

## ARTICLE I

### GENERAL PROVISIONS, DEFINITIONS, AND PROBATE JURISDICTION OF COURT

#### PART 1

#### SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

##### **Section 1-101. [Short Title.]**

This chapter shall be known and may be cited as the Massachusetts Uniform Probate Code.

##### **Section 1-102. [Purposes; Rule of Construction.]**

(a) This chapter shall be liberally construed and applied to promote its underlying purposes and policies.

(b) The underlying purposes and policies of this chapter are:

(1) to simplify and clarify the law concerning the affairs of decedents and missing persons;

(2) to discover and make effective the intent of a decedent in distribution of the decedent's property;

(3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to the decedent's successors;

(4) to facilitate use and enforcement of certain trusts;

(5) to make uniform the law among the various jurisdictions.

##### **Section 1-103. [Supplementary General Principles of Law Applicable.]**

Unless displaced by the particular provisions of this chapter, the principles of law and equity supplement its provisions.

##### **Section 1-104. [Severability.]**

If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or

application, and to this end the provisions of this chapter are declared to be severable.

### **Section 1-105. [Construction Against Implied Repeal.]**

This chapter is a general act intended as a unified coverage of its subject matter and no part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided.

### **Section 1-106. [Effect of Fraud and Evasion.]**

Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this chapter or if fraud is used to avoid or circumvent the provisions or purposes of this chapter, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person other than a bona fide purchaser benefiting from the fraud, whether innocent or not. Any proceeding must be commenced within 2 years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than 5 years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during the decedent's lifetime which affects the succession of the decedent's estate.

#### COMMENT

This is an overriding provision that provides an exception to the procedures and limitations provided elsewhere in this chapter. The remedy of a party wronged by fraud is intended to be supplementary to other protections provided in this chapter and can be maintained outside the process of settlement of the estate. Thus, if a will which is known to be a forgery is probated informally, and the forgery is not discovered until after the period for contest has run, the defrauded heirs still could bring a fraud action under this section. Or if a will is fraudulently concealed after the testator's death and its existence not discovered until after the basic three year period (§ 3-108) has elapsed, there still may be an action under this section. Similarly, a closing statement normally provides binding protection for the personal representative after six months from filing (§ 3-1005). However, if there is fraudulent misrepresentation or concealment in the preparation of the claim, a later suit may be brought under this section against the personal representative for damages; or restitution may be obtained from those distributees who benefit by the fraud. In any case innocent purchasers for value are protected.

Any action under this section is subject to usual rules of res judicata; thus, if a forged will has been informally probated, an heir discovers the forgery, and then there is a formal proceeding under § 3-1001 of which the heir is given notice, followed by an order of complete settlement of the estate, the heir could not bring a subsequent action under § 1-106 but would be bound by the litigation in which the issue could have been raised. The usual rules for securing relief for fraud on a court would govern, however.

The final limitation in this § is designed to protect innocent distributees after a reasonable period of time. There is no limit (other than the 2 years from discovery of the fraud) against the wrongdoer. But there ought to be some limit after which innocent persons who have built up expectations in good faith cannot be deprived of the property by a restitution action.

The time of "discovery" of a fraud is a fact question to be determined in the individual case. In some situations persons may not actually know that a fraud has been perpetrated but have such strong suspicion and evidence that a court may conclude there has been a discovery of the fraud at that stage. On the other hand there is no duty to exercise reasonable care to discover fraud; the burden should not be on the heirs and devisees to check on the honesty of the other interested persons or the fiduciary.

## **Section 1-107. [Evidence of Death or Status.]**

In addition to the rules of evidence in courts of general jurisdiction, the following rules relating to a determination of death and status apply:-

- (1) Death occurs when an individual has sustained either (i) irreversible cessation of circulatory and respiratory functions or (ii) irreversible cessation of all functions of the entire brain, including the brain stem. A determination of death must be made in accordance with accepted medical standards.
- (2) A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie evidence of the fact, place, date, and time of death and the identity of the decedent.
- (3) A certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, that an individual is missing, detained, dead, or alive is prima facie evidence of the status and of the dates, circumstances, and places disclosed by the record or report.
- (4) In the absence of prima facie evidence of death under paragraphs (2) or (3), the fact of death may be established by evidence, including circumstantial evidence.
- (5) An individual whose death is not established under the preceding paragraphs who is absent for a continuous period of 5 years, during which the person has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. The person's death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.

### COMMENT

The definition of death provided in this section derives from the Uniform Determination of Death Act. It is intended to be a guideline solely for the purposes of this chapter, and shall not be used as a definition of death for any other purpose.

## **Section 1-108. [Acts by Holder of Certain Powers.]**

For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative or trustee, including relief from liability or penalty for failure to post bond or to perform other duties, and for purposes of consenting to modification or termination of a trust or to deviation from its terms,

- (i) the sole holder or all co-holders of a presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, or a presently exercisable power to appoint among a class of appointees which is broader than the class of those persons who would take in default of the exercise of such power,

(ii) if the court so permits in its discretion, the sole holder or all co-holders of a testamentary general power of appointment, or a testamentary power to appoint among a class of appointees which is broader than the class of those persons who would take in default of the exercise of such power,

are deemed to act for beneficiaries to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

#### COMMENT

The status of a holder of a general power in estate litigation is dealt with by § 1-403.

"General power", as used in this section, is intended to refer to the common law concept, rather than to tax or other statutory meanings. A general power, as used herein, is one which enables the power holder to draw absolute ownership to the power holder.

#### MASSACHUSETTS COMMENT

This section was modified to adopt the provisions of G.L. c. 206, § 24, which permits the court, in its discretion, to waive the appointment of a guardian ad litem in a proceeding for allowance of accounts where a person entitled to notice has a general power of appointment, or the power to appoint among a class of appointees which is broader than the class of persons who would take in default of the exercise of the power.

#### **Section 1-109. [Standard of Proof.]**

In contested cases, the standard of proof is a preponderance of the evidence.

## 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 chapter:

(1) "Administration", includes both formal and informal testate and intestate proceedings under Article III.

(2) "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 in accordance with chapter 201D, and an individual authorized to make decisions for another under a natural death act.

(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 instrument", 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 chapter 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) "Court", the probate and family court department of the trial court and includes the district court and juvenile court departments of the trial court in proceedings relating to the appointment of guardians of minors when the subject of the proceeding is a minor and there is proceeding before such district or juvenile court.

(8) "Conservator", a person who is appointed by a court to manage the estate of a protected person.

(9) "Descendant" of an individual means all of such individual's 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 chapter.

(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", a person designated in a will to receive a devise. 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) "Disability", cause for appointment of a conservator under section 5-401.

(13) "Distributee", any person who has received property of a decedent from the decedent's 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 such trustee's 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.

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

(15) "Exempt property", that property of a decedent's estate which is described in Section 2-403.

(16) "Fiduciary", includes a personal representative, guardian, conservator, and trustee.

(17) "Foreign personal representative", a personal representative appointed by another jurisdiction.

(18) "Formal proceedings", proceedings conducted before a judge with notice to interested persons.

(19) "Governing instrument", a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a donative, appointive, or nominative instrument of any other type.

(20) "Guardian", a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, but excludes 1 who is a guardian ad litem.

(21) "Heirs", except as controlled by Section 2-711, are persons, including the surviving spouse and the commonwealth, who are entitled under the statutes of intestate succession to the property of a decedent.

(22) "Incapacitated person", an individual for whom a guardian has been appointed under Part 3 of article V.

(23) "Informal proceedings", those conducted without notice to interested persons by an officer of the court acting as a magistrate for probate of a will or appointment of a personal representative.

(24) "Interested person", includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claims 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.

(25) "Issue", of a person means descendant as defined in subsection (9).

(26) "Joint tenants 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.

(27) "Lease", includes an oil, gas, or other mineral lease.

(28) "Letters", includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(29) "Magistrate", refers to the official of the court designated to perform the function of magistrate as provided in Section 1-307.

(30) "Minor", a person who is under eighteen years of age.

(31) "Mortgage", any conveyance, agreement, or arrangement in which property is encumbered or used as security.

- (32) "Nonresident decedent", a decedent who was domiciled in another jurisdiction at the time of death.
- (33) "Organization", a corporation, business trust, estate, trust, partnership, joint venture, association, government or governmental subdivision or agency, or any other legal or commercial entity.
- (34) "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 chapter by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.
- (35) "Payor", 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.
- (36) "Person", an individual or an organization.
- (37) "Personal representative", includes executor, administrator, successor personal representative, special administrator, special personal representative, and persons who perform substantially the same function under the law governing their status. "General personal representative" excludes special personal administrator.
- (38) "Petition", a written request to the court for an order after notice.
- (39) "Proceeding", includes action at law and suit in equity.
- (40) "Property", includes both real and personal property or any interest therein and means anything that may be the subject of ownership.
- (41) "Protected person", a person for whom a conservator has been appointed under Part 4 of article V.
- (42) "Protective proceedings" means a proceeding for appointment of a conservator under Article V, Part 4.
- (43) "Register", refers to the official designated in section 4 of chapter 217.
- (44) "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.
- (45) "Settlement", in reference to a decedent's estate, includes the full process of



administration, distribution, and closing.

(46) "Special personal representative", a personal representative as described by sections 3-614 to 3-618, inclusive.

(47) "State", 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", a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

(49) "Successors", persons, other than creditors, who are entitled to property of a decedent under the decedent's will or this chapter.

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

(51) "Survive", except for purposes of part 3 of article VI, 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", 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 chapter 201A, 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 escrow for another.

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

(56) "Ward", an individual for whom a guardian has been appointed pursuant to part 2 of article V.

(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.

#### COMMENT

Special definitions for Article VI are contained in § 6-301. Except as controlled by special definitions applicable to these particular Articles, or applicable to particular sections, the definitions in § 1-201 apply to the entire chapter.

The definition of "trust" and the use of the term in Article VII eliminate procedural distinctions between testamentary and inter vivos trusts. Article VII does not deal with questions of substantive validity of trusts where a difference between inter vivos and testamentary trusts will continue to be important.

The meanings of "child", "issue" and "parent" are related to § 2-114.

See Comment, § 7-101, concerning the definition of "trustee".

The purpose of the last sentence to the definition of "distributee" in Paragraph (13) is to extend to trustees of inter vivos, receptacle trusts, the same power to act as distributees of devised assets that is given to testamentary trustees. Also, §§ 3-1004 and 3-1006 relate to "distributees".

## PART 3

### SCOPE, JURISDICTION AND COURTS

#### **Section 1-301. [Territorial Application.]**

Except as otherwise provided in this chapter, this chapter applies to: (1) the affairs and estates of decedents, missing persons, and persons to be protected, domiciled in this commonwealth, (2) the property of nonresidents located in this commonwealth or property coming into the control of a fiduciary who is subject to the laws of this commonwealth, (3) incapacitated persons and minors in this commonwealth, (4) survivorship and related accounts in this commonwealth, and (5) trusts subject to administration in this commonwealth.

#### **Section 1-302. [Subject Matter Jurisdiction.]**

(a) To the full extent permitted by the constitution, the court has jurisdiction over all subject matter relating to (1) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons, (2) protection of minors and incapacitated persons, (3) trusts, and (4) any other matters authorized by section 6 of chapter 215. The district court and the juvenile court shall have concurrent jurisdiction with the probate and family court to appoint guardians of minors when the subject of the petition is a minor and there is a proceeding before such district or juvenile court. The district and juvenile court shall have continuing jurisdiction over resignation, removal, reporting, and other proceedings related to the guardianship.

(b) The court has full power to make orders, judgments and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

(c) The court has jurisdiction over protective proceedings and guardianship proceedings.

(d) If both guardianship and protective proceedings as to the same person are commenced or pending in the same court, the proceedings may be consolidated.

#### **Section 1-303. [Venue; Multiple Proceedings; Transfer.]**

(a) Where a proceeding under this chapter could be maintained in more than one place in this commonwealth, the division in which the proceeding is first commenced has the exclusive right to proceed.

(b) If proceedings concerning the same estate, protected person, ward, or trust are commenced in more than one court of this commonwealth, the court in which the proceeding was first commenced shall continue to hear the matter, and the other courts shall hold the matter in abeyance until the question of venue is decided, and if the ruling

court determines that venue is properly in another court, it shall transfer the proceeding to the other court.

(c) If a court finds that in the interest of justice a proceeding or a file should be located in another court of this commonwealth, the court making the finding may transfer the proceeding or file to the other court.

**Section 1-304. [Reserved.]**

MASSACHUSETTS COMMENT

This section of the UPC would apply the Rules of Civil Procedure to all probate matters, replacing a number of the Probate Court Rules. While such a change was viewed favorably by the Joint Committee, it was agreed that the application of the Rules of Civil Procedure is more appropriately within the purview of the Supreme Judicial Court. Note, however, that some court rules will be superseded, at least in part, by provisions of this Code, including Rules 6 (§1-401), 16 (§1-401), 29B (§§ 5-308, 5-412A), Uniform Practice 29 (§3-617).

**Section 1-305. [Reserved.]**

MASSACHUSETTS COMMENT

The duties of the Register are set out in G.L. c. 217, § 15.

**Section 1-306. [Reserved.]**

MASSACHUSETTS COMMENT

This section of the UPC, providing for jury trials of probate matters, has been reserved in light of St. 1986 c. 211 § 1, which repealed G.L. c. 216 § 16 and abolished jury issues in proceedings of the Probate and Family Court, effective January 1, 1987.

**Section 1-307. [Magistrate; Powers.]**

The acts and orders which this chapter specifies as performable by the magistrate may be performed either by the magistrate or such other official of the court, including a judge or other official of the court, all as designated by the court by a written order filed and recorded in the office of the court.

**Section 1-308. [Reserved.]**

MASSACHUSETTS COMMENT

This section of the UPC, providing for application of the Rules of Appellate Procedure, is not adopted. See G.L. c. 215, §§9 to 11.

**Section 1-309. [Reserved.]**

**Section 1-310. [Oath or Affirmation on Filed Documents.]**

Except as otherwise specifically provided in this chapter or by rule, every document filed with the court under this chapter including petitions, and demands for notice, shall be deemed to include an oath, affirmation, or statement to the effect that its representations are true as far as the person executing or filing it knows or is informed, and penalties for perjury may follow deliberate falsification therein.

PART 4

**NOTICE, PARTIES AND REPRESENTATION IN ESTATE  
LITIGATION AND OTHER MATTERS**

**Section 1-401. [Notice; Method and Time of Giving; Objections; Uncontested Matters.]**

(a) If notice on any matter is required by reference to this section and except for specific notice requirements as otherwise provided, the court shall fix a return date and issue a citation. The petitioner shall cause notice of the return day of any matter to be given to any interested person or attorney if the appearance is by attorney or the interested person requested that notice be sent to the attorney. Notice shall be given:

(1) by mailing a copy of the citation at least 14 days before the return date by certified, registered or ordinary first class mail addressed to all interested persons who have not assented in writing or their attorney if the appearance is by attorney or the interested person requested that notice be sent to the attorney at the person's office or place of residence, if known; or

(2) by delivering a copy of the citation to the person being notified personally at least 14 days before the return date; or

(3) by publishing a copy of the citation once in a newspaper designated by the Register of Probate having general circulation in the county where the proceeding is pending or in a newspaper designated by the register of probate in a county identified by the court, the publication of which is to be at least 7 days before the return date.

(b) The court for good cause shown may provide for a different method or time of giving notice for any return date. Notice of proceedings for guardianships of minors in the district court and the juvenile court shall be given in accordance with the rules of those courts.

(c) Proof of the giving of notice shall be made on or before the hearing or return day and filed in the proceeding.

(d) Any party to a formal proceeding who opposes the proceeding for any reason shall before 10:00 A.M. of the return date enter an appearance in writing giving the name of the proceeding, the objecting party's name and the objecting party's address or the name and address of the objecting party's attorney.

(e) The objecting party shall file a written affidavit of objections to the proceeding, stating the specific facts and grounds upon which the objection is based within 30 days after the return date. If the objecting party is a respondent as defined under section 5-101, the respondent or the respondent's appointed counsel shall file a written affidavit of objection to the proceeding, stating the specific facts and grounds upon which the objection is based within 30 days after the return date.

(f) If an affidavit of objections fails to comply with the requirements of the foregoing section (e), such affidavit of objections and the appearance of the party filing such affidavit of objections may be struck on motion after notice at any time after filing of such affidavit of objections.

(g) If a proceeding is unopposed, after the time required for any notice has expired, upon proof of notice, the court or the magistrate may enter appropriate orders on the strength of the pleadings if satisfied that all conditions are met, or the court may conduct a hearing and require proof of the matters necessary to support the order sought.

#### MASSACHUSETTS COMMENT

This section adopts many of the procedural guidelines of G.L. c. 206, § 24 and Probate Rule 16.

New Standing Order 03-09 requires proof of mailing for first class mail and proof of publication where an interested party's address or identity is unknown in any guardianship of adult or conservatorship matter.

New Standing Order 04-09 sets forth additional notice requirements in guardianship of minors.

Rule 6 of the Supplemental Rules of the Probate and Family Court has been amended to provide for service of a citation by delivering in hand or by mailing by certified, registered or ordinary first class mail at least 14 days before the return day to interested persons within the United States, its Commonwealths or territories; if in other parts, 1 month before the return day. An extended return date will be made for any counsel appointed for a minor, alleged incapacitated person or person to be protected to permit time to file an appearance or objection.

New Rule 29D of the Supplemental Rules of the Probate and Family Court requires that a notice regarding appointment of counsel be included in all guardianship and conservatorship notices.

Chapter 140 of the Acts of 2012 added the phrase "or in a newspaper designated by the register of probate in a county identified by the court" after the word "pending" in subsection (a)(3).

Chapter 140 of the Acts of 2012 added the sentence: "If the objecting party is a respondent as defined under section 5-101, the respondent or the respondent's appointed counsel shall file a written affidavit of objections to the proceeding, stating the specific facts and grounds upon which the objection is based within 30 days after the return date." to the end of subsection (e).

#### **Section 1-402. [Notice; Waiver.]**

A person, including a guardian ad litem, conservator, or other fiduciary, may waive notice by a writing signed by the person or the person's attorney and filed in the proceeding. A person for whom a guardianship or other protective order is sought, a ward, an incapacitated person, or a protected person may not waive notice.

#### MASSACHUSETTS COMMENT

See also G.L. c. 215, § 47 for dispensing with notice by written assent or waiver of notice.

#### **Section 1-403. [Pleadings; When Parties Bound by Others; Notice]**

In formal proceedings involving trusts or estates of decedents, minors, protected persons, or incapacitated persons, and in judicially supervised settlements, the following

apply:

(1) Interests to be affected shall be described in pleadings which give reasonable information to owners by name or class, by reference to the instrument creating the interests, or in other appropriate manner.

(2) Persons are bound by orders binding others in the following cases:

(i) Orders binding the sole holder or all co-holders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, or a presently exercisable power to appoint among a class of appointees which is broader than the class of those persons who would take in default of the exercise of such power, bind other persons to the extent their interests as objects, takers in default, or otherwise are subject to the power.

(ii) To the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate the conservator controls; orders binding a guardian bind the protected person or ward if no conservator has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties; and orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate. If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent a minor child.

(iii) An unborn or unascertained person who is not otherwise represented is bound by an order to the extent the person's interest is adequately represented by another party having a substantially identical interest in the proceeding.

(3) Notice is required as follows:

(i) Notice as prescribed by section 1-401 shall be given to every interested person or to one who can bind an interested person as described in (2)(i) or (2)(ii) above. Notice may be given both to a person and to another who may bind such person.

(ii) Notice is given to unborn or unascertained persons, who are not represented under (2)(i) or (2)(ii), by giving notice to all known persons whose interest in the proceedings are substantially identical to those of the unborn or unascertained persons.

#### COMMENT

This section adopts the concept of virtual representation and eliminates the need for a guardian ad litem for persons unborn, unascertained, when there is notice to a person having a substantially identical interest in the proceeding.

A general power, as used here and in § 1-108, is one which enables the power holder to draw



absolute ownership to the power holder. The section assumes a valid general power. If the validity of the power itself were in issue, the power holder could not represent others, as for example, the takers in default.

The general rules of civil procedure are applicable where not replaced by specific provision. Those rules would determine the mode of giving notice or serving process on a minor or the mode of notice in class suits involving large groups of persons made party to a suit.

### **Section 1-404. [Guardian ad Litem and Next Friend.]**

(a) If, in a formal proceeding involving trusts or estates of decedents, minors, protected persons, or incapacitated persons and in judicially supervised settlements, or otherwise, a minor, a protected person, an incapacitated person, or a person not ascertained or not in being may be or may become interested in any property, real or personal or, in the enforcement or defense of any legal rights, the court in which any action, petition or proceeding of any kind relative to or affecting any such estate or legal rights is pending may, upon the representation of any party thereto or of any person interested, appoint a suitable person to appear and act therein as guardian ad litem or next friend of such minor, protected person, incapacitated person or person not ascertained or not in being. A judgment, order or decree issued as a result of such proceedings, following an appointment made under this subsection, shall be conclusive upon all persons for whom a guardian ad litem or next friend was appointed.

(b) The reasonable expenses of such guardian ad litem or next friend, including compensation and counsel fees, shall be determined by the court and paid as it may order, either out of the estate or by the plaintiff, petitioner or the commonwealth. If such expenses are to be paid by the plaintiff or petitioner execution therefor may issue in the name of the guardian ad litem or next friend.

(c) Nothing in this code shall affect the power of a court to appoint a guardian or conservator to defend the interests of a minor impleaded in such court, or interested in a suit or matter there pending, nor the power of such court to appoint or allow a person, as next friend for a minor, to commence, prosecute or defend a suit in his behalf.

(d) If it appears in a probate or appointment proceeding that a spouse, heir at law or devisee is an incapacitated or protected person or a minor, notice of all proceedings shall be given to the incapacitated or protected person or minor and to his or her guardian or conservator. Unless the spouse, heir or devisee is under conservatorship or, if not under conservatorship, is under guardianship by someone other than the petitioner or is represented by someone other than the petitioner, the court shall appoint a guardian ad litem who shall be provided notice of all proceedings.

#### MASSACHUSETTS COMMENT

This section is added to adopt the provisions of G.L. c. 201, §§ 34 through 36, c. 192, § 1A, 1B and 1C and Uniform Probate Practice XXVI. The UPC version was found at §1-403(4).

Chapter 140 of the Acts of 2012 changed references in subsection (a) to mentally retarded and autistic persons to protected and incapacitated persons.

Prior to Chapter 140 of the Acts of 2012, the last sentence of subsection (d) read: "Unless the spouse, heir or devisee is represented by someone other than the petitioner or is under guardianship or

conservatorship, the court shall appoint a guardian ad litem who shall receive notice of all proceedings.”

7/2012