including a revocable trust.

The distinction between a "beneficiary" and a "designated beneficiary" is easily illustrated. Section 6-413 provides that, on the transferor's death, the property that is the subject of a transfer on death deed is transferred to the designated beneficiaries who survive the transferor. If *X* and *Y* are the designated beneficiaries but only *Y* survives the transferor, then *Y* is a beneficiary and *X* is not. A further illustration comes into play if Section 6-413 is made subject to the state's antilapse statute. If *X* fails to survive the transferor but has a descendant, *Z*, who survives the transferor, the antilapse statute may create a substitute gift in favor of *Z*. In such a case, the designated beneficiaries are *X* and *Y*, but the beneficiaries are *Y* and *Z*.

Paragraph (3) provides a definition of a "joint owner" as an individual who owns property with one or more other individuals with a right of survivorship. The term is used in Sections 6-411 and 6-413.

Paragraph (4) is the standard Uniform Law Commission definition of a "person."

The effect of paragraph (5) is that this part applies to all interests in real property located in this state that are transferable at the death of the owner.

Paragraph (6) provides that a "transfer on death deed" is a deed authorized under this part. In some states with existing transfer on death deed legislation, the legislation has instead used the term "beneficiary deed." The term "transfer on death deed" is preferred, to be consistent with the transfer on death registration of securities. See Article VI, Part 3, containing the Uniform TOD Security Registration Act.

Paragraph (7) limits the definition of a "transferor" to an individual. The term "transferor" does not include a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any legal or commercial entity other than an individual. The term also does not include an agent or other representative. If a transfer on death deed is made by an agent on behalf of a principal or by a conservator, guardian, or judge on behalf of a ward, the principal or ward is the transferor. By way of analogy, see Uniform Trust

Code § 103(15) (defining "settlor") and the accompanying Comment (excluding an individual "acting as the agent for the person who will be funding the trust"). The power of an agent to make or revoke a transfer on death deed on behalf of a principal is determined by other law, such as the Uniform Power of Attorney Act, as indicated in the Comments to Sections 6-409 and 6-411.

SECTION 6-403. APPLICABILITY. This part applies to a transfer on death deed made before, on, or after [the effective date of this [part]] by a transferor dying on or after [the effective date of this [part]].

Comment

This section provides that this part applies to a transfer on death deed made before, on, or after the effective date of this part by a transferor dying on or after the effective date of this part. This section is consistent with the provisions governing transfer on death registration of securities. Those provisions "appl[y] to registrations of securities in beneficiary form made before or after [effective date], by decedents dying on or after [effective date]." See Section 6-311.

SECTION 6-404. NONEXCLUSIVITY. This [part] does not affect any method of transferring property otherwise permitted under the law of this state.

Comment

This section provides that this part is nonexclusive. This part does not affect any method of transferring property otherwise permitted under state law.

One such method is a present transfer with a retained legal life estate. Consider the following examples:

Example 1. *A* conveys Blackacre to *B* while reserving *A*'s right to remain in possession until *A*'s death. By this conveyance, *A* has made a present transfer of a future interest to *B*. The transfer is irrevocable. The future interest will ripen into possession at *A*'s death, even if *B* fails to survive *A*.

Example 2. *A* executes, acknowledges, and records a transfer on death deed for Blackacre, naming *B* as the designated beneficiary. During *A*'s lifetime, no interest passes to *B*, and *A* may revoke the deed. If unrevoked, the deed will transfer possession to *B* at *A*'s death only if *B* survives *A*.

As illustrated in these examples, the two methods of transfer have different effects and are governed by different rules.

SECTION 6-405. TRANSFER ON DEATH DEED AUTHORIZED. An individual

may transfer property to one or more beneficiaries effective at the transferor's death by a transfer on death deed.

Comment

This section authorizes a transfer on death deed and makes it clear that the transfer is not an inter vivos transfer. The transfer occurs at the transferor's death.

The transferor is an individual, but the singular includes the plural. Multiple individuals can readily act together to transfer property by a transfer on death deed, as in the common case of a husband and wife who own the property as joint tenants or as tenants by the entirety. On the effect of a transfer on death deed made by joint owners, see Section 6-413(c) and the accompanying Comment.

The transferor may select any form of ownership, concurrent or successive, absolute or conditional, contingent or vested, valid under state law. Among many other things, this permits the transferor to reserve interests for his estate (e.g., mineral interests); to specify the nature and extent of the beneficiary's interest; and to designate one or more primary beneficiaries and one or more alternate beneficiaries to take in the event the primary beneficiaries fail to survive the transferor. This freedom to specify the form and terms of the transferee's interest comports with the fundamental principle of American law recognized by the Restatement (Third) of Property (Wills and Other Donative Transfers) § 10.1 that the donor's intention should be "given effect to the maximum extent allowed by law." As the Restatement explains in Comment c to § 10.1, "American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law."

Notwithstanding this freedom of disposition, transferors are encouraged as a practical matter to avoid formulating dispositions that would complicate title. Dispositions containing conditions or class gifts, for example, may require a court proceeding to sort out the beneficiaries' interests. Other estate planning mechanisms, such as trusts, may be more appropriate in such cases.

SECTION 6-406. TRANSFER ON DEATH DEED REVOCABLE. A transfer on death deed is revocable even if the deed or another instrument contains a contrary provision.

Comment

A fundamental feature of a transfer on death deed under this part is that the transferor retains the power to revoke the deed. Section 6-406 is framed as a mandatory rule, for two reasons. First, the rule prevents an off-record instrument from affecting the revocability of a transfer on death deed. Second, the rule protects the transferor who may wish later to revoke the deed.

If the transferor promises to make the deed irrevocable or not to revoke the deed, the

promisee may have a remedy under other law if the promise is broken. The deed remains revocable despite the promise.

SECTION 6-407. TRANSFER ON DEATH DEED NONTESTAMENTARY. A transfer on death deed is nontestamentary.

Comment

This section is consistent with Section 6-101(a), which provides: "A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary."

As the Comment to Section 6-101 explains, because the mode of transfer is declared to be nontestamentary, the instrument of transfer is not a will and does not have to be executed in compliance with the formalities for wills, nor does the instrument need to be probated.

Whether a document that is ineffective as a transfer on death deed (e.g., because it has not been recorded before the transferor's death) should be given effect as a testamentary instrument will depend on the applicable facts and on the wills law of the jurisdiction. Section 2-503 provides in pertinent part: "Although a document ... was not executed in compliance with Section 2-502, the document ... is treated as if it had been executed in compliance with that section if the proponent of the document ... establishes by clear and convincing evidence that the decedent intended the document ... to constitute ... (iii) an addition to or alteration of the [decedent's] will ...."

SECTION 6-408. CAPACITY OF TRANSFEROR. The capacity required to make or revoke a transfer on death deed is the same as the capacity required to make a will.

Comment

This section provides that the capacity required to make or revoke a transfer on death deed, which is a revocable will substitute, is the same as the capacity required to make a will. It is appropriate that a will and a transfer on death deed require the same level of capacity, for both mechanisms are revocable and ambulatory, the latter term meaning that they do not operate before the grantor's death. This approach is consistent with the Restatement (Third) of Property (Wills and Other Donative Transfers) § 8.1(b), which applies the standard of testamentary capacity, and not the standard of capacity for inter vivos gifts, to revocable will substitutes: "If the donative transfer is in the form of a will, a revocable will substitute, or a revocable gift, the testator or donor must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property." This section is

also consistent with Uniform Trust Code § 601: "The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will."

A transfer on death deed is not affected if the transferor subsequently loses capacity. On the ability of an agent under a power of attorney to make or revoke a transfer on death deed, see the Comments to Sections 6-409 and 6-411.

SECTION 6-409. REQUIREMENTS. A transfer on death deed:

(1) except as otherwise provided in paragraph (2), must contain the essential elements and formalities of a properly recordable inter vivos deed;

(2) must state that the transfer to the designated beneficiary is to occur at the transferor's death; and

(3) must be recorded before the transferor's death in the public records in [the office of the county recorder of deeds] of the [county] where the property is located.

Comment

Paragraph (1) requires a transfer on death deed to contain the same essential elements and formalities, other than a present intention to convey, as are required for a properly recordable inter vivos deed under state law. "Essential elements" is a term with a long usage in the law of deeds of real property. The essential elements of a deed vary from one state to another but commonly include the names of the grantor and grantee, a clause transferring title, a description of the property transferred, and the grantor's signature. In all states, the essential elements of a properly recordable deed include the requirement that the deed be acknowledged by the grantor before a notary public or other individual authorized by law to take acknowledgments. See Thompson on Real Property § 92.04(c) (observing that a "certificate of acknowledgment or attestation is universally required to qualify an instrument for recordation"). In the context of transfer on death deeds, the requirement of acknowledgment fulfills at least four functions. First, it cautions a transferor that he or she is performing an act with legal consequences. Such caution is important where, as here, the transferor does not experience the wrench of delivery because the transfer occurs at death. Second, acknowledgment helps to prevent fraud. Third, acknowledgment facilitates the recording of the deed. Fourth, acknowledgment enables the rule in Section 6-411 that a later acknowledged deed prevails over an earlier acknowledged deed.

Paragraph (2) emphasizes an important distinction between an inter vivos transfer and a transfer on death. An inter vivos transfer reflects an intention to transfer, at the time of the conveyance, an interest in property, either a present interest or a future interest. In contrast, a transfer on death reflects an intention that the transfer occur at the transferor's death. Under no circumstances should a transfer on death be given effect inter vivos; to do so would violate the

transferor's intention that the transfer occur at the transferor's death.

Paragraph (3) requires a transfer on death deed to be recorded before the transferor's death in the county (or other appropriate administrative division of a state, such as a parish) where the land is located. If the property described in the deed is in more than one county, the deed is effective only with respect to the property in the county or counties where the deed is recorded. The requirement of recordation before death helps to prevent fraud by ensuring that all steps necessary to the effective transfer on death deed are completed during the transferor's lifetime. The requirement of recordation before death also enables all parties to rely on the recording system.

An individual's agent may execute a transfer on death deed on the individual's behalf to the extent permitted by other law, such as the Uniform Power of Attorney Act. This part does not define, but instead relies on other law to determine, the authority of an agent.

SECTION 6-410. NOTICE, DELIVERY, ACCEPTANCE, CONSIDERATION NOT REQUIRED. A transfer on death deed is effective without:

(1) notice or delivery to or acceptance by the designated beneficiary during the transferor's life; or

(2) consideration.

Comment

This section makes it clear that a transfer on death deed is effective without notice or delivery to or acceptance by the beneficiary during the transferor's lifetime (paragraph (1)) and without consideration (paragraph (2)).

Paragraph (1) is consistent with the fundamental distinction under this part between a transfer on death deed and an inter vivos deed. Under the former, but not under the latter, the transfer occurs at the transferor's death. Therefore, there is no requirement of notice, delivery, or acceptance during the transferor's life. This does not mean that the beneficiary is required to accept the property. The beneficiary may disclaim the property, as explained in Section 6-414 and the accompanying Comment.

Paragraph (2) is consistent with the law of donative transfers. A deed need not be supported by consideration.

SECTION 6-411. REVOCATION BY INSTRUMENT AUTHORIZED; REVOCATION BY ACT NOT PERMITTED.

(a) Subject to subsection (b), an instrument is effective to revoke a recorded transfer on

death deed, or any part of it, only if the instrument:

(1) is one of the following:

(A) a transfer on death deed that revokes the deed or part of the deed expressly or by inconsistency;

(B) an instrument of revocation that expressly revokes the deed or part of the deed; or

(C) an inter vivos deed that expressly revokes the transfer on death deed or part of the deed; and

(2) is acknowledged by the transferor after the acknowledgment of the deed being revoked and recorded before the transferor's death in the public records in [the office of the county recorder of deeds] of the [county] where the deed is recorded.

(b) If a transfer on death deed is made by more than one transferor:

(1) revocation by a transferor does not affect the deed as to the interest of another transferor; and

(2) a deed of joint owners is revoked only if it is revoked by all of the living joint owners.

(c) After a transfer on death deed is recorded, it may not be revoked by a revocatory act on the deed.

(d) This section does not limit the effect of an inter vivos transfer of the property.

Comment

This section concerns revocation by instrument and revocation by act. On revocation by change of circumstances, such as by divorce or homicide, see Section 6-413 and the accompanying Comment.

Subsection (a) provides the exclusive methods of revoking, in whole or in part, a recorded transfer on death deed by a subsequent instrument. Revocation by an instrument not specified, such as the transferor's will, is not permitted.

The rule that a transfer on death deed may not be revoked by the transferor's subsequent will is a departure from the Restatement (Third) of Property (Wills and Other Donative Transfers) § 7.2 comment e (see also the corresponding Reporter's Note), which encourages the revocability of will substitutes by will. However, there is a sound reason for the departure in the specific case of a transfer on death deed. A transfer on death deed operates on real property, for which certainty of title is essential. This certainty would be difficult, and in many cases impossible, to achieve if an off-record instrument, such as the grantor's will, could revoke a recorded transfer on death deed. The rule in this part against revocation by will is also consistent with the rule governing multiple-party bank accounts. See Section 6-213(b) ("A right of survivorship arising from the express terms of the account, Section 6-212, or a POD designation, may not be altered by will.")

A recorded transfer on death deed may be revoked by instrument only by (1) a subsequently acknowledged transfer on death deed, (2) a subsequently acknowledged instrument of revocation, such as the form in Section 6-417, or (3) a subsequently acknowledged inter vivos deed containing an express revocation clause. Consider the following examples:

Example 1. *T* executes, acknowledges, and records a transfer on death deed for Blackacre. Later, *T* executes, acknowledges, and records a second transfer on death deed for Blackacre, containing an express revocation clause revoking "all my prior transfer on death deeds concerning this property." The second deed revokes the first deed. The revocation occurs when the second deed is recorded. (For the result if the second deed had not contained the express revocation clause, see Example 5.)

Example 2. *T* executes, acknowledges, and records two transfer on death deeds for Blackacre. Both deeds expressly revoke "all my prior transfer on death deeds concerning this property." The dates of acknowledgment determine which deed revoked the other. The first deed is acknowledged November 1; the second deed is acknowledged December 15. The second deed is the later acknowledged, so it revokes the first deed. The revocation occurs when the second deed is recorded.

Example 3. *T* executes and acknowledges a transfer on death deed for Blackacre. *T* later executes and acknowledges a revocation form. Both instruments are recorded. Because the revocation form is acknowledged later than the deed, the form revokes the deed. The revocation occurs when the form is recorded.

Example 4. *T* executes and acknowledges a transfer on death deed for Blackacre. *T* later executes and acknowledges an inter vivos deed conveying Blackacre and expressly revoking the transfer on death deed. Both instruments are recorded. Because the inter vivos deed contains an express revocation provision and is acknowledged later than the transfer on death deed, the inter vivos deed revokes the transfer on death deed. The revocation occurs when the inter vivos deed is recorded. (For the result if the inter vivos deed had not contained an express revocation clause, see the discussion below on "ademption by extinction.")

The same rules apply whether the revocation is total or partial. In the previous examples,

suppose instead that the intial transfer on death deed provides for the transfer of two parcels, Blackacre and Whiteacre, and that the subsequent instrument revokes the transfer on death deed as to Blackacre. The subsequent instrument revokes the transfer on death deed in part.

If the property described in the original deed is in more than one county, the revocation is effective only with respect to the property in the county or counties where the revoking deed or instrument is recorded.

Subsection (a)(1)(A) speaks of revocation "expressly or by inconsistency." This provision references the well-established law of revocation by inconsistency of wills. Consider the following examples:

Example 5. *T* executes, acknowledges, and records a transfer on death deed for Blackacre naming *X* as the designated beneficiary. Later, *T* executes, acknowledges, and records a transfer on death deed for the same property, Blackacre, containing no express revocation of the earlier deed but naming *Y* as the designated beneficiary. Later, *T* dies. The recording of the deed in favor of *Y* revokes the deed in favor of *X* by inconsistency. At *T*'s death, *Y* is the owner of Blackacre.

Example 6. *T*, the owner of Blackacre in fee simple absolute, executes, acknowledges, and records a transfer on death deed for Blackacre naming *X* as the designated beneficiary. Later, *T* executes, acknowledges, and records a transfer on death deed containing no express revocation of the earlier deed but naming *Y* as the designated beneficiary of a life estate (or a mineral interest) in Blackacre. Later, *T* dies. The recording of the deed in favor of *Y* partially revokes the deed in favor of *X* by inconsistency. At *T*'s death, *Y* is the owner of a life estate (or a mineral interest) in Blackacre, and *X* is the owner of the remainder.

The question is sometimes raised whether a recorded inter vivos deed *without an express revocation clause* operates as a revocation of an earlier transfer on death deed. The answer highlights the important distinction between "revocation" and "ademption by extinction." See Atkinson on Wills § 134. Revocation means that the instrument is rendered void. Ademption by extinction means that the transfer of the property cannot occur because the property is not owned by the transferor at death. The doctrines are different.

In some instances, revocation and ademption have the same practical effect: the designated beneficiary of the property receives nothing. Nothing in this section changes that fact, as indicated in subsection (d). However, there are other instances where the doctrines have differing effects. Consider the following illustration, drawn from the law of wills.

Example 7. *T* executes a will devising Blackacre to *A*. Later, *T* becomes legally incompetent, and *G* is appointed as *T*'s conservator. *G*, acting within the scope of his authority, sells Blackacre to *B* for $100,000. Later, *T* dies.

The law of wills provides that the devise to *A* is adeemed rather than revoked. This means that *A* is not entitled to Blackacre but is entitled to a pecuniary devise in the amount of $100,000. See Section 2-606(b). See also Atkinson on Wills § 134; *Wasserman v. Cohen*, 606 N.E.2d 901, 903 (Mass. 1993). The result is designed to effectuate *T*'s presumed intention.

The Joint Editorial Board for Uniform Trust and Estate Acts has begun a conversation on whether this Code's provisions on ademption should be extended to nonprobate transfers, thus harmonizing the treatment of wills and will substitutes on this aspect of the law. This part accepts the well recognized distinction between revocation and ademption in order to leave the door open for such future harmonization, which would effectuate the presumed intention of nonprobate grantors.

Subsection (b) supplies rules governing revocation by instrument in the event of a transfer on death deed made by multiple owners. Subsection (b)(1) provides that revocation by a transferor does not affect a transfer on death deed as to the interest of another transferor. Subsection (b)(2) provides that a transfer on death deed of joint owners is revoked only if it is revoked by all of the living joint owners. This rule is consistent with Section 6-306, which provides in pertinent part: "A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary." Subsection (b)(2) applies only to a deed of joint owners. A joint tenant who severs the joint tenancy, thereby destroying the right of survivorship, is no longer a joint owner.

Subsection (c) provides that a recorded transfer on death deed may not be revoked by a revocatory act performed on the deed. Such an act includes burning, tearing, canceling, obliterating, or destroying the deed or any part of it.

This part does not define, but instead looks to other law to determine, the authority of an agent. An individual's agent may revoke a transfer on death deed on the individual's behalf to the extent permitted by other law, such as the Uniform Power of Attorney Act.

SECTION 6-412. EFFECT OF TRANSFER ON DEATH DEED DURING TRANSFEROR'S LIFE. During a transferor's life, a transfer on death deed does not:

(1) affect an interest or right of the transferor or any other owner, including the right to transfer or encumber the property;

(2) affect an interest or right of a transferee, even if the transferee has actual or constructive notice of the deed;

(3) affect an interest or right of a secured or unsecured creditor or future creditor of the transferor, even if the creditor has actual or constructive notice of the deed;

(4) affect the transferor's or designated beneficiary's eligibility for any form of public assistance;

(5) create a legal or equitable interest in favor of the designated beneficiary; or

(6) subject the property to claims or process of a creditor of the designated beneficiary.

Comment

A fundamental feature of a transfer on death deed under this part is that it does not operate until the transferor's death. The transfer occurs at the transferor's death, not before.

Paragraph (1): A transfer on death deed, during the transferor's lifetime, does not affect the interests or property rights of the transferor or any other owners. Therefore, the deed does not, among many other things: affect the transferor's right to transfer or encumber the property inter vivos; sever a joint tenancy or a joint tenant's right of survivorship; trigger a due-on-sale clause in the transferor's mortgage; trigger the imposition of real estate transfer tax; or affect the transferor's homestead or real estate tax exemptions, if any.

Paragraph (2): A transfer on death deed does not affect transferees, whether or not they have notice of the deed. Like a will, the transfer on death deed is ambulatory. It has no effect on inter vivos transfers.

Paragraph (3): A transfer on death deed, during the transferor's lifetime, does not affect pre-existing or future creditors, secured or unsecured, whether or not they have an interest in the property or notice of the deed.

Paragraph (4): A transfer on death deed, during the transferor's lifetime, does not affect the transferor's or designated beneficiary's eligibility for any form of public assistance, including Medicaid. On this point, the drafting committee of this part specifically disapproves of the contrary approach of Colo. Rev. Stat. § 15-15-403.

Paragraph (5): During the transferor's lifetime, a transfer on death deed does not create a legal or equitable interest in the designated beneficiary. The beneficiary does not have an interest that can be assigned or encumbered. Note, however, that this rule would not preclude the doctrine of after-acquired title. A warranty deed from a designated beneficiary to a third party would operate to pass the beneficiary's title to the third party after the transferor's death.

Paragraph (6): A transfer on death deed, during the transferor's lifetime, does not make the property subject to claims or process of the designated beneficiary's creditors. The deed has no more effect than a will.

If a transferor combines an inter vivos transfer of an interest in property (such as a mineral interest) with a transfer on death of the remainder interest, the inter vivos transfer may have present effect even though the transfer on death does not occur until the transferor's death.

SECTION 6-413. EFFECT OF TRANSFER ON DEATH DEED AT TRANSFEROR'S DEATH.

(a) Except as otherwise provided in the transfer on death deed[,][or] in this section[,][or

in [cite state statutes on antilapse, revocation by divorce or homicide, survival and simultaneous death, and elective share, if applicable to nonprobate transfers]], on the death of the transferor, the following rules apply to property that is the subject of a transfer on death deed and owned by the transferor at death:

(1) Subject to paragraph (2), the interest in the property is transferred to the designated beneficiary in accordance with the deed.

(2) The interest of a designated beneficiary is contingent on the designated beneficiary surviving the transferor. The interest of a designated beneficiary that fails to survive the transferor lapses.

(3) Subject to paragraph (4), concurrent interests are transferred to the beneficiaries in equal and undivided shares with no right of survivorship.

(4) If the transferor has identified two or more designated beneficiaries to receive concurrent interests in the property, the share of one which lapses or fails for any reason is transferred to the other, or to the others in proportion to the interest of each in the remaining part of the property held concurrently.

(b) Subject to [cite state recording act], a beneficiary takes the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death. For purposes of this subsection and [cite state recording act], the recording of the transfer on death deed is deemed to have occurred at the transferor's death.

(c) If a transferor is a joint owner and is:

(1) survived by one or more other joint owners, the property that is the subject of a transfer on death deed belongs to the surviving joint owner or owners with right of survivorship; or

(2) the last surviving joint owner, the transfer on death deed is effective.

(d) A transfer on death deed transfers property without covenant or warranty of title even if the deed contains a contrary provision.

Comment

Subsection (a) states four default rules, except as otherwise provided by the transfer on death deed, by this section, or by other provisions of state law governing nonprobate transfers.

The four default rules established by subsection (a) are these. First, the property that is the subject of an effective transfer on death deed and owned by the transferor at death is transferred at the transferor's death to the designated beneficiaries as provided in the deed. The rule implements the transferor's intention as described in the deed. Consider the following example:

Example 1. *A* executes, acknowledges, and records a transfer on death deed for Blackacre naming *X* as the primary beneficiary and *Y* as the alternate beneficiary if *X* fails to survive *A*. Both *X* and *Y* survive *A*. Blackacre is transferred to *X* at *A*'s death in accordance with the provisions of the deed.

This default rule implements the fundamental principle that the provisions of the deed control the disposition of the property, unless otherwise provided by state law.

The drafting committee of this part approves of the result in *In re Estate of Roloff*, 143 P.3d 406 (Kan. Ct. App. 2006) (holding that crops should be transferred with the land under a transfer on death deed because this result would be reached on the same facts with any other deed).

The bracketed language at the beginning of subsection (a) enables a state to make the default rules subject to other statutes, such as an antilapse statute or a statute providing for revocation on divorce. Consider the following examples:

Example 2. *A* executes, acknowledges, and records a transfer on death deed for Blackacre naming *X* as the primary beneficiary and *Y* as the alternate beneficiary if *X* fails to survive *A*. In fact, *X* and *Y* fail to survive *A*, who is survived only by *X*'s child, *Z*. Assume that the state's antilapse statute applies to transfer on death deeds and creates a substitute gift in *Z*. (For such a statute, see Section 2-706.) Blackacre is transferred to *Z* at *A*'s death in accordance with the provisions of the deed as modified by the antilapse statute.

Example 3. *A* executes, acknowledges, and records a transfer on death deed for Blackacre naming her spouse, *X*, as the primary beneficiary and *Y* as the alternate beneficiary if *X* fails to survive *A*. Later, *A* and *X* divorce. Assume that the state's statute on revocation by divorce applies to transfer on death deeds and revokes the designation in favor of *X*, with the effect that the provisions of the transfer on death deed are given effect as if *X* had disclaimed. (For such a statute, see Section 2-804.) Assume further that the effect of the putative disclaimer

is that *X* is treated as having failed to survive *A*. (See Section 2-1106(a)(3)(B).) Blackacre is transferred to *Y* at *A*'s death in accordance with the provisions of the deed as modified by the revocation on divorce and disclaimer statutes.

Note that the property must be owned by the transferor at death. Property no longer owned by the transferor at death cannot be transferred by a transfer on death deed, just as it cannot be transferred by a will. This is the principle of ademption by extinction, discussed in the Comment to Section 6-411.

In almost every instance, the transferor will own the property not only at death but also when the transfer on death deed is executed, but the latter is not imperative. Consider the following example. *H* and *W*, a married couple, hold Blackacre as tenants by the entirety. *H* executes, acknowledges, and records a transfer on death deed for Blackacre in favor of *X*. *W* later dies, at which point *H* owns Blackacre in fee simple absolute. Later, *H* dies. Under the law of some states, there may be a question whether the transfer on death deed is effective, given that *H* executed it when Blackacre was owned, not by *H* and *W*, but by the marital entity. The correct answer is that the transfer on death deed is effective at *H*'s death because Blackacre is owned by *H* at *H*'s death. See, e.g., *Mitchell v. Wilmington Trust Co.*, 449 A.2d 1055 (Del. Ch. 1982) (mortgage granted by one tenant by the entirety is not void upon execution but remains inchoate during the lives of both spouses, and becomes a valid lien if the spouse who executed the mortgage survives the other spouse or if the spouses get divorced).

The second default rule established by subsection (a) is that the interest of a designated beneficiary is contingent on surviving the transferor. This default rule treats wills and will substitutes alike. The interest of a designated beneficiary who fails to survive the transferor lapses.

The third default rule established by subsection (a) is that concurrent beneficiaries receive equal and undivided interests with no right of survivorship among them. This default rule is consistent with the general presumption in favor of tenancy in common. See Powell on Real Property § 51.02. The rule is also consistent with Section 6-212 governing multiple-party accounts and Section 6-307 governing the transfer on death registration of securities.

The fourth and last default rule established by subsection (a) is that, in the event of the lapse or failure of an interest to be held concurrently, the share that lapses or fails passes proportionately to the surviving concurrent beneficiaries. Consider the following example:

Example 4. *A* executes, acknowledges, and records a transfer on death deed for Blackacre naming *X*, *Y*, and *Z* as the designated beneficiaries. *X* and *Y* survive *A*, but *Z* fails to survive *A*. The transfer on death deed is effective and, in the absence of an antilapse statute, transfers Blackacre to *X* and *Y*. This default rule is consistent with the transferor's probable intention in the absence of an antilapse statute and also with Section 2-604(b) on the lapse of a residuary devise.

Subsection (b) concerns the effect of transactions during the transferor's life. The subsection states an intermediate rule between two extremes. One extreme would provide that transactions during the transferor's life affect the beneficiary only if the transactions are

recorded before the transferor's death. This would unfairly disadvantage the transferor's creditors and inter vivos transferees. The other extreme would provide that transactions during the transferor's life always supersede the beneficiary's interest, even if the recording act would provide otherwise. Between these two positions is the rule of subsection (b).

Subsection (b) provides that the beneficiary's interest is subject to *all* conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death. "Liens" includes liens arising by operation of law, such as state Medicaid liens.

The only exception to this rule arises when the state recording act so provides. The state recording act will so provide only when two conditions are met: (1) the inter vivos conveyance or encumbrance is unrecorded throughout the transferor's life (the legal fiction in this subsection protects persons who transact with the transferor and record any time before the transferor's death); and (2) the beneficiary is protected by the recording act. These two conditions will be met only in rare instances. Most beneficiaries of transfer on death deeds are gratuitious, whereas state recording acts typically protect only purchasers for value. See Powell on Real Property § 82.02.

Subsection (c) provides that the survivorship right of a joint owner takes precedence over the transfer on death deed. This rule is consistent with the law of joint tenancy and wills: the right of survivorship takes precedence over a provision in a joint tenant's will.

Subsection (d) states the mandatory rule that a transfer on death deed transfers the property without covenant or warranty of title. The rule is mandatory for two reasons: first, to prevent mishaps by uninformed grantors; and second, to recognize that a transfer on death deed is a will substitute. The rule of this section is consistent with the longstanding law of wills. As stated by Sir Edward Coke, "an express warranty cannot be created by will." Coke on Littleton 386a.

SECTION 6-414. DISCLAIMER. A beneficiary may disclaim all or part of the beneficiary's interest as provided by [cite state statute or the Uniform Disclaimer of Property Interests Act].

Comment

A beneficiary of a transfer on death deed may disclaim the property interest the deed attempts to transfer. While this section relies on other law, such as the Uniform Disclaimer of Property Interests Act, to govern the disclaimer, two general principles should be noted.

First, there is no need under the law of disclaimers to execute a disclaimer in advance. During the transferor's life, a designated beneficiary has no interest in the property. See Section 6-412. Nothing passes to the designated beneficiary while the transferor is alive, hence there is no need to execute a disclaimer during that time.

Second, an effective disclaimer executed after the testator's death "relates back" to the moment of the attempted transfer, here the death of the transferor. Because the disclaimer "relates back," the beneficiary is regarded as never having had an interest in the disclaimed property. The Uniform Disclaimer of Property Interests Act reaches this result, without using the language of relation back. See Section 2-1106(b)(1): "The disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable ...." As the Comment to Section 2-1106 explains, "This Act continues the effect of the relation back doctrine, not by using the specific words, but by directly stating what the relation back doctrine has been interpreted to mean."

SECTION 6-415. LIABILITY FOR CREDITOR CLAIMS AND STATUTORY ALLOWANCES.

Alternative A

A beneficiary of a transfer on death deed is liable for an allowed claim against the transferor's probate estate and statutory allowances to a surviving spouse and children to the extent provided in Section 6-102.

Alternative B

(a) To the extent the transferor's probate estate is insufficient to satisfy an allowed claim against the estate or a statutory allowance to a surviving spouse or child, the estate may enforce the liability against property transferred at the transferor's death by a transfer on death deed.

(b) If more than one property is transferred by one or more transfer on death deeds, the liability under subsection (a) is apportioned among the properties in proportion to their net values at the transferor's death.

(c) A proceeding to enforce the liability under this section must be commenced not later than [18 months] after the transferor's death.

End of Alternatives

Comment

Alternative A defers to Section 6-102 to establish the liability of a beneficiary of a transfer on death deed for creditor claims and statutory allowances.

Section 6-102 was added in 1998 to establish the principle that recipients of nonprobate transfers can be required to contribute to pay allowed claims and statutory allowances to the extent the probate estate is insufficient. The fundamental rule of liability is contained in Section 6-102(b): "Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against the decedent's probate estate and stautory allowances to the decedent's spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee." The other provisions of Section 6-102 implement this liability rule.

For states not favoring the comprehensive approach of Section 6-102(b) or the equivalent, Alternative B provides an *in rem* liability rule applying to transfer on death deeds. The property transferred under a transfer on death deed is liable to the transferor's probate estate for properly allowed claims and statutory allowances to the extent the estate is insufficient.

One of the functions of probate is creditor protection. Section 6-102, referenced in Alternative A, attempts to provide comprehensive creditor protection within the realm of nonprobate transfers. In addition, this part in Alternative B provides more creditor protection than is typically available under current law. For many transferors, the transfer on death deed will be used in lieu of joint tenancy with right of survivorship. Under the usual law of joint tenancy, the unsecured creditors of a deceased joint tenant have no recourse against the property or against the other joint tenant. Instead, the property passes automatically to the survivor, free of the decedent's debts. See Comment 5 to Section 6-102. If the debts cannot be paid from the probate estate, the creditor is out of luck. Under Alternative B, in contrast, the property transferred under a transfer on death deed is liable to the probate estate for properly allowed claims and statutory allowances to the extent the estate is insufficient.

[SECTION 6-416. OPTIONAL FORM OF TRANSFER ON DEATH DEED. The following form may be used to create a transfer on death deed. The other sections of this part govern the effect of this or any other instrument used to create a transfer on death deed:

(front of form)

REVOCABLE TRANSFER ON DEATH DEED

NOTICE TO OWNER

You should carefully read all information on the other side of this form. You May Want to Consult a Lawyer Before Using This Form.

This form must be recorded before your death, or it will not be effective.

IDENTIFYING INFORMATION

Owner or Owners Making This Deed:

_____ _____

Printed name Mailing address

_____ _____

Printed name Mailing address

Legal description of the property:

_____

PRIMARY BENEFICIARY

I designate the following beneficiary if the beneficiary survives me.

_____ _____

Printed name Mailing address, if available

ALTERNATE BENEFICIARY – Optional

If my primary beneficiary does not survive me, I designate the following alternate beneficiary if that beneficiary survives me.

_____ _____

Printed name Mailing address, if available

TRANSFER ON DEATH

At my death, I transfer my interest in the described property to the beneficiaries as designated above.

Before my death, I have the right to revoke this deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS DEED

_____ [(SEAL)] _____

Signature Date

_____ [(SEAL)] _____

Signature Date

ACKNOWLEDGMENT

(insert acknowledgment for deed here)

(back of form)

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

What does the Transfer on Death (TOD) deed do? When you die, this deed transfers the described property, subject to any liens or mortgages (or other encumbrances) on the property at your death. Probate is not required. The TOD deed has no effect until you die. You can revoke it at any time. You are also free to transfer the property to someone else during your lifetime. If you do not own any interest in the property when you die, this deed will have no effect.

How do I make a TOD deed? Complete this form. Have it acknowledged before a notary public or other individual authorized by law to take acknowledgments. Record the form in each [county] where any part of the property is located. The form has no effect unless it is acknowledged and recorded before your death.

Is the "legal description" of the property necessary? Yes.

How do I find the "legal description" of the property? This information may be on the deed you received when you became an owner of the property. This information may also be available in [the office of the county recorder of deeds] for the [county] where the property is located. If you are not absolutely sure, consult a lawyer.

Can I change my mind before I record the TOD deed? Yes. If you have not yet recorded the deed and want to change your mind, simply tear up or otherwise destroy the deed.

How do I "record" the TOD deed? Take the completed and acknowledged form to [the office of the county recorder of deeds] of the [county] where the property is located. Follow the instructions given by the [county recorder] to make the form part of the official property records. If the property is in more than one [county], you should record the deed in each [county].

Can I later revoke the TOD deed if I change my mind? Yes. You can revoke the TOD deed. No one, including the beneficiaries, can prevent you from revoking the deed.

How do I revoke the TOD deed after it is recorded? There are three ways to revoke a recorded TOD deed: (1) Complete and acknowledge a revocation form, and record it in each [county] where the property is located. (2) Complete and acknowledge a new TOD deed that disposes of the same property, and record it in each [county] where the property is located. (3) Transfer the property to someone else during your lifetime by a recorded deed that expressly revokes the TOD deed. You may not revoke the TOD deed by will.

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend, or lawyer.

Do I need to tell the beneficiaries about the TOD deed? No, but it is recommended. Secrecy can cause later complications and might make it easier for others to commit fraud.

I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, you are encouraged to consult a lawyer.]

Comment

The form in this section is optional. The section is based on Section 4 of the Uniform Health-Care Decisions Act.

The transfer on death deed is likely to be used by consumers for whom the preparation of a tailored inter vivos revocable trust is too costly. The form in this section is designed to be understandable and consumer friendly.

For examples of statutory forms containing answers to questions likely to be asked by consumers, see the Illinois statutory forms for powers of attorney. 755 Ill. Comp. Stat. 45/3-3 (power of attorney for property); 755 Ill. Comp. Stat. 45/4-10 (power of attorney for health care).

[SECTION 6-417. OPTIONAL FORM OF REVOCATION. The following form may be used to create an instrument of revocation under this part. The other sections of this part govern the effect of this or any other instrument used to revoke a transfer on death deed.

(front of form)

REVOCATION OF TRANSFER ON DEATH DEED

NOTICE TO OWNER

This revocation must be recorded before you die or it will not be effective. This revocation is effective only as to the interests in the property of owners who sign this revocation.

IDENTIFYING INFORMATION

Owner or Owners of Property Making This Revocation:

_____

Printed name Mailing address

_____

Printed name Mailing address

Legal description of the property:

_____

REVOCATION

I revoke all my previous transfers of this property by transfer on death deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS REVOCATION

_____ [(SEAL)] _____

Signature Date

_____ [(SEAL)] _____

Signature Date

ACKNOWLEDGMENT

(insert acknowledgment here)

(back of form)

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

How do I use this form to revoke a Transfer on Death (TOD) deed? Complete this form. Have it acknowledged before a notary public or other individual authorized to take acknowledgments. Record the form in the public records in [the office of the county recorder of deeds] of each [county] where the property is located. The form must be acknowledged and recorded before your death or it has no effect.

How do I find the "legal description" of the property? This information may be on the TOD deed. It may also be available in [the office of the county recorder of deeds] for the [county] where the property is located. If you are not absolutely sure, consult a lawyer.

How do I "record" the form? Take the completed and acknowledged form to [the office of the county recorder of deeds] of the [county] where the property is located. Follow the instructions given by the [county recorder] to make the form part of the official property records. If the property is located in more than one [county], you should record the form in each of those [counties].

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend, or lawyer.

I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, consult a lawyer.]

Comment

The form in this section is optional. The section is based on Section 4 of the Uniform Health-Care Decisions Act.

The aim of the form in this section is to be understandable and consumer friendly.

ARTICLE VII

TRUST ADMINISTRATION

Historical Note

Article VII of the Uniform Probate Code addressed selected issues of trust administration, including trust registration, the jurisdiction of the courts concerning trusts, and the duties and liabilities of trustees. Article VII of the UPC was superseded by the Uniform Trust Code, approved in 2000, and was withdrawn in 2010 following the widespread enactment of the UTC.

~~**PART 1**~~

~~**TRUST REGISTRATION**~~

~~**Section**~~

~~**PART 2**~~

~~**JURISDICTION OF COURT CONCERNING TRUSTS**~~

~~Section~~

~~**PART 3**~~

~~**DUTIES AND LIABILITIES OF TRUSTEES**~~

~~**Section**~~

~~**PART 4**~~

~~**POWERS OF TRUSTEES**~~

~~**[GENERAL COMMENT ONLY]**~~

~~**COMMENT**~~

~~Several considerations explain the presence in the Uniform Probate Code of procedures applicable to inter vivos and testamentary trusts. The most important is that the Court assumed by the Code is a full power Court which appropriately may receive jurisdiction over trustees. Another is that personal representatives under Articles III and IV and conservators under Article V, have the status of trustees. It follows naturally that these fiduciaries and regular trustees should bear a similar relationship to the Court. Also, the general move of the Code away from the concept of supervisory jurisdiction over any fiduciary is compatible with the kinds of procedural provisions which are believed to be desirable for trustees.~~

~~The relevance of trust procedures to those relating to settlement of decedents' estates is apparent in many situations. Many trusts are created by will. In a substantial number of states, statutes now extend probate Court control over decedents' estates to testamentary trustees, but the same procedures rarely apply to inter vivos trusts. For example, eleven states appear to require testamentary trustees to qualify and account in much the same manner as executors, though quite different requirements relate to trustees of inter vivos trusts in these same states. Twenty-four states impose some form of mandatory Court accountings on testamentary trustees, while only three seem to have comparable requirements for inter vivos trustees.~~

~~From an estate planning viewpoint, probate Court supervision of testamentary trustees causes many problems. In some states, testamentary trusts cannot be released to be administered in another state. This requires complicated planning if inconvenience to interested persons is to be avoided when the beneficiaries move elsewhere. Also, some states, preclude foreign trust companies from serving as trustees of local testamentary trusts without complying with onerous or prohibitive qualification requirements. Regular accountings in Court have proved to be more expensive than useful in relation to the vast majority of trusts and sometimes have led to the ill-advised use of legal life estates to avoid these burdens.~~

~~The various restrictions applicable to testamentary trusts have caused many planners to recommend use of revocable inter vivos trusts. The widely adopted Uniform Testamentary Addition to Trusts Act has accelerated this tendency by permitting testators to devise estates to trustees of previously established receptacle trusts which have and retain the characteristics of inter vivos trusts for purpose of procedural requirements.~~

~~The popularity of this legislation and the widespread use of pour-over wills indicates rather vividly the obsolescence and irrelevance of statutes contemplating supervisory jurisdiction.~~

~~One of the problems with inter vivos and receptacle trusts at the present time, however, is that persons interested in these arrangements as trustees or beneficiaries frequently discover~~

that there are no simple and efficient statutory or judicial remedies available to them to meet the special needs of the trust relationship. Proceedings in equity before Courts of general jurisdiction are possible, of course, but the difficulties of obtaining jurisdiction over all interested persons on each occasion when a judicial order may be necessary or desirable are commonly formidable. A few states offer simplified procedures on a voluntary basis for inter vivos as well as testamentary trusts. In some of these, however, the legislation forces inter vivos trusts into unpopular patterns involving supervisory control. Nevertheless, it remains true of the legislation in most states that there is too little for inter vivos trusts and too much for trusts created by will.

Other developments suggest that enactment of useful, uniform legislation on trust procedures is a matter of considerable social importance. For one thing, accelerating mobility of persons and estates is steadily increasing the pressure on locally oriented property institutions. The drafting and technical problems created by lack of uniformity of trust procedures in the several states are quite serious. If people cannot obtain efficient trust service to preserve and direct wealth because of state property rules, they will turn in time to national arrangements that eliminate property law problems. A general shift away from local management of trusteed wealth and increased reliance on various contractual claims against national funds seems the most likely consequence if the local law of trusts remains nonuniform and provincial.

Modestly endowed persons who are turning to inter vivos trusts to avoid probate are of more immediate concern. Lawyers in all parts of the country are aware of the trend toward reliance on revocable trusts as total substitutes for wills which recent controversies about probate procedures have stimulated. There would be little need for concern about this development if it could be assumed also that the people involved are seeking and getting competent advice and fiduciary assistance. But there are indications that many people are neither seeking nor receiving adequate information about trusts they are using. Moreover, professional fiduciaries are often not available as trustees for small estates. Consequently, neither settlors nor trustees of "do-it-yourself" trusts have much idea of what they are getting into. As a result, there are corresponding dangers to beneficiaries who are frequently uninformed or baffled by formidable difficulties in obtaining relief or information.

Enactment of clear statutory procedures creating simple remedies for persons involved in trust problems will not prevent disappointment for many of these persons but should help minimize their losses.

Several objectives of the Code are suggested by the preceding discussion. They may be summarized as follows:

1. To eliminate procedural distinctions between testamentary and inter vivos trusts.

2. To strengthen the ability of owners to select trustees by eliminating formal qualification of trustees and restrictions on the place of administration.

3. To locate nonmandatory judicial proceedings for trustees and beneficiaries in a convenient Court fully competent to handle all problems that may arise.

4. To facilitate judicial proceedings concerning trusts by comprehensive provisions for obtaining jurisdiction over interested persons by notice.

5. To protect beneficiaries by having trustees file written statements of acceptance of trusts with suitable Courts, thereby acknowledging jurisdiction and providing some evidence of the trust's existence for future beneficiaries.

6. To eliminate routinely required Court accountings, substituting clear remedies and statutory duties to inform beneficiaries.

PART 1

TRUST REGISTRATION

GENERAL COMMENT

Registration of trusts is a new concept and differs importantly from common arrangements for retained supervisory jurisdiction of Courts of probate over testamentary trusts. It applies alike to inter vivos and testamentary trusts, and is available to foreign-created trusts as well as those locally created. The place of registration is related not to the place where the trust was created, which may lose its significance to the parties concerned, but is related to the place where the trust is primarily administered, which in turn is required (Section 7-305) to be at a location appropriate to the purposes of the trust and the interests of its beneficiaries. Sections 7-102 and 7-305 provide for transfer of registration. The procedure is more flexible than the typical retained jurisdiction in that it permits registration or submission to other appropriate procedures at another place, even in another state, in order to accommodate relocation of the trust at a place which becomes more convenient for its administration. (Cf. 20 [Purdon's] Pa.Stat. § 2080.309.) In addition, the registration acknowledges that a particular Court will be accessible to the parties on a permissive basis without subjecting the trust to compulsory, continuing supervision by the Court.

The process of registration requires no judicial action or determination but is accomplished routinely by simple acts on the part of the trustee which will place certain information on file with the Court (Section 7-102). Although proceedings involving a registered trust will not be continuous but will be separate each time an interested party initiates a proceeding, it is contemplated that a will maintain a single file for each registered trust as a record available to interested persons. Proceedings are facilitated by the broad jurisdiction of the Court (Section 7-201) and the Code's representation and notice provisions (Section 1-403).

Section 7-201 provides complete jurisdiction over trust proceedings in the Court of registration. Section 7-103 above provides for jurisdiction over parties. Section 7-104 should facilitate use of trusts involving assets in several states by providing for a single principal place of administration and reducing concern about qualification of foreign trust companies.

Section 7-101. Duty To Register Trusts. The trustee of a trust having its principal place of administration in this state shall register the trust in the Court of this state at the

principal place of administration. Unless otherwise designated in the trust instrument, the principal place of administration of a trust is the trustee's usual place of business where the records pertaining to the trust are kept, or at the trustee's residence if he has no such place of business. In the case of co-trustees, the principal place of administration, if not otherwise designated in the trust instrument, is (1) the usual place of business of the corporate trustee if there is but one corporate co-trustee, or (2) the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate co-trustee, and otherwise (3) the usual place of business or residence of any of the co-trustees as agreed upon by them. The duty to register under this Part does not apply to the trustee of a trust if registration would be inconsistent with the retained jurisdiction of a foreign court from which the trustee cannot obtain release.

COMMENT

This section rests on the assumption that a central "filing office" will be designated in each county where the Court may sit in more than one place.

The scope of this section and of Article VII is tied to the definition of "trustee" in Section 1-201. It was suggested that the definition should be expanded to include "land trusts." It was concluded, however that the inclusion of this term which has special meaning principally in Illinois, should be left for decision by enacting states. Under the definition of "trust" in this Code, custodial arrangements as contemplated by legislation dealing with gifts to minors, are excluded, as are "trust accounts" as defined in Article VI.

Section 7-102. Registration Procedures. Registration shall be accomplished by filing a statement indicating the name and address of the trustee in which it acknowledges the trusteeship. The statement shall indicate whether the trust has been registered elsewhere. The statement shall identify the trust: (1) in the case of a testamentary trust, by the name of the testator and the date and place of domiciliary probate; (2) in the case of a written inter vivos trust, by the name of each settlor and the original trustee and the date of the trust instrument; or (3) in the case of an oral trust, by information identifying the settlor or other source of funds and

describing the time and manner of the trust's creation and the terms of the trust, including the subject matter, beneficiaries and time of performance. If a trust has been registered elsewhere, registration in this state is ineffective until the earlier registration is released by order of the Court where prior registration occurred, or an instrument executed by the trustee and all beneficiaries, filed with the registration in this state.

COMMENT

Additional duties of the clerk of the Court are provided in Section 1-305. The duty to register trusts is stated in Section 7-101.

Section 7-103. Effect Of Registration.

(a) By registering a trust, or accepting the trusteeship of a registered trust, the trustee submits personally to the jurisdiction of the Court in any proceeding under Section 7-201 of this Code relating to the trust that may be initiated by any interested person while the trust remains registered. Notice of any proceeding shall be delivered to the trustee, or mailed to him by ordinary first class mail at his address as listed in the registration or as thereafter reported to the Court and to his address as then known to the petitioner.

(b) To the extent of their interests in the trust, all beneficiaries of a trust properly registered in this state are subject to the jurisdiction of the court of registration for the purposes of proceedings under Section 7-201, provided notice is given pursuant to Section 1-401.

COMMENT

This section provides for jurisdiction over the parties. Subject matter jurisdiction for proceedings involving trusts is described in Sections 7-201 and 7-202. The basic jurisdictional concept in Section 7-103 is that reflected in widely adopted long-arm statutes, that a state may properly entertain proceedings when it is a reasonable forum under all the circumstances, provided adequate notice is given. Clearly the trustee can be deemed to consent to jurisdiction by virtue of registration. This basis for consent jurisdiction is in addition to and not in lieu of other bases of jurisdiction during or after registration. Also, incident to an order releasing registration under Section 7-305, the Court could condition the release on registration of the trust in another state or Court. It also seems reasonable to require beneficiaries to go to the seat of the trust when litigation has been initiated there concerning a trust in which they claim

beneficial interests, much as the rights of shareholders of a corporation can be determined at a corporate seat. The settlor has indicated a principal place of administration by his selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered. Although most cases will fit within traditional concepts of jurisdiction, this section goes beyond established doctrines of in personam or quasi in rem jurisdiction as regards a nonresident beneficiary's interests in foreign land of chattels, but the National Conference believes the section affords due process and represents a worthwhile step forward in trust proceedings.

Section 7-104. Effect Of Failure To Register. A trustee who fails to register a trust in a proper place as required by this Part, for purposes of any proceedings initiated by a beneficiary of the trust prior to registration, is subject to the personal jurisdiction of any Court in which the trust could have been registered. In addition, any trustee who, within 30 days after receipt of a written demand by a settlor or beneficiary of the trust, fails to register a trust as required by this Part is subject to removal and denial of compensation or to surcharge as the Court may direct. A provision in the terms of the trust purporting to excuse the trustee from the duty to register, or directing that the trust or trustee shall not be subject to the jurisdiction of the Court, is ineffective.

COMMENT

Under Section 1-108, the holder of a presently exercisable general power of appointment can control all duties of a fiduciary to beneficiaries who may be changed by exercise of the power. Hence, if the settlor of a revocable inter vivos trust directs the trustee to refrain from registering a trust, no liability would follow even though another beneficiary demanded registration. The ability of the general power holder to control the trustee ends when the power is terminated.

Section 7-105. Registration, Qualification of Foreign Trustee. A foreign corporate trustee is required to qualify as a foreign corporation doing business in this state if it maintains the principal place of administration of any trust within the state. A foreign co-trustee is not required to qualify in this State solely because its co-trustee maintains the principal place of administration in this State. Unless otherwise doing business in this State, local qualification by a foreign trustee, corporate or individual, is not required in order for the trustee to receive

distribution from a local estate or to hold, invest in, manage or acquire property located in this State, or maintain litigation. Nothing in this section affects a determination of what other acts require qualification as doing business in this state.

COMMENT

Section 7-105 deals with non-resident trustees in a fashion which should correct a widespread deficiency in present regulation of trust activity. Provisions limiting business of foreign corporate trustees constitute an unnecessary limitation on the ability of a trustee to function away from its principal place of business. These restrictions properly relate more to continuous pursuit of general trust business by foreign corporations than to isolated instances of litigation and management of the assets of a particular trust. The ease of avoiding foreign corporation qualification statutes by the common use of local nominees or subtrustees, and the acceptance of these practices, are evidence of the futility and undesirability of more restrictive legislation of the sort commonly existing today. The position embodied in this section has been recommended by important segments of the banking and trust industry through a proposed model statute, and the failure to adopt this reform has been characterized as unfortunate by a leading trust authority. *See* 5 Scott on Trusts § 558 (3rd ed. 1967).

PART 2

JURISDICTION OF COURT CONCERNING TRUSTS

Section 7-201. Court; Exclusive Jurisdiction of Trusts.

(a) The Court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts. Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts. These include, but are not limited to, proceedings to:

(1) appoint or remove a trustee;

(2) review trustees' fees and to review and settle interim or final accounts;

(3) ascertain beneficiaries, determine any question arising in the administration or distribution of any trust including questions of construction of trust instruments, to instruct trustees, and determine the existence or

nonexistence of any immunity, power, privilege, duty or right; and

(4) release registration of a trust.

(b) Neither registration of a trust nor a proceeding under this section result in continuing supervisory proceedings. The management and distribution of a trust estate, submission of accounts and reports to beneficiaries, payment of trustee's fees and other obligations of a trust, acceptance and change of trusteeship, and other aspects of the administration of a trust shall proceed expeditiously consistent with the terms of the trust, free of judicial intervention and without order, approval or other action of any court, subject to the jurisdiction of the Court as invoked by interested parties or as otherwise exercised as provided by law.

COMMENT

Derived in small part from Florida Statutes, 1965, Chapters 737 and 87, and Title 20, Penna.Statutes, (Purdon) 32080.101 et seq.

Section 7-202. Trust Proceedings; Venue. Venue for proceedings under Section 7-201 involving registered trusts is in the place of registration. Venue for proceedings under Section 7-201 involving trusts not registered in this state is in any place where the trust properly could have been registered, and otherwise by the rules of civil procedure.

Section 7-203. Trust Proceedings; Dismissal of Matters Relating to Foreign Trusts. The Court will not, over the objection of a party, entertain proceedings under Section 7-201 involving a trust registered or having its principal place of administration in another state, unless (1) when all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration or (2) when the interests of justice otherwise would seriously be impaired. The Court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in

which the trust is registered or has its principal place of business, or the Court may grant a continuance or enter any other appropriate order.

COMMENT

While recognizing that trusts which are essentially foreign can be the subject of proceedings in this state, this section employs the concept of forum non conveniens to center litigation involving the trustee and beneficiaries at the principal place of administration of the trust but leaves open the possibility of suit elsewhere when necessary in the interests of justice. It is assumed that under this section a court would refuse to entertain litigation involving the foreign registered trust unless for jurisdictional or other reasons, such as the nature and location of the property or unusual interests of the parties, it is manifest that substantial injustice would result if the parties were referred to the court of registration. As regards litigation involving third parties, the trustee may sue and be sued as any owner and manager of property under the usually applicable rules of civil procedure and also as provided in Section 7-203.

The concepts of res judicata and full faith and credit applicable to any managing owner of property have generally been applicable to trustees. Consequently, litigation by trustees has not involved the artificial problems historically found when personal representatives maintain litigation away from the state of their appointment, and a prior adjudication for or against a trustee rendered in a foreign court having jurisdiction is viewed as conclusive and entitled to full faith and credit. Because of this, provisions changing the law, analogous to those relating to personal representatives in Section 4-401 do not appear necessary. See also Section 3-408. In light of the foregoing, the issue is essentially only one of forum non conveniens in having litigation proceed in the most appropriate forum. This is the function of this section.

Section 7-204. Court; Concurrent Jurisdiction of Litigation Involving Trusts and Third Parties. The Court of the place in which the trust is registered has concurrent jurisdiction with other courts of this state of actions and proceedings to determine the existence or nonexistence of trusts created other than by will, of actions by or against creditors or debtors of trusts, and of other actions and proceedings involving trustees and third parties. Venue is determined by the rules generally applicable to civil actions.

Section 7-205. Proceedings for Review of Employment of Agents and Review of Compensation of Trustee and Employees of Trust. On petition of an interested person, after notice to all interested persons, the Court may review the propriety of employment of any person by a trustee including any attorney, auditor, investment advisor or other specialized

agent or assistant, and the reasonableness of the compensation of any person so employed, and the reasonableness of the compensation determined by the trustee for his own services. Any person who has received excessive compensation from a trust may be ordered to make appropriate refunds.

COMMENT

In view of the broad jurisdiction conferred on the probate court, description of the special proceeding authorized by this section might be unnecessary. But the Code's theory that trustees may fix their own fees and those of their attorneys marks an important departure from much existing practice under which fees are determined by the Court in the first instance. Hence, it seems wise to emphasize that any interested person can get judicial review of fees if he desires it. Also, if excessive fees have been paid, this section provides a quick and efficient remedy. This review would meet in part the criticism of the broad powers given in the Uniform Trustees' Powers Act.

Section 7-206. Trust Proceedings; Initiation by Notice; Necessary Parties. Proceedings under Section 7-201 are initiated by filing a petition in the Court and giving notice pursuant to Section 1-401 to interested parties. The Court may order notification of additional persons. A decree is valid as to all who are given notice of the proceeding though fewer than all interested parties are notified.

PART 3

DUTIES AND LIABILITIES OF TRUSTEES

Section 7-301. General Duties Not Limited. Except as specifically provided, the general duty of the trustee to administer a trust expeditiously for the benefit of the beneficiaries is not altered by this Code.

Section 7-302. Trustee's Standard of Care and Performance. Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if

the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

COMMENT

This is a new general provision designed to make clear the standard of skill expected from trustees, both individual and corporate, nonprofessional and professional. It differs somewhat from the standard stated in § 174 of the Restatement of Trusts, Second, which is as follows:

> "The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a reasonable man of ordinary prudence, he is under a duty to exercise such skill."

By making the basic standard align to that observed by a prudent man in dealing with the property of another, the section accepts a standard as it has been articulated in some decisions regarding the duty of a trustee concerning investments. See Estate of Cook, (Del.Chanc.1934) 20 Del. Ch. 123, 171 A. 730. Also, the duty as described by the above section more clearly conveys the idea that a trustee must comply with an external, rather than with a personal, standard of care.

Section 7-303. Duty to Inform and Account to Beneficiaries. The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. In addition:

(a) Within 30 days after his acceptance of the trust, the trustee shall inform in writing the current beneficiaries and if possible, one or more persons who under Section 1-403 may represent beneficiaries with future interests, of the Court in which the trust is registered and of his name and address.

(b) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration.

(c) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

COMMENT

Analogous provisions are found in Section 3-705.

This provision does not require regular accounting to the Court nor are copies of statements furnished beneficiaries required to be filed with the Court. The parties are expected to assume the usual ownership responsibility for their interests including their own record keeping. Under Section 1-108, the holder of a general power of appointment or of revocation can negate the trustee's duties to any other person.

This section requires that a reasonable selection of beneficiaries is entitled to information so that the interests of the future beneficiaries may adequately be protected. After mandatory notification of registration by the trustee to the beneficiaries, further information may be obtained by the beneficiary upon request. This is to avoid extensive mandatory formal accounts and yet provide the beneficiary with adequate protection and sources of information. In most instances, the trustee will provide beneficiaries with copies of annual tax returns or tax statements that must be filed. Usually this will be accompanied by a narrative explanation by the trustee. In the case of the charitable trust, notice need be given only to the attorney general or other state officer supervising charitable trusts and in the event that the charitable trust has, as its primary beneficiary, a charitable corporation or institution, notice should be given to that charitable corporation or institution. It is not contemplated that all of the individuals who may receive some benefit as a result of a charitable trust be informed.

In any circumstance in which a fiduciary accounting is to be prepared, preparation of an accounting in conformity with the Uniform Principles and Model Account Formats promulgated by the National Fiduciary Accounting Project shall be considered as an appropriate manner of presenting a fiduciary account. See ALI-ABA Monograph, Whitman, Brown and Kramer, Fiduciary Accounting Guide (2nd edition 1990).

Section 7-304. Duty to Provide Bond. A trustee need not provide bond to secure performance of his duties unless required by the terms of the trust, reasonably requested by a beneficiary or found by the Court to be necessary to protect the interests of the beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented. On petition of the trustee or other interested person the Court may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties. If bond is required, it shall be filed in the Court of registration or other appropriate Court in amounts and with sureties and liabilities as provided in Sections 3-604 and 3-606 relating to bonds of personal representatives.

COMMENT

See Sections 3-603 and 3-604; 60 Okla.Stats.1961, § 175.24 [60 Okl.St.Ann. § 175.24]; Pa.Fid. Act, 1949, § 390.911(b) [20 Purdon's Pa.Stat. § 390.911(b)]; cf. Tenn.Code Ann. § 35-113.

Section 7-305. Trustee's Duties; Appropriate Place of Administration; Deviation.

A trustee is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management. If the principal place of administration becomes inappropriate for any reason, the Court may enter any order furthering efficient administration and the interests of beneficiaries, including, if appropriate, release of registration, removal of the trustee and appointment of a trustee in another state. Trust provisions relating to the place of administration and to changes in the place of administration or of trustee control unless compliance would be contrary to efficient administration or the purposes of the trust. Views of adult beneficiaries shall be given weight in determining the suitability of the trustee and the place of administration.

COMMENT

This section and 7-102 are related. The latter section makes it clear that registration may be released without Court order if the trustee and beneficiaries can agree on the matter. Section 1-108 may be relevant, also.

The primary thrust of Article VII is to relate trust administration to the jurisdiction of courts, rather than to deal with substantive matters of trust law. An aspect of deviation, however, is touched here.

Section 7-306. Personal Liability of Trustee to Third Parties.

(a) Unless otherwise provided in the contract, a trustee is not personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust estate unless he fails to reveal his representative capacity and identify the trust estate in the contract.

(b) A trustee is personally liable for obligations arising from ownership or control of

property of the trust estate or for torts committed in the course of administration of the trust estate only if he is personally at fault.

(c) Claims based on contracts entered into by a trustee in his fiduciary capacity, on obligations arising from ownership or control of the trust estate, or on torts committed in the course of trust administration may be asserted against the trust estate by proceeding against the trustee in his fiduciary capacity, whether or not the trustee is personally liable therefor.

(d) The question of liability as between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding.

COMMENT

The purpose of this section is to make the liability of the trust and trustee the same as that of the decedent's estate and personal representative.

Ultimate liability as between the estate and the fiduciary need not necessarily be determined whenever there is doubt about this question. It should be permissible, and often it will be preferable, for judgment to be entered, for example, against the trustee individually for purposes of determining the claimant's rights without the trustee placing that matter into controversy. The question of his right of reimbursement may be settled informally with beneficiaries or in a separate proceeding in the probate court involving reimbursement. The section does not preclude the possibility, however, that beneficiaries might be permitted to intervene in litigation between the trustee and a claimant and that all questions might be resolved in that action.

Section 7-307. Limitations on Proceedings Against Trustees After Final Account. Unless previously barred by adjudication, consent or limitation, any claim against a trustee for breach of trust is barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within [6 months] after receipt of the final account or statement. In any event and notwithstanding lack of full disclosure a trustee who has issued a final account or statement received by the beneficiary

and has informed the beneficiary of the location and availability of records for his examination is protected after 3 years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if, being a minor or disabled person, it is received by his representative as described in Section 1-403(1) and (2).

COMMENT

Final accounts terminating the trustee's obligations to the trust beneficiaries may be formal or informal. Formal judicial accountings may be initiated by the petition of any trustee or beneficiary. Informal accounts may be conclusive by consent or by limitation. This section provides a special limitation supporting informal accounts. With regard to facilitating distribution see Section 5-103.

Section 1-108 makes approval of an informal account or settlement with a trustee by the holder of a presently exercisable general power of appointment binding on all beneficiaries. In addition, the equitable principles of estoppel and laches, as well as general statutes of limitation, will apply in many cases to terminate trust liabilities.

PART 4

POWERS OF TRUSTEES

GENERAL COMMENT

There has been considerable interest in recent years in legislation giving trustees extensive powers. The Uniform Trustees' Powers Act, approved by the National Conference in 1964 has been adopted in Idaho, Kansas, Mississippi and Wyoming. New York and New Jersey have adopted similar statutes which differ somewhat from the Uniform Trustees' Powers Act, and Arkansas, California, Colorado, Florida, Iowa, Louisiana, Oklahoma, Pennsylvania, Virginia and Washington have comprehensive legislation which differ in various respects from other models. The legislation in Connecticut, North Carolina and Tennessee provides lists of powers to be incorporated by reference as draftsmen wish.

Comprehensive legislation dealing with trustees' powers appropriately may be included in the Code package at this point.