ARTICLE V

PROTECTION OF PERSONS UNDER DISABILITY AND THEIR PROPERTY

MASSACHUSETTS COMMENT

This Massachusetts version of Article V incorporates many protections for minor, incapacitated and disabled persons which have not yet found their way into the uniform act. Extensive revisions have been drawn from the Senior Lawyers Division of the ABA which evolved into proposals to revise the Uniform Guardianship and Protective Proceedings Act, also known as Article V of the Uniform Probate Code.

The additional protections include a more precise definition of incapacity and disability; distinctions between guardians of the person and conservators of property; information required of petitioners at commencement of proceedings; more elaborate reporting requirements for guardians and conservators; and mandated monitoring by the Courts of reports and accounts.

See new Standing Order 02-09 for the effect of the new MUPC on pending cases with no permanent decree and on guardianship and conservatorship appointments made before the July 1, 2009 effective date of Article V.

PREFATORY NOTE

The Uniform Guardianship and Protective Proceedings Act is the product of a continuing review and study of laws in the area of probate matters by the National Conference of Commissioners on Uniform State Laws. In 1969, the National Conference adopted and promulgated the Uniform Probate Code. Since that time, various amendments and additions to the Uniform Probate Code have been adopted and promulgated.

Article V, Parts 1, 2, 3, and 4 of the original Uniform Probate Code cover guardianships for minors, guardianships for reasons other than minority, and protective proceedings seeking court-appointed conservators or other protective orders for the estate concerns of minors, adult incompetents, absentees and others. The following new provisions expand and extend Article V, Parts 1, 2, 3, and 4 of the original Uniform Probate Code to include the concept of "limited guardianships."

The impetus for adding a "limited guardianship" concept to the guardianship and conservator provisions of the Uniform Probate Code grew out of the recommendations of an American Bar Association project, the ABA Commission on the Mentally Disabled, which, in relation to guardianship other than for minors, recommended that state laws be changed to avoid an asserted "overkill" implicit in standard guardianship proceedings. In part, this occurs, it was asserted, because a finding of non compos mentis or incompetence has been the traditional threshold for the appointment of a guardian. As a result, in consequence of the appointment of a guardian, all personal and legal autonomy is stripped from the ward and vested in the appointing court and guardian. The call for "limited guardianship" was a call for more sensitive procedures and for appointments fashioned so that the authority of the protector would intrude only to the degree necessary on the liberties and prerogatives of the protected person. In short, rather than permitting an all-or-none status, there should be an intermediate status available to the courts through which the protected person will have personal liberties and prerogatives restricted only to the extent necessary under the circumstances. The court should be admonished to look for a least-restrictive protection approach.

For a time, spokesmen for the Uniform Probate Code took the position that the formulations approved by the National Conference in 1969 should not be classified with "typical" guardianship legislation, and that Article V met the objectives of advocates of "limited guardianship." In particular, it was pointed out that appointment of a guardian of the person under the 1969 UPC (Art. V, Part 3) involves elaborate personal notices (1969 UPC § 5-303), and avoids a determination of "incompetence" because of a new standard describing an "incapacitated person" (1969 UPC § 5-101[1]). Further, it was

noted that a UPC guardian, who has not gained the powers of a conservator (1969 UPC, Art. V, Part 4) has very limited authority over a ward's estate (see 1969 UPC § 5-312), meaning that a common, historic reason for guardianship proceedings has been removed. A "protective proceeding" pursuant to 1969 UPC, Art. V, Part 4, through which a court appointee having broad powers over the estate of another may be obtained, does not involve any restriction or finding regarding the legal capacity of a protected person (1969 UPC § 5-408[5]). Also, great flexibility regarding the precise dimension of a protective order or the legal authority of a conservator is provided by explicit statutory language (1969 UPC §§ 5-408, 5-409, & 5-426).

Nonetheless, Idaho, the first state to adopt the Uniform Probate Code, and other states acting in response to requests by followers of the ABA Commission's work, have been enacting new "limited guardianship" statutes. In Idaho, the new limited guardianship legislation was enacted without specific repeal of the provisions of the Uniform Probate Code that were already part of their statutory law. Other states were enacting rather short statutes that adopted the least-intrusive or least-restrictive concept of limited guardianship in skeleton form without further elaboration. These, and other similar instances of confusion, overlap and other problems born of hasty legislative acceptance of limited guardianship language demonstrated that the National Conference of Commissioners on Uniform State Laws should adjust its formulations on guardianship to include explicit language relative to the concept of "limited guardianships." The concept of "limited guardianships" certainly is consistent with the general policy considerations upon which the Uniform Probate Code, Article V, had been based in 1969. In addition, by making limited-guardianship concepts more explicit in the act, it was and is believed that some confusion could be eliminated and that this act could replace skeleton-type acts to make the concept workable.

The clearest and most explicit statements incorporating the "limited guardianship" philosophy of a least-intrusive approach to guardianships and protective proceedings are in §§ 5-306(a), 5-306(c) and 5-407(a) of the 1982 Uniform Probate Code. However, other language that appeared previously as Uniform Probate Code, Article V, Parts 1, 2, 3, and 4 has been reviewed, altered to achieve greater internal consistency and adjusted to accommodate the "limited guardianship" concept more clearly.

Indeed, the new work by the National Conference of Commissioners on Uniform State Laws of Article V of the Uniform Probate Code has resulted in two free-standing acts. These acts extend the Uniform Probate Code formulations, but each act has been designed to be enacted as a separate act should a state legislature wish to do so. The first of these, the Uniform Durable Power of Attorney Act, was completed and promulgated in 1979, and has been well received as an improved version of what was originally included as UPC Article V, Part 5. The second step has resulted in the Uniform Guardianship and Protective Proceedings Act.

Part 1

GENERAL PROVISIONS AND DEFINITIONS

Section 5-101. [General Definitions.]

As used in parts 1, 2, 3 and 4 of this article:

(1) "Claims", in respect to a protected person, includes liabilities of the protected person, whether arising in contract, tort, or otherwise, and liabilities of the estate which arise at or after the appointment of a conservator, including expenses of administration.

(2) "Conservator", a person who is appointed by a court to manage the estate of a protected person and includes a limited conservator, temporary conservator and special conservator.

(3) "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.

(4) "Disability", cause for a protective order as described in Section 5-401.

(5) "Estate", includes the property of the person whose affairs are subject to this Article.

(6) "Guardian", a person who has qualified as a guardian of a minor or incapacitated person pursuant to court appointment and includes a limited guardian, special guardian and temporary guardian, but excludes one who is merely a guardian ad litem.

(7) "Guardian-ad-litem", a person or organization appointed under Sections 1-404 and 5-106 of this Code.

(8) "Health care proxy", a health care proxy executed pursuant to chapter 201D, a durable power of attorney for health care executed prior to the enactment of chapter 201D and similar instruments for appointment of health care agents executed in accordance with the laws of other jurisdictions.

(9) "Incapacitated person", an individual who for reasons other than advanced age or minority, has a clinically diagnosed condition that results in an inability 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.

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

(11) "Letters", includes Certificate of Guardianship and certificate of conservatorship.

(12) "Mentally retarded person", an individual who has a substantial limitation in present functioning beginning before age 18, manifested by significantly subaverage intellectual functioning existing concurrently with related limitations in two or more of the following applicable adaptive skills areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functioning academics, leisure, and work.

(13) "Minor", a person who is under 18 years of age.

(14) "Mortgage", any conveyance, agreement, or arrangement in which property is used as collateral.

(15) "Nursing facility", an institution or a distinct part of an institution which is primarily engaged in providing to residents: (i) skilled nursing care and related services for residents who require medical or nursing care; (ii) rehabilitation services for the rehabilitation of injured, disabled or sick persons; or (iii) on a regular basis, health-related care and services to individuals who because of their mental or physical condition require care and services, above the level of room and board, which can be made available to that individual only through institutional facilities that are not primarily a mental health facility or developmentally disabled facility; provided however, that the term nursing facility shall not apply with regard to the placement or transfer of a patient to a facility that is (i) licensed by the department of public health, under section 51 of chapter 111, as a long term acute care hospital nor inpatient rehabilitation facility; (ii) licensed by the department of public health, under section 71 of chapter 111, as a rest home; or (iii) licensed or certified as an assisted living residence by the executive office of elder affairs under 651 CMR 12.00 et seq.

(16) "Organization", includes a corporation, business trust, estate, trust, partnership, association, 2 or more persons having a joint or common interest, government, governmental subdivision or agency, or any other legal entity.

(17) "Parent", a natural or adoptive parent other than a parent whose parental rights have been terminated or a parent who has signed a voluntary surrender.

(18) "Person", an individual or an organization.

(19) "Petition", a written request to the court for an order after notice.

(20) "Proceeding", includes action at law and suit in equity.

(21) "Property", includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(22) "Protected person", a minor or other person for whom a conservator has

been appointed or other protective order has been made as provided in sections 5-407 and 5-408.

(23) "Protective proceeding", a proceeding under the provisions of part 4 of this article.

(23 ½) “Respondent”, an individual for whom the appointment of a guardian or conservator or other protective order is sought.

(24) "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.

(25) "Ward", a person for whom a guardian has been appointed solely because of minority.

COMMENT

Proceedings seeking appointment of a personal guardian for a minor without other disability as described in §§ 5-204 et seq. are somewhat less complicated, though formal in the sense that adjudications following notice and hearings are involved. The Code does not contemplate use in connection with guardianships and other protective proceedings of "summary" or "informal" proceedings of the sort utilized in decedent estate settlements for non-adjudicated probate of wills and appointment of personal representatives.

When read with § 5-407(f), the defined term "disability" plainly does not refer to lack of legal capacity, but only to the grounds described in warranting a protective proceeding as described in § 5-401.

The definition of "incapacitated person" supplies the substantive grounds for appointment of a guardian for reasons other than minority. See § 5-306(b).

The definition of "parent" is intended to include an adoptive parent, because an adoptive parent is eligible to inherit as a parent in intestate succession under the Uniform Probate Code and most statutes governing adoptions. The defined meaning of "parent" is especially significant when read with §§ 5-202(f) and 5-203 which prevent the appointment of a guardian of a minor, other than a temporary guardian under § 5-204(b), for whom a parent still has custodial rights.

The terms "ward," "incapacitated person" and "protected person" help distinguish persons over whom another holds personal, custodial authority from those whose property, or some part thereof, has been ordered into a statutory trusteeship or otherwise subjected to a protective court order. For instance, a minor for whom a guardian has been named and whose property is the subject of a conservatorship or other protective order is both a ward and a protected person.

MASSACHUSETTS COMMENT

Conservator is not specifically defined in Massachusetts law except as a caretaker for specific disabilities under G.L. c. 201, § 16.

Disability as used in § 5-401 encompasses all of the classes for which conservators have been appointed in Massachusetts

Guardian would have a more specific meaning under the UPC than has been considered under present Massachusetts law.

Incapacitated person follows the definition set out in the Uniform Guardianship and Protective Proceedings Act, March 1997 draft and offers a more specific definition than has been used in the Massachusetts statutes.

Mentally Retarded is included to aid in determining when a clinical team report is appropriate under §5-303(b)(11). Note that mental retardation alone is no longer a sufficient basis for appointment of a guardian. A mentally retarded person may not be incapacitated to a degree necessitating a guardianship.

Chapter 140 of the Acts of 2012 revised the definition of Nursing facility.

Chapter 140 of the Acts of 2012 added the definition of Respondent.

Visitors as proposed by the UPC have not been retained. Massachusetts practice has been to appoint either a Family Service Officer, Court Clinic, or Guardian Ad Litem as appropriate in the particular situation. These appointments do not conflict with the term "Visitor" and can fulfill the same function.

Section 5-102. [Facility of Payment or Delivery.]

(a) Any person under a duty to pay or deliver money or personal property to a minor may perform the duty, in amounts not exceeding $5,000 a year, by paying or delivering the money or property to:

(1) the minor;

(2) any person having the care and custody of the minor with whom the minor resides;

(3) a guardian of the minor;

(4) a custodian under the uniform transfers to minors act or a custodial trustee under the uniform custodial trust act; or

(5) a financial institution as a deposit in a state or federally insured interest bearing account or certificate in the sole name of the minor with notice of the deposit to the minor.

(b) If the person making payment or delivery knows that a conservator has been appointed or proceedings for appointment of a conservator of the estate of the minor are pending, the person may make payment or delivery only to the conservator.

(c) Persons, receiving money or property for a minor under subsection (a)(2) are obligated to apply the money to the support, care, education, health or welfare of the minor, but may not pay themselves except by way of reimbursement for out-of-pocket expenses for necessary goods and services. Any excess sums must be preserved for future support, care, education, health or welfare of the minor and any balance not so used and any property received for the minor must be turned over to the minor when majority is attained.

(d) A person who pays or delivers money or property in accordance with provisions of this section is not responsible for the proper application thereof.

COMMENT

Where a minor has only a small amount of property, it would be wasteful to require protective proceedings to deal with the property. This section makes it possible for other persons to handle the less complicated property affairs of the ward. Protective proceedings, including the possible establishment of a conservatorship, should be sought where substantial property is involved.

The protection afforded by the section is unavailable if the person making payment or delivery knows that a conservator has been appointed for the minor's estate or knows that a proceeding seeking appointment of a conservator is pending. By way of contrast, the protection is available in spite of a payor's knowledge that a guardian for the minor has been appointed or may be appointed as a result of a pending proceeding. Guardianship proceedings affecting minors are described in Part 2 of this Article. A conservator for a minor comes into existence, if at all, incident to a protective proceeding as described in Part 4 of this Article. A guardian's powers, described in § 5-209, do not include the authority to compel payment of money due the ward unless no conservator has been appointed. See § 5-209(c)(3). In contrast, a conservator has title to all assets of the minor's estate, except as otherwise provided in the case of a limited conservator. See § 5-419.

MASSACHUSETTS COMMENT

Massachusetts has adopted the Uniform Transfers to Minors Act, G.L. c. 201A and the Uniform Custodial Trust Act, c. 203B.

Section 5-103. [Delegation of Powers by Parent or Guardian.]

(a) A parent or parents of a minor, other than a parent or parents whose parental rights have been terminated or a parent who has signed a voluntary surrender, or a guardian or guardians of a minor or incapacitated person may appoint a temporary agent for a period not exceeding 60 days, and may delegate to such agent any power that the parent or guardian has regarding the care, custody or property of the minor child, ward or incapacitated person, except the power to consent to marriage or adoption of a minor; provided, however, that no parent or guardian shall appoint a temporary agent when a court has ordered that the minor child be placed in the custody of a person other than the parent or guardian.

(b) Any delegation under this section shall be by a writing signed by, or at the direction of, the parent(s) or guardian(s) and attested by at least 2 witnesses 18 years of age or older, neither of whom is the temporary agent together with the written acceptance of the temporary agent.

(c) A parent or guardian may not appoint a temporary agent of a minor if the minor has another living parent whose whereabouts are known and who is willing and able to provide care and custody for the minor unless the nonappointing parent consents to the appointment in writing. A parent may not appoint a temporary agent if the appointing parent's parental rights have been terminated or a parent who has signed a voluntary surrender.

(d) Any delegation under this section may be revoked or amended by the appointing parent(s) or guardian(s) and delivered to all interested persons. The authority of the temporary agent may be limited or altered by the court.

COMMENT

This section permits a temporary delegation of parental powers. For example, parents (or a guardian) of a minor plan to be out of the country for several months. They wish to empower a close relative (an uncle, e.g.) to take any necessary action regarding the child while they are away. Using this section, they could execute an appropriate power of attorney giving the uncle custody and power to consent. Then, if an emergency operation were required, the uncle could consent on behalf of the child; as a practical matter he would of course attempt to communicate with the parents before acting. The section is designed to reduce problems relating to consents for emergency treatment.

A guardian's authority over a ward or incapacitated person, described in § 5-209 (guardians of minors) and § 5-309 (guardians of incapacitated persons), includes authority regarding the care, custody and control of the ward that goes well beyond consenting to health care.

In contrast to § 5-102, which relates only to certain business affairs of minors, this section is pertinent to the affairs of minors and incapacitated persons for whom guardians have been appointed.

MASSACHUSETTS COMMENT

This and § 5-202 would replace the short term emergency and standby emergency proxy provisions of G.L. c. 201, §§ 2A to 2H.

See also the Caregiver Authorization Affidavit under M.G.L. c. 201F enacted the same day as the Massachusetts Uniform Probate Code. By an affidavit a parent or guardian may grant concurrent rights to direct education and health care of a minor child.

Section 5-104. [Reserved.]

Section 5-105. [Venue.]

(a) Provided that the court has jurisdiction:

(1) venue for a guardianship proceeding for a minor is in the court at the place where the minor resides at the time the proceedings are commenced, or, in the case of a nomination of a guardian by the will of a parent or guardian, in the court of the county in which the will was or could be probated except venue for a guardianship proceeding for a minor in district court of juvenile court shall be in the court where the underlying proceeding was filed;

(2) venue for a guardianship proceeding for an incapacitated person is in the court at the place where the incapacitated person resides at the time the proceedings are commenced, or, in the case of a nomination by the will of a parent or spouse, in the court of the county in which the will was or could be probated. If the incapacitated person has been admitted to a facility referred to in chapter one hundred eleven, section 70E pursuant to an order of a court of competent jurisdiction, venue is also in the county in which that facility is located; and

(3) venue for a protective proceeding is in the court at the place where the person to be protected resides at the time the proceedings are commenced, whether or not a guardian has been appointed in another place or, if the person

to be protected does not reside in this commonwealth, in the court at the place where property of the person is located.

(b) If a proceeding under this code is brought in more than one place in this commonwealth, the court at the place in which a 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

The standard venue rules apply to guardianship and conservatorship. If there are two proceedings, the original court has the right to proceed unless the original court determines that venue lies elsewhere or that the interest of justice requires the proceeding to be transferred to the later court. If the nominating instrument creating the guardianship is a will, then the proceeding should be filed in the county where the will would be subject to probate. For other nominating instruments, the proceeding should be filed where the minor resides.

MASSACHUSETTS COMMENT

This section follows G.L. c. 201, § 1 as to residency as the place of venue. This section does not confer jurisdiction upon the Court. See Article I, Part 3 and the Uniform Interstate Family Support Act, G.L. c. 209D.

This section combines in one place the provisions which appear in the Uniform Probate Code at §§ 5-205, 5-302, 5-312 and 5-403. Venue at the place where the individual is present (unless institutionalized pursuant to (b)) is not adopted. The distinction is recognized in Martin v. Gardiner, (1922), 240 Mass. 350. Section 5-312 on transfer of venue, being too cumbersome to administer, was also not included. A Court, by application to the office of the Chief Justice of the Court, may request transfer of a proceeding for hearing or trial.

Chapter 140 of the Acts of 2012 removed “of” from “nomination of by the will of a parent or spouse” in paragraph (2) of subsection (a).

Section 5-106. [Appointment of Counsel; Guardian ad Litem.]

(a) After filing of a petition for appointment of a guardian, conservator or other protective order, if the ward, incapacitated person or person to be protected or someone on his or her behalf requests appointment of counsel; or if the court determines at any time in the proceeding that the interests of the ward, incapacitated person or person to be protected are or may be inadequately represented, the court shall appoint an attorney to represent the person, giving consideration to the choice of the person if 14 or more years of age. If the ward, incapacitated person or person to be protected has adequate resources, his or her counsel shall be compensated from the estate, unless the court shall order that such compensation be paid by the petitioner. Counsel for any indigent ward, incapacitated person or person to be protected shall be compensated by the commonwealth or the petitioner as the court may order. This section shall not be interpreted to abridge or limit the right of any ward, incapacitated person or person to be protected to retain counsel of his or her own choice and to prosecute or defend a petition under this article.

(b) The court may appoint as guardian ad litem, an individual or any public or charitable agency to investigate the condition of the ward, incapacitated person or person to be protected and make appropriate recommendations to the court.

(c) The incapacitated person or person to be protected is entitled to be present at any hearing in person. A ward, if 14 or more years of age, is entitled to be present at any hearing in person unless the court, upon written findings, determines that the best interest of the ward will not be served thereby. The person is entitled to be represented by counsel, to present evidence, to cross-examine witnesses, including any physician or other qualified person and any guardian ad litem. The issue may be determined at a closed hearing if the person or counsel for the person so requests.

(d) Any person may apply for permission to provide information in the proceeding and the court may grant the request, with or without hearing, upon determining that the best interest of the person to be protected will be served thereby. The court may attach appropriate conditions to the permission.

COMMENT

The section establishes a framework within which professionals, including the judge, attorney, and physician, if any, may be expected to exercise good judgment in regard to the person who is the subject of the proceeding. The National Conference accepts that it is desirable to rely on professionals rather than to attempt to draft detailed standards or conditions for appointment.

Since there has not been any prior determination of incapacity, the person, who is the subject of the proceeding, should be extended the same rights as any other person whose personal freedom may be restricted as a result of the proceedings. Subsections (a) and (c) expressly recognize those rights. The hearing will be an open hearing, unless the person or counsel for the person requests a closed hearing.

Subsection (b) permits, but does not require, the court to utilize agencies, which may have a particular expertise, to aid in evaluating the person's condition. Subsection (d) permits a person, who might not otherwise be an "interested person," to request permission to provide information in the proceeding. The court may or may not grant the permission and may attach conditions to the permission when granted. The court is given broad latitude in using public-interest agencies and in permitting persons, who do not otherwise qualify as "interested persons," in aiding the court to evaluate the case and in determining measures that will be in the best interest of the individual. There are not any rights for these groups to participate in the proceedings-their involvement initially and the extent of their involvement is within the discretionary control of the court.

MASSACHUSETTS COMMENT

The wording relative to a "visitor" has been deleted as unnecessarily duplicative. A UPC provision allowing the Court to grant to an appointed attorney power to act as guardian ad litem was removed. An attorney's duty of zealous advocacy may conflict with a guardian ad litem's responsibility to report to the Court, see "Zealous Advocacy for the Defendant in Adult Guardianship Cases," Clearinghouse Review, January 1996, p. 879.

Under the Code adult persons subject to guardianships and conservators have the right to be present at hearings.

Chapter 140 of the Acts of 2012 added “or the petitioner as the court may order” to the end of the third sentence of subsection (a).

Section 5-107. [Who May Not Be Guardian]

The court shall not appoint as guardian any person petitioning for guardianship who: (i) is currently being investigated or has charges pending for committing an

assault and battery that resulted in serious bodily injury to the minor, incapacitated or protected person; or (ii) is currently being investigated or has charges pending for neglect of the minor, incapacitated or protected person. The court shall terminate a guardianship appointed under this section if, upon petition, it is established that the guardian is: (i) currently being investigated or has charges pending for committing an assault and battery that resulted in serious bodily injury to the minor, incapacitated or protected person; or (ii) is currently being investigated or has charges pending for neglect of the minor, incapacitated or protected person.

MASSACHUSETTS COMMENT

This new section 5-107 is added to preserve the protection added to G.L. c. 201, section 6B by section 108 of chapter 176 of the Acts of 2008, creating the Office of the Child Advocate.

Chapter 140 of the Acts of 2012 replaced four occurrences of “ill person” with “protected person”.

PART 2

GUARDIANS OF MINORS

Section 5-201. [Appointment and Status of Guardian of Minor.]

A person may become a guardian of a minor by appointment by parent or guardian or upon appointment by the court. The guardianship status continues until terminated, without regard to the location from time to time of the guardian or minor ward. The district or juvenile court may appoint guardians of minors if the person who is the subject of the petition is a minor and there is a proceeding before such district or juvenile court and shall have continuing jurisdiction over resignation, removal, reporting, and other proceedings related to the guardianship.

COMMENT

One purpose of this section is to establish that a guardian created by parental or guardian appointment under §§ 5-202 and 5-203, infra, has the same legal status, as a guardian by court appointment under § 5-204 and following sections. Another purpose is to declare that the relationship of guardian and ward continues even though both persons involved may move to another jurisdiction. Thus, this Article makes the guardian and ward status more like the parent/child status it replaces. This is in contrast to the older concept that the court of guardianship, acting through the guardian as its appointee, carries the principal responsibility for wards under its jurisdiction. The older concept is not satisfactory as applied to instances where the persons involved leave the jurisdiction of the appointing court.

MASSACHUSETTS COMMENT

The last sentence of this section retains the wording of G.L. c. 201, § 1.

Section 5-202. [Parental or Guardian Appointment of Guardian for Minor.]

(a) A parent, by will or other writing signed by the parent and attested by at least 2 witnesses, may appoint a guardian for any minor child the parent has or may have in the future, may revoke or amend the appointment, and may specify any desired limitations on the powers to be granted to the guardian.

(b) A guardian, by will or other writing signed by the guardian and attested by at least 2 witnesses, may appoint a guardian for any minor child for whom the guardian serves, may revoke or amend the appointment, and may specify any desired limitations on the powers to be granted to the guardian.

(c) Upon petition of an appointing parent or guardian, upon finding that the appointing parent or guardian will likely become unable to care for the minor within 2 years or less, and after notice as provided in section 5-206(b), the court, before the appointment becomes effective, may confirm the parent's or guardian's selection of a guardian and terminate the rights of others under section 5-203.

(d) Subject to section 5-203, the appointment of a guardian becomes effective on the first to occur of the appointing parent's or guardian's death, an adjudication that

the parent or guardian is an incapacitated person, or a written determination by a physician who has examined the parent or guardian that the parent or guardian is no longer able to care for the minor unless the minor is in the care or custody of a person other than a parent pursuant to sections 24, 25, 26 and 39G of chapter 119; chapter 201; or section 3, chapter 210.

(e) Within 30 days after the appointment becomes effective, a guardian shall:

(1) file a notice of acceptance of appointment and a copy of the will or other nominating instrument with the court of the county in which the will was or could be probated or, in the case of another nominating instrument, with the court of the county in which the minor resides; and

(2) unless the appointment was previously confirmed by the court, petition the court for confirmation of the appointment, giving notice in the manner provided in section 5-206(b).

(f) The parental appointment of a guardian does not supersede the parental rights of either parent. If both parents are dead or have been adjudged incapacitated persons, an appointment by the last parent who dies or was adjudged incapacitated has priority.

(g) The powers of a guardian who timely complies with the requirements of subsection (e) relate back to give acts by the guardian which are of benefit to the minor and which occurred on or after the date the guardian was eligible to file an acceptance of office the same effect as those which occurred after the filing.

(h) The authority of a guardian appointed under this section terminates upon the first to occur of the appointment of a guardian by the court, the revocation of the appointment by the appointing parent or guardian, or the filing of an objection pursuant to section 5-203.

COMMENT

This section has been revised by expanding the circumstances under which a parent can appoint a guardian to serve. It also provides for a guardian to appoint another to serve as the next guardian on the occurrence of a specified contingency. The number of contingencies has been increased from death to death, adjudication of incapacity or written determination by a physician that the parent or guardian is no longer able to care for a minor child.

In the case of a parent who has disappeared, relief should be sought under the emergency guardianship section § 5-204, with preference to the nominated guardian absent a showing that it is not in the best interest of the minor child for that person to be appointed.

Section (a) recognizes that the appointing parent may have additional children after making the appointment, so the language covers children that may be born, adopted or whose custody may be granted to the appointing parent, without the need to re-execute the nomination.

The nomination of a person as guardian is a rebuttable presumption that the nominated person should be appointed as guardian and the Court should not disregard the nomination without good cause.

The appointing parent or guardian has the option of either making the appointment in a nomination or petitioning the Court prior to the triggering event for confirmation of the appointment. Court confirmation terminates the right to object, but does not terminate the right of the appointing parent or

guardian to revoke the appointment.

The purpose of the confirmation of appointment is to convert the nominated guardianship to a regular guardianship as soon as possible. The petition for confirmation of appointment to be filed by a guardian should include the name and address of the minor, the identity and whereabouts of all persons having parental rights or serving as guardian, the petitioner's name and address, relationship to the parent and child, interest in the appointment, information about any custody orders, and a statement of the petitioner's willingness to serve; any limitations placed by the appointing parent or guardian on the authority of the nominated guardian; information about the petitioner; and reasons why the appointment should be confirmed. The petition should be accompanied by a death certificate, an order of adjudication of incapacity or a written statement by the physician who has examined the appointing parent or guardian that the appointing parent or guardian is no longer able to care for the minor child. In this last case, the written statement should include the prognosis and diagnosis of the parent's or guardian's condition. The petition should be accompanied by a copy of the nominating instrument. If the selection as guardian was previously confirmed pursuant to subsection (c), a copy of the order of confirmation should accompany the petition.

In the hearing on the petition for confirmation, if the Court finds that the appointing parent or guardian will not regain the ability to care for the minor child, the Court should enter an order confirming the appointment, absent evidence rebutting the presumption of appointment. If the Court finds that the parent or guardian may regain ability to care for the minor child, the Court should enter an order confirming the appointment for a period of time deemed appropriate by the Court. An order of confirmation cuts off the right of the minor, the other parent or the person other than the parent having care and custody of the minor to object. The confirmation also supersedes the rights of the non-appointing parent.

Unless stated to the contrary in this section, other sections of this Article apply.

If a parent becomes incapacitated subsequent to the guardian's appointment becoming effective, at that time, the guardian's appointment supersedes the parental rights of the incapacitated parent.

The minor, the other parent or the person other than the parent having care and custody of the minor all have the right to file an objection under § 5-203 within a specified time period. If an objection is filed, the nominated guardian has no authority to act and instead must petition the Court for appointment as guardian under § 5-206. An objection that is not timely filed does not terminate the appointment.

Section (g) provides that any acts performed before filing relate back to cover the time between the appointment becoming effective and the guardian's filing of the notice of acceptance to give those acts occurring in that time frame the same effect as those occurring after the filing of the notice of acceptance, as long as those prior acts are beneficial to the minor.

MASSACHUSETTS COMMENT

The UPC self-executing parental appointment of a guardian was at first not recommended by the Joint Committee. However, after enactment of Chapter 210 of 1995 adding sections 2A to 2H to G.L. c. 201, the Joint Committee reconsidered. The UPC version sets forth a clearer and simpler method for parental appointment without taxing scarce court resources. This and section 5-103 are intended to replace the standby emergency and short term emergency proxy provisions of G.L. c. 201 §§ 2A to 2H.

See also the Caregiver Authorization Affidavit under M.G.L. c. 201F enacted the same day as the Massachusetts Uniform Probate Code. By an affidavit a parent or guardian may grant concurrent rights to direct education and health care of a minor child.

Section 5-203. [Objection by Minor Fourteen or Older to Parental Appointment.]

Except where the court has previously confirmed a nominee under section 5-202(c),

(i) a minor 14 or more years of age who is the subject of a parental appointment,

(ii) the other parent, if that parent's parental rights have not been terminated, or

(iii) a person other than a parent having care or custody of the minor or with whom the minor has resided during the 60 preceding days, excluding a foster parent

may prevent the appointment or cause it to terminate by filing in the court in which the appointing instrument is filed a written objection to the appointment before it is accepted or within 30 days after receiving notice of its acceptance. An objection may be withdrawn. An objection does not preclude appointment of the nominee by the court in a proper proceeding of the parental nominee or any other suitable person. The court may treat the filing of an objection as a petition for the appointment of a temporary guardian, and proceed accordingly.

COMMENT

In the case where an objection is filed, the nominee has no authority to act and instead must file a petition for appointment as guardian under § 5-206. Although the minor, the other parent, or the person who has care or custody of the minor has the right to object to the appointment, the court still can appoint the nominee over any objection. An objection that is not timely filed will not prevent the appointment.

A written objection of a minor to a parental appointment prevents a later accepted appointment from becoming effective. However, if the objection is withdrawn before the filing of the guardian's acceptance, the effect of the objection is canceled. An objection filed within 30 days following the filing of an acceptance terminates the appointment but does not invalidate acts done previously in reliance on the guardian's authority. See § 5-210. It may be questioned, however, whether a post-acceptance objection that serves to terminate the authority of a parental guardian may be withdrawn so as to re-instate the guardian's authority. Safe practice in such a case would dictate that those interested in establishing a legal guardianship petition the court for an appointment under § 5-204.

The second to final sentence in the section is not intended to imply that a court proceeding for appointment of a guardian is necessary or appropriate when there has been an effective parental appointment. It was inserted to indicate that a minor age 14 or more may not block a court appointment of one nominated as guardian by a parent even though the prospective ward is able to block or terminate a parental appointment that does not involve action by the court. In this connection, note that § 5-207, applicable to an appointment by the court, directs the court to respect the nomination of the prospective ward if 14 or more years of age. But, the court may conclude that appointment of the minor's nominee would be contrary to the best interest of the minor, clearing the way for appointment of a parental nominee or some other suitable person.

Section 5-204. [Court Appointment of Guardian of Minor; Conditions for Appointment; Temporary Guardian.]

(a) The court may appoint a guardian for a minor if (i) the minor's parents are deceased or incapacitated, (ii) the parents consent, (iii) the parents' parental rights have been terminated, (iv) the parents have signed a voluntary surrender, or (v) the court finds the parents, jointly, or the surviving parent, to be unavailable or unfit to have custody. A guardian appointed pursuant to section 5-202 whose appointment has not been prevented or nullified under section 5-203 has priority over any guardian who may be appointed by the court, but the court may proceed with another appointment upon a finding that the parental nominee has failed to accept the appointment within 30 days

after notice of the guardianship proceeding.

(b) While a petition for appointment of a guardian is pending, if a minor has no guardian, and the court finds that following the procedures of this article will likely result in substantial harm to the health, safety or welfare of the minor occurring prior to the return date, and no other person appears to have authority to act in the circumstances, on appropriate motion, the court may appoint a temporary guardian who may exercise those powers granted in the order. A motion for appointment of a temporary guardian shall state the nature of the circumstances requiring appointment, the particular harm sought to be avoided, and the actions which will be necessary by the temporary guardian to avoid the occurrence of the harm. Such motion shall be accompanied by an affidavit containing facts supporting the statements and requests in the motion. The appointment of a temporary guardian for a minor may occur even though the conditions described in subsection (a) have not been established. The appointment may be for a period of up to 90 days except that upon a finding of extraordinary circumstances set forth in its order, the court may order an appointment for a longer period to a date certain. The court may for good cause shown extend the appointment for additional 90 day periods.

(c) If an appointed guardian is not effectively performing duties and the court further finds that the welfare of the minor requires immediate action, it may appoint, with or without notice, a special guardian for the minor having the powers of a general guardian, except as limited in the letters of appointment. The authority of any guardian previously appointed is suspended as long as a special guardian has authority. The appointment may be for a period of up to 90 days except that upon a finding of extraordinary circumstances set forth in its order the court may order an appointment for a longer period to a date certain. The Court may for good cause shown extend the appointment for additional 90 day periods.

(d) The petitioner must give written notice 7 days prior to any hearing for the appointment of a temporary guardian in hand to the minor if 14 or more years of age and by delivery or by mail to all persons named in the petition for appointment of guardian. A certificate that such notice has been given, setting forth the names and addresses of those to whom notice has been given, shall be prima facie evidence thereof.

(e) If the court determines that an immediate emergency situation exists which requires the immediate appointment of a temporary guardian, it may shorten or waive the notice requirements in whole or in part and grant the motion, provided, however, that prior notice shall be given to the minor, if the minor is 14 or more years of age, as the court may order and post-appointment notice of any appointment is given to the minor and those named in the petition for appointment of guardian stating further that any such person may move to vacate the order of the court or request that the court take any other appropriate action on the matter, and on said motion to vacate. The court shall hear said motion as a de novo matter, as expeditiously as possible. A certificate stating that such notice has been given shall be filed with the court within 7 days following the appointment. Upon failure to file such certificate the court may on its own motion vacate said order.

(f) In the event that any person to whom notice is required is of parts unknown,

such notice shall be delivered or mailed to that person's last known address, and the fact of such delivery or mailing shall be recited in the certificate of notice.

COMMENT

This section and §§ 5-205 through 5-207 following cover proceedings to secure a court appointed guardian of a minor. Sections 5-208 through 5-212 are applicable to all guardians of minors who derive authority from appointment by a parent or guardian or court appointment as contemplated in this Part. Nothing in this Article is intended to deal with the status of a so-called natural guardian, with the authority of a parent over a child, or with authority over a child or children that may be conferred by other state laws.

The court is not authorized to appoint a guardian for one for whom a parent has custodial rights or for one who has a guardian appointed by a parent or a guardian. Two purposes are served by this restriction. First, it prevents use of guardianship proceedings as a weapon or tactic in a squabble between parents concerning child custody, thereby forcing these disputes to marital proceedings. Second, it establishes that a guardian appointed by a parent or a guardian is as completely endowed with authority as a guardian as one appointed by court order. A guardian appointed by a parent or a guardian may be replaced by one appointed by the court following removal in proceedings under § 5-212. If a court-appointed guardian comes into existence before a parental nomination is discovered or implemented by acceptance, it will be necessary to terminate the authority of the court-appointed guardian in order to clear the way for the parental nominee. See § 5-201. In this connection, the second sentence of § 5-204(a) may be invoked in appropriate cases by the proponent of the parental or guardian nomination. This would occur in proceedings incident to an application to the court for an order correcting the original appointment. Alternatively, the nominee of a parent or guardian may urge removal of the court-appointed guardian on the ground that the best interest of the minor as contemplated in § 5-212 would be served by termination of the prior appointment.

Subsection (b) gives the court having jurisdiction of guardianship matters important power regarding the welfare of a minor in the form of authority to appoint a temporary guardian in cases of necessity. The authority permits appointment of a temporary guardian even though one or both parents have parental authority. It is to be noted, however, that the appointment of a temporary guardian must be preceded by notice and hearing. The authority might be particularly useful in a case where both parents have disappeared or simply departed without making adequate arrangements for their children. If the needs of minor children require the creation of guardianships before it is possible to prove the death of the parents, the subsection opens the way to appointment of one having parental authority for up to 90 days that does not require proof of the requirement of subsection (a) that "the parents are deceased or incapacitated, or the parents are unfit..."

MASSACHUSETTS COMMENT

Subsection (a) is not inconsistent with G.L. c. 201, § 2. G.L. c. 201, § 14 authorizes the appointment of a temporary guardian of a minor as provided in subsection (b). However, the wording has limited such appointment to situations where the parents are deceased or not available. Subsection (b) limits the term of a temporary guardian to the 90 day initial limit with 90 day extensions provided by Probate Rule 29B.

Subsection (a) gives the Court new authority to terminate or suspend parental rights, but utilizes the same factors as for approval of adoption without consent.

Chapter 140 of the Acts of 2012 changed “over the age of 14 years” in subsection (d) to read “14 or more years of age”.

Section 5-205. [Reserved.]

MASSACHUSETTS COMMENT

The UPC section on venue has been moved with §§ 5-302, 5-312 and 5-403 to a new section 5-

Section 5-206. [Procedure for Court Appointment of Guardian of Minor.]

(a) A minor 14 or more years of age or any person interested in the welfare of the minor may petition for appointment of a guardian.

(b) After the filing of a petition, notice shall be given in the manner prescribed by section 1-401 by the petitioner to:

(1) the minor, if the minor is 14 or more years of age and is not the petitioner;

(2) any person who has been awarded care or custody of the minor by a court of competent jurisdiction, whom is alleged to have had the principal care or custody of the minor or with whom the minor has resided during the 60 days preceding the filing of the petition, excluding foster parents;

(3) any living parent of the minor, excluding a parent whose parental rights have been terminated or a parent who has signed a voluntary surrender, or, if none, brothers and sisters, or, if none, heirs apparent or presumptive;

(4) the spouse if the minor is married;

(5) any person nominated as guardian by the minor if the minor has attained 14 years of age;

(6) any parental or guardian appointee whose appointment has not been prevented or terminated under section 5-203;

(7) any guardian or conservator currently acting for the minor in this commonwealth or elsewhere; and

(8) the United States veterans administration or its successor if the minor is entitled to any benefit, estate or income paid or payable by or through said administration or its successors.

(c) Upon hearing, if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the conditions of section 5-204(a) have been met, and the welfare and best interest of the minor will be served by the requested appointment, it shall make the appointment and issue letters. In other cases, the court may dismiss the proceedings or make any other disposition of the matter that will serve the best interest of the minor.

COMMENT

The Court, in order to make the decision on a petition for appointment, must have as much information as possible. The requirements of this section seek to fulfill that by requiring specific information be contained in the petition. The Court can, at any stage of the proceeding, appoint an attorney to represent the minor if the Court determines that the minor's interests are not or might not be adequately represented. See § 5-106.

Subsection (a) is intended to qualify as a potential petitioner any person with a serious interest or concern for a minor's welfare, including a relative or a non-relative having knowledge of the circumstances who completes a petition to the court, and any public official having official or personal concerns for the minor's welfare. If the court determines that the petitioner's concerns in the matter stem from interests that may not serve the welfare and best interest of the minor, it may dismiss the proceeding on the ground that the conditions for appointment as specified in subsection (c) have not been met.

MASSACHUSETTS COMMENT

Subsections (b)(4) and (8) were added to the UPC to make the section consistent with G.L. c. 201, § 2. See § 5-106 for the Court's authority to appoint a guardian ad litem or counsel for the minor.

Chapter 140 of the Acts of 2012 added “14 or more years of age” after “minor” in subsection (a).

Section 5-207. [Court Appointment of Guardian of Minor; Qualifications; Priority of Minor's Nominee.]

(a) The court may appoint as guardian any person whose appointment would be in the best interest of the minor. The court shall appoint a person nominated by the minor, if the minor is 14 or more years of age, unless the court finds the appointment contrary to the best interest of the minor.

(b) In the interest of developing self-reliance of a ward or for other good cause, the court, at the time of appointment or later, on its own motion or on motion of the minor ward or other interested person, may limit the powers of a guardian otherwise granted by this article and thereby create a limited guardianship. Any limitation on the statutory power of a guardian of a minor must be endorsed on the guardian's letters or, in the case of a guardian by parental appointment, must be reflected in letters that are issued at the time any limitation is imposed. Following the same procedure, additional powers may be granted or existing powers may be withdrawn.

COMMENT

Rather than provide for priorities among various classes of relatives, it was felt that the only priority should be for the person nominated by the minor. The important point is to locate someone whose appointment will be in the best interest of the minor. If there is contention among relatives over who should be named, it is not likely that a statutory priority keyed to degrees of kinship would help resolve the matter. For example, if the argument involved a squabble between relatives of the child's father and relatives of its mother, priority in terms of degrees of kinship would be useless.

Guardianships under this Article are not likely to be attractive positions for persons who are more interested in handling a minor's estate than in his or her personal well being. An order of a court having equity power is necessary if the guardian is to receive payment for services where there is no conservator for the minor's estate. Also, the powers of management of a ward's estate conferred on a guardian are restricted so that if a substantial estate is involved, a conservator will be needed to handle the financial matters.

Subsection (b) is new and extends the limited guardianship concept to guardians of minors by encouraging court orders limiting the already limited authority of a guardian. Using this provision, a court, at the time of appointment or on petition thereafter, might limit the authority of a guardian so that, for example, the guardian would not be able to direct the ward's religious training, or so that the guardian would be restricted in controlling the ward's place of abode by a condition that the ward's consent to any change of abode be given. The section provides that special restrictions of this sort may be removed or altered by further court order. Obviously, the drafters did not intend that the procedure for contracting and expanding special limitations on a guardian's power should be used to grant a guardian greater powers

than are described in the section.

MASSACHUSETTS COMMENT

Under G.L. c. 201, § 2 a minor above the age of 14 may nominate a guardian who, if approved by the Court, shall be appointed accordingly.

Section 5-208. [Bond; Consent to Service by Acceptance of Appointment; Notice.]

(a) Prior to receiving letters, a guardian shall accept appointment by filing a bond conditioned upon faithful discharge of all duties of the trust according to law and containing a statement of acceptance of the duties of the office. By accepting a parental or court appointment as guardian, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. The petitioner shall cause notice of any proceeding to be delivered or mailed to the guardian at the guardian's address listed in the court records and to the address then known to the petitioner.

(b) A surety shall be required on the bond of a guardian of a minor unless the court determines that it is in the best interest of the minor to waive the surety or to require additional sureties.

(c) The requirements and provisions of section 5-411 apply to guardians appointed under this part.

COMMENT

The "long-arm" principle behind this section is well established. It seems desirable that the court in which acceptance is filed be able to serve its process on the guardian wherever he or she has moved. The continuing interest of that court in the welfare of the minor is ample to justify this provision. The consent to service is real rather than fictional in the guardianship situation, where the guardian acts voluntarily in filing acceptance. It is probable that the form of acceptance will expressly embody the provisions of this section, although the statute does not expressly require this.

MASSACHUSETTS COMMENT

The requirement of a bond for guardians does not appear in the Uniform Probate Code because it is understood that a conservator will be appointed to manage property of a minor. It is added here as additional security where a guardian may be receiving periodic income, entitlements, etc. for a ward, which after time may accumulate and warrant protection. The Court appointment or parental appointment constitutes consent to jurisdiction. Without such acceptance no guardianship is created.

Section 5-209. [Powers, Duties, Rights and Immunities of Guardian; Limitations.]

(a) A guardian of a ward has the powers and responsibilities of a parent regarding the ward's support, care, education, health and welfare. A guardian shall act at all times in the ward's best interest and exercise reasonable care, diligence and prudence.

(b) In particular and without qualifying the foregoing, a guardian of a ward or incapacitated person shall:

(1) if consistent with the terms of any order by a court of competent jurisdiction take custody of the person of the ward or incapacitated person and establish his or her place of abode within or without this commonwealth;

(2) become or remain personally acquainted with the ward or incapacitated person and maintain sufficient contact with the person to know of his or her capacities, limitations, needs, opportunities, and physical and mental health;

(3) take reasonable care of the personal effects and commence protective proceedings if necessary to protect other property of the ward or incapacitated person;

(4) apply any available money of the ward or incapacitated person to his or her current needs for support, care, education health and welfare; provided that if any person has a legal duty to support a minor and has sufficient funds, the minor's funds are not to be used to discharge the legal obligation of support without prior order of the court unless the court determines that the minor's funds may be used for support;

(5) conserve any excess money of the person for his or her future needs, but if a conservator has been appointed for the estate of the ward or incapacitated person, the guardian, at least quarterly, shall pay to the conservator money of the ward or incapacitated person to be conserved for his or her future needs; and

(6) report the condition of the ward or protected person and of his or her estate that has been subject to the guardian's possession or control, as ordered by the court on petition of any person interested in the respondent's welfare or as required by court rule, but not less than annually.

(c) A guardian of a ward or incapacitated person may:

(1) apply for and receive money for the support of the ward or incapacitated person otherwise payable to his or her parent, guardian, or custodian for his or her support under the terms of any statutory benefit or insurance system or any private contract, devise, trust, conservatorship, or custodianship;

(2) if no conservator for the estate of the ward or incapacitated person has been appointed, institute proceedings, including administrative proceedings, or take other appropriate action to compel the performance by any person of a duty to support the ward or incapacitated person or to pay sums for his or her benefit;

(3) if consistent with the terms of any order by a court of competent jurisdiction and sections 5-306A and 5-309, consent to medical or other professional care, treatment, or advice for the ward or incapacitated person without liability by reason of the consent for injury to the ward or incapacitated person resulting from the negligence or acts of third persons unless a parent would have been liable in the circumstances;

(4) consent or refuse to consent to the marriage, divorce or adoption of the ward

or incapacitated person;

(5) if reasonable under all of the circumstances, delegate to the ward or incapacitated person certain responsibilities for decisions affecting his or her well-being; and

(6) utilize the services of agencies and individuals to provide necessary and desirable social and protective services of different types appropriate to such person including, but not limited to, counseling services, advocacy services, legal services, and other aid as the guardian deems to be in the interest of such person.

(d) A guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room, board and clothing personally provided to the ward or incapacitated person, but only as approved by order of the court and only from the person's estate. If a conservator, other than the guardian or one who is affiliated with the guardian, has been appointed for the estate of the person, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without order of the court controlling the guardian.

(e) A guardian need not use the guardian's personal funds for the ward or incapacitated person's expenses. A guardian is not liable to a third person for acts of the respondent solely by reason of the relationship.

COMMENT

Subsection (a) specifies that the parental powers and responsibilities entailed in a guardianship are those concerned with the ward or incapacitated person's "support, care, education health and welfare." These terms, when read with subsection (b), obviously refer to all kinds of considerations that should be weighed and implemented on behalf of the person by one invested with legal authority to control the respondent's activities.

Subsection (b)(2) reflects a consensus that a person who accepts a guardianship for a minor should be forewarned by explicit statutory language that the position entails responsibilities to make and maintain personal contact with the ward or incapacitated person.

The basic duties of a guardian are described in the mandates of subsection (b). Subsection (c) outlines optional authority that is extended to every guardian by the statute. Subsection (d), dealing with the delicate question of compensation for a guardian, requires that a guardian obtain approval from an independent conservator of the minor's estate or from the court before taking sums as compensation from funds of the minor that have been received by the guardian. In contrast to 1969 UPC § 5-312(a)(4) which permitted a guardian for an incapacitated person to take funds of the ward or incapacitated person by way of reimbursement for personal funds previously expended for certain purposes, this section requires court approval before any guardian's claim for reimbursement can be satisfied otherwise than through a conservator. Note, however, that no advance court approval is required in order to permit a guardian to use available funds of the ward or incapacitated person his or her current needs as provided in subsection (b)(4).

The powers of a guardian regarding property of the ward or incapacitated person are quite limited. Note, also, that the section does not encourage a guardian to apply to the appointing court for additional property power. Rather, the provisions are designed to encourage use of a protective proceeding under § 5-401 if property powers beyond those statutorily available to a guardian are needed. In this connection, it may be observed that subsection (c)(3), which contains one of the section's few references to use of the courts by a guardian, authorizes a guardian to institute proceedings to enforce a duty to support or pay money only if there is no conservator for the estate of the ward or incapacitated

person.

If the circumstances of a minor dictate that authority to control both person and property be obtained, protective proceedings under § 5-401 et seq. are indicated. In addition, the provisions of this Article enable interested persons to obtain appointment of the same or different persons as guardian and conservator for a minor, however, 2 proceedings are necessary where a single person is to serve in both capacities.

The language regarding a guardian's liability to third persons for acts of the incapacitated person is intended merely to prevent any attribution of liability to a guardian on account of a incapacitated person's acts that might be thought to follow from the guardian's legal control of the incapacitated person. It is not intended to exonerate a incapacitated person or the incapacitated person's own estate from the consequences of the incapacitated person's own negligence.

MASSACHUSETTS COMMENT

Unlike a Massachusetts Guardian of Minor, G.L. c. 201, § 4, the UPC guardian does not manage the minor's estate. Such management is the responsibility of a Conservator. The duties of the Guardian are to become personally involved in the care of the individual. The Code requires an annual report of the condition of the minor, but not necessarily in the same detail as is required of a guardian of an incapacitated person under 5-309(b). Sub-section (c)(6) is added to preserve G.L. c. 201 § 6A(g) and to apply it to all guardianships, not just guardianships of the mentally retarded.

Note that subsections (b), (c), (d) and (e) apply both to guardians of minors and guardians of incapacitated persons.

Section 5-210. [Termination of Appointment of Guardian; General.]

A guardian's authority and responsibility terminates upon the death, resignation, or removal of the guardian or upon the minor's death, adoption, marriage, or attainment of majority, but termination does not affect the guardian's liability for prior acts or the obligation to account for funds and assets of the ward. Resignation of a guardian does not terminate the guardianship until it has been approved by the court. A parental appointment under an informally probated will is voided if the will is later denied probate in a formal proceeding.

COMMENT

The position taken in this section that termination of a guardian's authority and responsibility does not apply retroactively to nullify prior acts is intended to govern all forms of termination including termination by objection as described in § 5-203.

Any of various events, that may or may not appear from the records of the court that appointed a guardian may serve to terminate the guardian's authority and responsibility. The extremely limited authority of a guardian over the ward's money and property tends to reduce instances when third persons may be jeopardized by an unknown termination of a guardian's authority. Principles protecting third persons who rely to their detriment on an apparent authority that has been terminated without their knowledge should govern the occasional cases in which a prior, unknown termination clouds the legality of a guardian's act.

MASSACHUSETTS COMMENT

Massachusetts G.L. c. 201, § 4 provides that the guardianship of a minor terminates at age 18 unless sooner discharged. G.L. c. 201, § 13 in the case of mentally ill, mentally retarded or spendthrift guardians describes a procedure for termination not unlike the UPC section. G.L. c. 201, § 25 requires the consent of a guardian of a minor for a marriage and in the absence thereof the Court may authorize a

marriage. G.L. c. 201, § 24 provides that a guardian of a married minor shall not have care, custody and education of the married minor unless authorized by the Court. G.L. c. 201, § 25 provides that the guardian of a married minor shall not apply the minor's funds for the minor's maintenance while the minor is married unless authorized by the Probate Court.

Section 5-211. [Reserved.]

Section 5-212. [Resignation, Removal, and Other Post-appointment Proceedings.]

(a) Any person interested in the welfare of a ward or the ward, if 14 or more years of age, may petition for removal of a guardian on the ground that removal would be in the best interest of the ward or for any other order that is in the best interest of the ward. A guardian may petition for permission to resign. A petition for removal or for permission to resign may, but need not, include a request for appointment of a successor guardian.

(b) Notice of hearing on a petition for an order subsequent to appointment of a guardian must be given to the ward, the guardian, the parents of the ward, provided that the parental rights have not been terminated or a voluntary surrender has not been signed, and any other person as ordered by the court.

(c) After notice and hearing on a petition for removal or for permission to resign, the court may terminate the guardianship and make any further order that may be appropriate, including appointment of a successor guardian.

COMMENT

Subsection (b) of this section is new and identifies who must be given notice of any post-appointment proceedings affecting a guardianship. Section 1-401 describes methods and time requirements concerning notices required by this section. Section 1-402, which controls waiver of required notices, prevents waiver of notice by the ward. It would seem that a ward who is the petitioner in a post-appointment proceeding would not need to receive notice. However, a ward should be given notice of a petition initiated in the ward's name by a next friend.

MASSACHUSETTS COMMENT

Removal under Massachusetts statutes is authorized by G.L. c. 201, § 33.

PART 3

GUARDIANS OF INCAPACITATED PERSONS

Section 5-301. [Nomination of Guardian for Incapacitated Person by Will or Other Writing.]

(a) A parent, by will or other writing signed by the parent and attested by at least 2 witnesses, may nominate a guardian for an unmarried adult child who the parent believes is an incapacitated person, may revoke or amend the nomination, and may specify any desired limitations on the powers to be granted to the guardian.

(b) An individual by will or other writing signed by the individual and attested by at least 2 witnesses, may nominate a guardian for his or her spouse who the individual believes is an incapacitated person, may revoke or amend the nomination, and may specify any desired limitations on the powers to be granted to the guardian.

MASSACHUSETTS COMMENT

The UPC self-executing parental or spousal appointment of a guardian is not adopted. Instead, the section provides for appointment by the Court after nomination by a parent or spouse and observance of customary procedure. See § 5-303. Nevertheless, this version sets forth a clearer and simpler method for parental nomination than recently enacted G.L. c. 201, §§ 2A to 2H, without taxing scarce court resources and extends the concept to incapacitated persons of any age, not just minors. This section adopts the language of Uniform Guardianship and Protective Proceedings Act, March 1997 Draft with the additional requirement of 2 attesting witnesses for a non-testamentary appointment of guardian.

Section 5-302. [Reserved.]

Section 5-303. [Procedure for Court Appointment of a Guardian of an Incapacitated Person.]

(a) An incapacitated person or any person interested in the welfare of the person alleged to be incapacitated may petition for a determination of incapacity, in whole or in part, and the appointment of a guardian, limited or general.

(b) The petition must set forth the petitioner's name, residence and address, relationship to the person alleged to be incapacitated, and interest in the appointment, and, to the extent known, set forth the following with respect to the person alleged to be incapacitated and the relief requested:

(1) the name and age of the person alleged to be incapacitated, his or her residence and the date residence was established;

(2) the address of the place it is proposed that the person alleged to be incapacitated will reside if the appointment is made;

(3) a brief description of the nature of the alleged incapacity, and whether:

(A) the person is alleged to be mentally retarded;

(B) the petitioner seeks court authorization to consent to treatment for which a substituted judgment determination may be required; or

(C) the petitioner seeks court authorization to admit the person alleged to be incapacitated to a nursing facility.

(4) the name and address of the proposed guardian, his or her relationship to the person alleged to be incapacitated, the reason why he or she should be selected, and the basis of the claim, if any, for priority for appointment;

(5) the name and address of the person's:

(A) spouse; and

(B) children, or if none, parents and brothers and sisters, or, if none, heirs apparent or presumptive and the ages of any who are minors, so far as known or ascertainable with reasonable diligence by the petitioner;

(6) the name and address of the person who has care or custody of the person alleged to be incapacitated or with whom the person has resided during the 60 days (exclusive of any period of hospitalization or institutionalization) preceding the filing of the petition;

(7) the name and address of any representative payee;

(8) the name and address of any person nominated as guardian by the person alleged to be incapacitated, and the name and address of any guardian or conservator currently acting for him or her in this commonwealth or elsewhere;

(9) the name and address of any agent designated under a durable power of attorney or health care proxy of which the person alleged to be incapacitated is the principal, if known to the petitioner, and the petitioner shall file with the petition a copy of any such power of attorney or health care proxy, if available;

(10) the reason why a guardianship is necessary, the type of guardianship requested, and if a general guardianship, the reason why limited guardianship is inappropriate, and if a limited guardianship, the powers to be granted to the limited guardian;

(11) a statement:

(A) that a medical certificate dated within 30 days of the filing of the petition or, in the case of a person alleged to be mentally retarded, a clinical team report dated within 180 days of the filing of the petition, is in the possession of the court or accompanies the petition; or

(B) of the nature of any circumstance which makes it impossible to obtain a medical certificate or clinical team report which shall be supported by

affidavit or affidavits meeting the requirement set forth in Massachusetts Rule of Civil Procedure 4.1(h), in which case the court may waive or postpone the requirement of filing of a medical certificate or clinical team report; and

(12) a general statement of the property of the person alleged to be incapacitated with an estimate of its value, including any insurance or pension, and the source and amount of any other anticipated income or receipts.

(c) Unless otherwise directed by the court, a medical certificate filed under this Article shall be signed by a registered physician, certified psychiatric nurse clinical specialist, nurse practitioner or licensed psychologist and shall contain:

(1) a description of the nature, type, and extent of the person's specific cognitive and functional limitations;

(2) an evaluation of the person's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills;

(3) a prognosis for improvement and a recommendation as to the appropriate treatment or habilitation plan; and

(4) the date of any examination upon which the report is based.

(d) A person alleged to be mentally retarded must be examined by a clinical team consisting of a physician, a licensed psychologist and a social worker, each of whom is experienced in the evaluation of mentally retarded persons, who shall report their conclusions to the court.

(e) The court may require additional medical or psychological testimony as to the mental and physical condition of the person alleged to be incapacitated or disabled and may require that such person submit to examination. The court may also appoint 1 or more persons, expert in incapacity or disability, to examine such person and report the conclusions thereof to the court.

(f) Reasonable expenses incurred in any examination conducted pursuant to this section shall be paid by the petitioner, the estate of the person alleged to be incapacitated or by the commonwealth as the court may determine.

COMMENT

The procedure described in this section involves two designations or appointments of persons as participants in a court-appointed guardianship proceeding based on incapacity. First, the Court may appoint counsel who may represent the individual in all cases in which he or she lacks adequate counsel of choice. In context, the court probably should determine not only that private counsel is in the case, but that such counsel has been engaged by the individual acting without undue pressure from others having some possible personal interest in the proceeding. Also, the court may designate a guardian ad litem to function as described.

Mandatory participation by a physician or licensed psychologist is not mentioned in connection with guardianship proceedings based on minority. See § 5-206. These officials are mentioned in § 5-404 covering court proceedings seeking what has sometimes been called a "guardian of the estate" and is

referred to in this Article as a conservator.

Underlying the guardian ad litem, counsel and physician provisions in this section is the belief that an individual's liberty to select an abode, to receive or to refuse medical, psychiatric, vocational, or other therapy or attention should not be displaced by appointment of a guardian unless the appointment is clearly necessary. In order to properly evaluate the merits of a petition seeking appointment of a guardian, the court should have access to information regarding the individual other than as provided by the petitioner and associated counsel. The precautionary procedures tend to reduce the risk that relatives of the individual may use guardianship procedures to relieve themselves of burdensome but bearable responsibilities for care, or to prevent the person from dissipating assets they would like to inherit, or for other reasons that are not in the best interest of the individual. Also, they are designed to increase the perceptions of the person available to the court and lessen the risk that honestly held but overly-narrow judgments regarding tolerable limits of eccentricity may cause the loss of an individual's liberty.

The mandatory features of a guardianship proceeding make the procedure somewhat more complex than a protective proceeding under § 5-401 et seq. seeking the appointment of a conservator. The differences may tend to discourage use of guardianships and so reduce the instances in which persons may be declared to be without legal capacity. Loss of control over one's property is serious, to be sure, but there are reasons why it may be viewed as less serious than suffering a judgment that one is legally incapacitated and must be placed under the care of a guardian. First, one's property can and should be made available for support of legal dependents. Also, court-directed management of one's property does not impede the personal liberty of the protected person nor prevent the acquisition and enjoyment of assets that may be acquired thereafter. Finally, the interposition of another's control of one's personal freedom is rarely necessary or justified in noncriminal settings. Alternative methods of protecting persons with little ability to care for themselves should be encouraged.

MASSACHUSETTS COMMENT

It should be noted that if circumstances require proceedings for both guardianship and conservatorship, two petitions should be filed, however, they may be consolidated for hearing. See § 1-302(d). The expanded level of detail required in the petition will aid the Court in determining if the appointment of counsel or a guardian ad litem is warranted.

Treatment referred to in § 5-303(b)(3)(B) may include treatment with antipsychotic medication, sterilization, abortion, electroconvulsive therapy, psychosurgery and withdrawal of artificial maintenance of nutrition and hydration. This disclosure will alert the Court to the need of any Rogers type proceedings and may cause the Court to enter limitations on the guardian's letters.

Although § 5-303(b)(11) requires in most cases the filing of a medical certificate or clinical team report with the petition, § 5-306(b) also requires that a medical certificate show an exam not more than 30 days prior to hearing. Thus, it is possible that a new medical certificate might have to be procured prior to hearing. This additional requirement does not apply to clinical team reports.

Medical certificates may be made by physicians, certified psychiatric nurse specialists and licensed psychologists. See amended Uniform Practice XXII.

If it is impossible to obtain a medical certificate because the respondent will not submit to an exam, a motion pursuant to M.R.C.P. Rule 35 may be presented.

Subsection (b)(9) has been altered to require disclosure of health care proxies and durable powers of attorney "if known to the petitioner." This should not be understood to lessen the obligation of the petitioner and counsel to inquire as to the existence of such documents, especially in light of priorities of appointment under § 5-305 and priority of authority under § 5-309(e).

Note that if a health care provider questions the authority of a health care agent, under G.L. c. 201D a petition may be made to determine the validity of a health care proxy, thus avoiding the complexities of a guardianship. Also, a prayer may be added to a guardianship petition to invalidate a proxy, override a decision of a health care agent or for removal of the agent.

Subsection (e) makes applicable to all guardianships a provision which was apropos only to guardianship of the mentally retarded, G.L. c. 201, § 6A (f).

New Standing Order 01-09 provides that medical certificates, clinical team reports, treatment plans and medical affidavits will be impounded and not available for public inspection. A request of interested party to access impounded medical information may be made on a new form provided by the court (MPC 303). Interested parties may request impoundment of additional documents or the entire file under Trial Court Rule VIII, Uniform Rules on Impoundment Procedure. If a case is dismissed without a decree having entered, the entire file will be impounded.

Chapter 140 of the Acts of 2012 added subsection (e); changed the phrase "the petitioner shall attach a copy" in subsection (b)(9) to read, "the petitioner shall file with the petition"; and inserted "registered" before the word "physician", and ", certified psychiatric nurse clinical specialist, nurse practitioner" after the word "physician" in subsection (c).

Section 5-304. [Notice in Guardianship or Conservatorship Proceeding.]

(a) In a proceeding for the appointment of a guardian or conservator or for protective order, notice shall be given by the petitioner to:

(1) the person alleged to be incapacitated or the person to be protected, if 14 or more years of age, and the person's spouse and children, or, if none, parents, brothers and sisters, or, if none, heirs apparent or presumptive;

(2) any person who is serving as guardian, conservator, or who has the care or custody of the person or with whom the person has resided during the 60 days (exclusive of any period of hospitalization or institutionalization) preceding the filing of the petition;

(3) in case no other person is notified under paragraph (1), at least one of the nearest adult relatives, if any can be found;

(4) all other persons named in the petition;

(5) if the person is alleged to be mentally retarded, to the department of mental retardation;

(6) the United States veteran's administration or its successor, if the person is entitled to any benefit, estate or income paid or payable by or through said Administration or its successor; and

(7) any other person as directed by the court.

(b) Notice of hearing on a petition for an order subsequent to appointment of a guardian or conservator must be given to the incapacitated person, person to be protected, the guardian, the conservator and any other person as ordered by the court.

(c) Notice must be served personally on the person alleged to be incapacitated or the person to be protected. In all other cases, required notices must be given as provided in section 1-401.

(d) A person alleged to be incapacitated or person to be protected may not waive notice.

COMMENT

It may be noted that personal service is not necessary for the required notice to a minor age 14 or over under § 5-206 governing proceedings seeking a court-appointed guardian for a minor. In this connection, it should be observed that the instant section, rather than § 5-206, governs if the petition seeks to establish that a minor is incapacitated for reasons other than minority and so is in need of a guardian who will continue to serve in spite of the person's attainment of majority. See § 5-210 and compare § 5-310.

MASSACHUSETTS COMMENT

In section (a)(1) heirs apparent or presumptive have been added to make this section incorporate all requirements of G.L. c. 201, § 7. This section is made applicable to conservatorship proceedings by § 5-405. Domestic partners should be afforded notice by sub-section (a)(2) the application of which has also been expanded by not counting periods of hospitalization or institutionalization in computing the period of residence.

Chapter 140 of the Acts of 2012 removed reference to “temporary guardian or temporary conservator” in subsection (a) since notice in such instances is provided for in 5-308(c) and 5-412A(d) and inserted “, if 14 or more years of age, and the person’s,” in place of the words “and his” in subsection (a)(1).

Section 5-305. [Who May Be Guardian; Priorities.]

(a) Any qualified person may be appointed guardian of an incapacitated person.

(b) Unless lack of qualification or other good cause dictates the contrary, the court shall appoint a guardian in accordance with the incapacitated person's most recent nomination in a durable power of attorney.

(c) Except as provided in subsection (b), the following, if suitable, are entitled to consideration for appointment in the order listed:

(1) the spouse of the incapacitated person or a person nominated pursuant to subsection (b) of 5-301;

(2) a parent of the incapacitated person, or a person nominated pursuant to section 5-301; and

(3) any person the court deems appropriate.

(d) With respect to persons having equal priority, the court shall select the one it deems best suited to serve. The court, acting in the best interest of the incapacitated person, may pass over a person having priority and appoint a person having a lower priority or no priority.

COMMENT

Subsection (a) limits those who may act as guardians for incapacitated persons to "qualified" persons. "Qualified" in its application to "persons" is not defined in this Article, meaning that an appointing court has considerable discretion regarding the suitability of an individual to serve as guardian

for a particular ward. In exercising this discretion, the court should give careful consideration to the needs of the ward and to the experience or other qualifications of the applicant to react sensitively and positively to the ward's needs.

Subsections (b) and (c) govern priorities among persons who may seek appointment. Unless good cause or lack of qualification dictates otherwise, priority is with one nominated in an unrevoked power of attorney of the ward that remains effective though the ward has become incompetent since executing the power of attorney.

MASSACHUSETTS COMMENT

The UPC hierarchy of priorities is not adopted as it may create an impediment to appointment of one better suited but of lesser standing. See G.L. c. 201, §§ 6, 6A and 6B which contain no priorities. Section 5-503 allows one to nominate a guardian in a durable power of attorney.

Chapter 140 of the Acts of 2012 replaced the phrase “by will of a deceased spouse or by other writing signed by the spouse and attested by at least 2 witnesses” with “pursuant to subsection (b) of 5-301” in subsection (c)(1).

Section 5-306. [Findings; Order of Appointment.]

(a) The court shall exercise the authority conferred in this part so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's limitations or other conditions warranting the procedure.

(b) Upon hearing, the court may appoint a guardian as requested if it finds that:

(1) a qualified person seeks appointment;

(2) venue is proper;

(3) the required notices have been given;

(4) any required medical certificate is dated and the examination has taken place within 30 days prior to the hearing;

(5) any required clinical team report is dated and the examinations have taken place within 180 days prior to the filing of the petition;

(6) the person for whom a guardian is sought is an incapacitated person;

(7) the appointment is necessary or desirable as a means of providing continuing care and supervision of the incapacitated person; and

(8) the person's needs cannot be met by less restrictive means, including use of appropriate technological assistance.

The court, on appropriate findings, may enter any appropriate order, or dismiss the proceedings.

(c) The court, at the time of appointment or later, on its own motion or on appropriate petition or motion of the incapacitated person or other interested person, may limit the powers of a guardian otherwise conferred by parts 1, 2, 3 and 4 of this article and thereby create a limited guardianship. Any limitation on the statutory power of a guardian of an incapacitated person must be endorsed on the guardian's letters. Following the same procedure, a limitation may be removed or modified and appropriate letters issued.

COMMENT

The purpose of subsections (a) and (c) is to remind an appointing court that a guardianship under this legislation should not confer more authority over the person of the incapacitated person than appears necessary to alleviate the problems caused by the person's incapacity. This is a statement of the general principle underlying a "limited guardianship" concept. For example, if the principal reason for the guardianship is the incapacitated person's inability to comprehend a personal medical problem, the guardian's authority could be limited to making a judgment, after evaluation of all circumstances, concerning the advisability and form of treatment and to authorize actions necessary to carry out the decision. Or, if the incapacitated person's principal problem stems from memory lapses and associated wanderings, a guardian with authority limited to making arrangements for suitable security against this risk might be indicated. Subsection (c) facilitates use by the appointing court of a trial-and-error method to achieve a tailoring of the guardian's authority to changing needs and circumstances. Section 5-106 authorizes use of any public or charitable agency that demonstrates interest and competence in evaluating the condition and needs of the incapacitated person in arriving at a decision regarding the appropriate powers of the guardian.

The section does not authorize enlargement of the powers of a guardian beyond those described in § 5-309 and related sections. Rather, limitations on a guardian's § 5-309 powers and duties may be imposed and removed.

Section 5-306A. [Substituted Judgment.]

(a) No guardian, temporary guardian or special guardian of a minor or an incapacitated person shall have the authority to consent to treatment for which substituted judgment determination may be required, provided that the Court shall authorize such treatment when it (i) specifically finds using the substituted judgment standard that the person, if not incapacitated, would consent to such treatment and (ii) specifically approves and authorizes a treatment plan and endorses said plan in its order or decree. The court shall not authorize such treatment plan except after a hearing for the purpose of which counsel shall be provided for any indigent minor or incapacitated person. Said hearing shall be held as soon as is practicable; provided, however, that if the petitioner requests a temporary order on the grounds that the welfare of the minor or person alleged to be incapacitated requires an immediate authorization of treatment, the court shall act on such request in accordance with the procedures set forth in section 5-308. When approving and authorizing an antipsychotic medication treatment plan by order or decree, the court shall consider the testimony or affidavit of a licensed physician or certified psychiatric nurse clinical specialist regarding such plan.

(b) The court may delegate to a guardian the authority to monitor the treatment process to ensure that a treatment plan is followed, provided a guardian is readily available for such purpose. Approval of a treatment plan shall not be withheld, however, because a guardian is not available to serve as monitor. In such

circumstances, the court shall appoint a suitable person to monitor the treatment process to ensure that the treatment plan is followed. Reasonable expense incurred in such monitoring may be paid out of the estate of such person, by the petitioner, or, subject to appropriation, by the commonwealth, as may be determined by the court.

(c) Each order authorizing a treatment plan pursuant to this section shall provide for periodic review at least annually to determine whether the minor or incapacitated person's condition and circumstances have substantially changed such that, if competent, the minor or incapacitated person would no longer consent to the treatment authorized therein. Each such order shall further provide for an expiration date beyond which the authority to provide treatment thereunder shall, if not extended by the court, terminate.

(d) A minor 14 or more years of age or an incapacitated person shall be required to attend any hearing relative to authority to consent to treatment for which a substituted judgment determination is required, unless the court finds that there exist extraordinary circumstances requiring the absence of the minor or incapacitated person in which event the attendance of his counsel shall suffice; provided that the court may base its findings exclusively upon affidavits and other documentary evidence if it (1) determines after careful inquiry and upon representations of counsel, that there are no contested issues of fact and (2) includes in its findings the reason that oral testimony was not required.

(e) Any privilege established by section 135A of chapter 112 or by section 20B of chapter 233 relating to confidential communications shall not prohibit the filing of reports or affidavits, or the giving of testimony, pursuant to this part, for the purposes of obtaining treatment of a person alleged to be incapacitated; provided, however, that such person has been informed prior to making such communication that they may be used for such purpose and has waived the privilege.

MASSACHUSETTS COMMENT

The types of treatment for which a substituted judgment procedure may be required are not listed as they may vary depending on the invasiveness of the particular proposed procedure or because of advancements which reduce side effects, etc., see In Matter of Spring, 380 Mass. 629, 405 N.E.2d 115 (1980). Treatments for which Court authorization may be required include antipsychotic medication, sterilization, abortion, electro-convulsive therapy, psychosurgery and removal of artificial maintenance of nutrition or hydration. Subsection (b) codifies the annual review of treatment plans established by Guardianship of Weedon, 409 Mass. 196, 565 NE2d 432 (1991).

Authority for a guardian to commit a person to a mental health or retardation facility by the Probate Court under G.L. c. 201 is repealed. See § 5-309(f). Guardians may, however, proceed under G.L. c. 123 in the District Court.

Subsection (e) preserves the protections of G.L. c. 201, § 6A(g). See also Comm. v. Lamb, 365 Mass. 265 (1974).

Chapter 140 of the Acts of 2012 added “When approving and authorizing an antipsychotic medication treatment plan by order or decree, the court shall consider the testimony or affidavit of a licensed physician or certified psychiatric nurse clinical specialist regarding such plan.” to subsection (a), added the words “minor or” before the words “incapacitated person” twice in subsection (c), and by changing the first clause of subsection (d) to also apply to minors 14 or more years of age.

Section 5-306B. [Authority to Consent to Treatment.] [Reserved]

MASSACHUSETTS COMMENT

This section is reserved for codification and simplification of the procedure for authorization of Rogers type treatments.

Section 5-307. [Acceptance of Appointment; Consent to Jurisdiction.]

(a) Prior to receiving letters, a guardian shall accept appointment by filing a bond conditioned upon faithful discharge of all duties of the trust according to law and containing a statement of acceptance of the duties of the office. By accepting a parental or court appointment as guardian, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. The petitioner shall cause notice of any proceeding to be delivered or mailed to the guardian at the guardian's address listed in the court records and to the address then known to the petitioner.

(b) A surety shall be required on the bond of a guardian of an incapacitated person unless the court determines that it is in the best interest of the incapacitated person to waive surety or to require additional sureties. Language in a durable power of attorney or health care proxy waiving the guardian's bond shall be deemed to be a request for waiver of any necessity of sureties on a bond.

(c) The requirements and provisions of section 5-411 apply to guardians appointed under this part.

COMMENT

The "long-arm" principle behind this section is well established. It seems desirable that the court in which acceptance is filed be able to serve its process on the guardian wherever he or she has moved. The continuing interest of that court in the welfare of the minor is ample to justify this provision. The consent to service is real rather than fictional in the guardianship situation, where the guardian acts voluntarily in filing acceptance. It is probable that the form of acceptance will expressly embody the provisions of this section, although the statute does not expressly require this.

MASSACHUSETTS COMMENT

The requirement of a bond for guardians does not appear in the Uniform Probate Code because it is understood that a conservator will be appointed to manage property of a disabled person. It is added here as additional security where a guardian may be receiving periodic income entitlements, etc. for a ward or incapacitated person, which after time may accumulate and deserve protection. The Court appointment or parental appointment constitutes consent to jurisdiction. Without such acceptance no guardianship is created.

Section 5-308. [Emergency Orders; Temporary Guardians.]

(a) While a petition for appointment of a guardian is pending, if an incapacitated person has no guardian, and the court finds that following the procedures of this article will likely result in immediate and substantial harm to the health, safety or welfare of the person alleged to be incapacitated occurring prior to the return date, and no other person appears to have authority to act in the circumstances, on appropriate motion the

court may appoint a temporary guardian who may exercise only those powers granted in the order. A motion for appointment of a temporary guardian shall state the nature of the circumstances requiring appointment, the particular harm sought to be avoided, the actions which will be necessary by the temporary guardian to avoid the occurrence of the harm and the name and address of any agent designated under a health care proxy or durable power of attorney of which the person alleged to be incapacitated is the principal, and the petitioner shall attach a copy of any such health care proxy or durable power of attorney, if available. Such motion shall be accompanied by an affidavit containing facts supporting the statements and requests in the motion. The appointment may be for a period of up to 90 days except that upon a finding of extraordinary circumstances set forth in its order, the court may order an appointment for a longer period to a date certain. The court may for good cause shown extend the appointment for additional 90 day periods.

(b) If an appointed guardian is not effectively performing duties and the court further finds that the welfare of the incapacitated person requires immediate action, it may appoint, with or without notice, a special guardian for the incapacitated person having the powers of a general guardian, except as limited in the letters of appointment. The authority of any guardian previously appointed by the court is suspended as long as a special guardian has authority. The appointment may be for a period of up to 90 days except that upon a finding of extraordinary circumstances set forth in its order the court may order an appointment for a longer period to a date certain. The court may for good cause shown extend the appointment for additional 90 day periods.

(c) The petitioner must give written notice 7 days prior to any hearing for the appointment of a temporary guardian in hand to the person alleged to be incapacitated and by delivery or by mail to all persons named in the petition for appointment of guardian. A certificate that such notice has been given, setting forth the names and addresses of those to whom notice has been given, shall be prima facie evidence thereof.

(d) If the court determines that an immediate emergency situation exists which requires the immediate appointment of a temporary guardian, it may shorten or waive the notice requirements in whole or in part and grant the motion, provided, however, that prior notice shall be given to the person alleged to be incapacitated as the court may order and post appointment notice of any appointment is given to the person alleged to be incapacitated and those named in the petition for appointment of guardian stating further that any such person may move to vacate the order of the court or request that the court take any other appropriate action on the matter, and on said motion to vacate. The court shall hear said motion as a de novo matter, as expeditiously as possible. A certificate stating that such notice has been given shall be filed with the court within 7 days following the appointment. Upon failure to file such certificate the court may on its own motion vacate said order.

(e) In the event that any person to whom notice is required is of parts unknown, such notice shall be delivered or mailed to that person's last known address, and the fact of such delivery or mailing shall be recited in the certificate of notice.

(f) Appointment of a temporary guardian, with or without notice, is not a final determination of a person's incapacity.

(g) The court may remove a temporary guardian at any time. A temporary guardian shall make any report the court requires. In other respects the provisions of parts 1, 2, 3 and 4 of this article concerning guardians apply to temporary guardians.

COMMENT

The language "and no other person appears to have authority to act in the circumstances" has been added to subsection (a). The added language should aid in preventing the mere institution of a guardianship proceeding from upsetting an arrangement for care under a health care proxy, or for nullifying an opportunity to use legislation like the Model Health Care Consent Act to resolve a problem involving the care of a person who is unable to care for himself or herself.

Under subsection (b), the appointing court retains authority to act on petition or on its own motion to suspend a guardian's authority by appointing a special guardian. The necessary finding, which need not follow notice to interested persons, is that the welfare of the incapacitated person requires action and the appointed guardian is not acting effectively.

MASSACHUSETTS COMMENT

Probate Rule 29B, introduced following the 1973 Study of the UPC, adopted a reviewable 90 day limit on temporary guardians or conservators. Temporary guardians for minors, spendthrifts, mentally ill and mentally retarded are authorized by petition under G.L. c. 201, § 14 and the temporary guardian's powers are enumerated in c. 201, § 15. Subsection (c) is similar to § 3-306. Subsections (d) through (f) follow generally Probate Rule 29B and (g) is taken from the Uniform Guardianship and Protective Proceedings Act, § 311(c), March 1997 draft.

Section 5-309. [Powers, Duties, Rights and Immunities of Guardians; Limitations.]

(a) Except as limited pursuant to section 5-306(c), a guardian of an incapacitated person shall make decisions regarding the incapacitated person's support, care, education, health and welfare, but a guardian is not personally liable for the incapacitated person's expenses and is not liable to third persons by reason of that relationship for acts of the incapacitated person. A guardian shall exercise authority only as necessitated by the incapacitated person's mental and adaptive limitations, and, to the extent possible, shall encourage the incapacitated person to participate in decisions, to act on his or her own behalf, and to develop or regain the capacity to manage personal affairs. A guardian, to the extent known, shall consider the expressed desires and personal values of the incapacitated person when making decisions, and shall otherwise act in the incapacitated person's best interest and exercise reasonable care, diligence, and prudence. A guardian shall immediately notify the court if the incapacitated person's condition has changed so that he or she is capable of exercising rights previously limited. In addition, a guardian has the duties, powers and responsibilities of a guardian of a minor as described in section 5-209(b), (c), (d) and (e).

(b) A guardian shall report in writing the condition of the incapacitated person and account for funds and other assets subject to the guardian's possession or control within 60 days following appointment, at least annually thereafter, and when otherwise ordered by the court. A report shall briefly state:

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

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

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

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

(5) if the incapacitated person is institutionalized, whether the guardian considers the current treatment or habilitation plan to be in the incapacitated person's best interests;

(6) plans regarding future care; and

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

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

(d) The court may appoint a guardian ad litem pursuant to section 1-404 to review a report, to interview the incapacitated person or guardian, and to make such other investigation as the court may direct.

(e) A guardian, without authorization of the court, may not revoke a health care proxy of which the incapacitated person is the principal. If a health care proxy is in effect, absent an order of the court to the contrary, a health-care decision of the agent takes precedence over that of a guardian.

(f) No guardian shall be given the authority under this chapter to admit or commit an incapacitated person to a mental health facility or a mental retardation facility as defined in the regulations of the department of mental health.

(g) No guardian shall have the authority to admit an incapacitated person to a nursing facility, except upon a specific finding by the court that such admission is in the incapacitated person's best interest, unless: (1) the admission shall not exceed 60 days; (2) any person authorized to sign a medical certificate recommends such admission; (3) neither any interested person nor the incapacitated person objects; (4) on or before such admission, a written notice of intent to admit the incapacitated person to a nursing facility for short term-services has been filed by the guardian in the appointing court and a copy thereof has been served in-hand on the incapacitated person and provided to the nursing facility; and 5) the incapacitated person is represented by counsel or counsel is appointed forthwith. The notice of intent to admit the incapacitated person to a nursing facility for short-term services shall be on a form prescribed by the chief justice of the probate and family court.

COMMENT

The reference to § 5-306 coordinates this section with the limited guardian concept. All guardians, however appointed, have the powers and duties of a guardian of a minor as provided in § 5-209, subsections (b), (c), (d), and (e). As discussed in the Comment to § 5-209, these powers do not enable a guardian to deal with property matters of the incapacitated person. A protective order under § 5-401 et seq. is indicated when property management is needed. Though the legislation does not contemplate that the statutory authority of a guardian may be increased by court order, the court, at the time of appointment or on motion or petition thereafter, may limit the power of a guardian in any respect. The provisions of § 5-304(b) requiring advance notice of a proceeding regarding a guardian's power instituted subsequent to appointment would apply to a post-appointment proceeding to impose or remove restrictions on a guardian's authority.

If the incapacitated person had made a health care proxy, the guardian can not revoke it without court order. Further, the agent's decision takes priority over those of the guardian unless the proxy has been revoked by court order. A mental health-care institution includes those institutions or treatment facilities defined in the Uniform Health-Care Decisions Act as adopted by the state. Commitment to a mental health-care institution can not occur without following the state's procedures for involuntary civil commitment. Although a guardian can not commit a ward to a mental health-care institution, the guardian may initiate proceedings under the state's applicable health care act for voluntary or involuntary, commitment, outpatient treatment, or involuntary medication for mental health treatment.

MASSACHUSETTS COMMENT

This section is comparable to G.L. c. 201, §§ 4 and 12. G.L. c. 201, §§ 37-38 address preservation of assets which under the UPC is left to a conservator, c.f. § 5-407. This section has been extensively revised to include the recommendations of the ABA Senior Lawyers Division, Task Force on Guardianship Reform (Second Working Draft, January 27, 1994) and the Uniform Guardianship and Protective Proceedings Act, March 1997 draft and includes a more complete reporting requirement than that of guardians of minors under §5-209(b)(5).

Health care proxies, for purposes of this Code, are defined in Part 1 to include, not only a proxy under G.L. c. 201D, but also pre-statutory powers of attorney for health care and similar instruments executed under the laws of other jurisdictions.

Subsection (f) is added to make it clear that committal proceedings may no longer be brought in Probate Court, but must be undertaken in District Court under G.L. c. 123, even if Rogers orders are made in the Probate and Family Court.

The requirement of specific authority for admission to a nursing facility is an important new protection for the elderly.

Chapter 140 of the Acts of 2012 added the phrase: “of incapacitated persons” after the word “guardianships” in subsection (c) and replaced subsection (g).

Section 5-310. [Termination of Guardianship for Incapacitated Person.]

The authority and responsibility of a guardian of an incapacitated person terminates upon the death of the guardian or incapacitated person, the determination of incapacity of the guardian, the determination that the person is no longer incapacitated, or upon removal or resignation as provided in section 5-311. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect a guardian's liability for prior acts or the obligation to report or account for funds and assets of the incapacitated person.

COMMENT

The concept that a guardian's authority may be terminated even though the guardian remains liable for prior acts or unaccounted funds is a corollary of the proposition that a guardian's authority to act for the incapacitated person should end automatically and without court order in certain circumstances. A more primitive concept to the effect that a guardian's authority derived from a court order continues until the court orders otherwise generates unnecessary and excessive use of the courts. Nonetheless, the question of whether a person's incapacity exists or continues and whether a guardian is necessary to provide continuing care and supervision of the incapacitated person is too complex to be resolved automatically save in the instances enumerated in this section. If a court determines that a person's incapacity or need for a guardian has ended, it may terminate the authority and make an appropriate, additional order regarding the guardian's liabilities for acts done or funds for which there has not been any accounting. The additional order might defer the determination regarding liabilities to a later time.

MASSACHUSETTS COMMENT

This section replaces G.L. c. 201, § 13.

Section 5-311. [Removal or Resignation of Guardian; Termination of Incapacity.]

(a) On petition of the incapacitated person or any person interested in the incapacitated person's welfare, the court, after notice and hearing, may remove a guardian if the person under guardianship is no longer incapacitated or for other good cause. On petition of the guardian, the court, after hearing, may accept a resignation.

(b) The incapacitated person or any person interested in the welfare of the incapacitated person may petition for an order that the person is no longer incapacitated and for termination of the guardianship. A request for an order may also be made informally to the court.

(c) Upon removal, resignation, or death of the guardian, or if the guardian is determined to be incapacitated or disabled, the court may appoint a successor guardian and make any other appropriate order. Before appointing a successor guardian, or ordering that a person's incapacity has terminated, the court shall follow the same procedures to safeguard the rights of the incapacitated person that apply to a petition for appointment of a guardian.

COMMENT

The person's incapacity is a question that usually may be reviewed at any time. However, provision is made for a discretionary restriction on review. In all review proceedings, the welfare of the person is paramount.

The provisions of subsection (b) were designed to provide another protection against use of guardianship proceedings to secure a lock-up of a person who is not capable of looking out for his or her personal needs. If the safeguards imposed at the time of appointment fail to prevent an unnecessary guardianship, subsection (b) is intended to facilitate a person's unaided or unassisted efforts to inform the court that an injustice has occurred as a result of the guardianship.

MASSACHUSETTS COMMENT

Provisions for removal previously found in G.L. c. 201, §§ 13, 13A and 33 are consolidated and restated in this section. The standard for removal in this section is the best interests of the incapacitated person which is new.

Section 5-312. [Reserved.]

MASSACHUSETTS COMMENT

All sections concerning venue in guardianship or protective proceedings are consolidated in § 5-105.

Section 5-313. [Religious Freedom of Incapacitated Person.]

It shall be the duty of all guardians appointed under this article to protect and preserve the incapacitated person's right of freedom of religion and religious practice.

MASSACHUSETTS COMMENT

This section is added to preserve G.L. c. 201, § 51.

PART 4

MANAGEMENT OF PROPERTY OF PERSONS UNDER DISABILITY AND MINORS

Section 5-401. [Management of Estate.]

(a) Upon petition and after notice and hearing in accordance with the provisions of this part, the court may appoint a limited or unlimited conservator or make any other protective order for cause as provided in this section.

(b) Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that a minor owns money, real property or personal property requiring management or protection that cannot otherwise be provided or has or may have business affairs that may be jeopardized or prevented by minority, or that funds are needed for support and education and that protection is necessary or desirable to obtain or provide money.

(c) Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person who is disabled for reasons other than minority if the court determines that:

(1) the person is unable to manage property and business affairs effectively because of a clinically diagnosed impairment in the ability to receive and evaluate information or make or communicate decisions, even with the use of appropriate technological assistance, or because the individual is detained or otherwise unable to return to the United States; and

(2) the person has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, and welfare of the person or those entitled to the person's support and that protection is necessary or desirable to obtain or provide money.

COMMENT

This is the basic section of this Part providing for protective proceedings for minors and disabled persons. "Protective proceeding" is a generic term used to describe proceedings to establish conservatorships and obtain protective orders. Persons who may be subjected to the proceedings described here include a broad category of persons who, for a variety of different reasons, may be unable to manage their own property.

Since the problems of property management are generally the same for minors and disabled persons, it was thought undesirable to treat these problems in two separate parts. Where there are differences, these have been separately treated in specific sections.

The Comment to § 5-306, supra, points up the different meanings of "incapacity" (warranting guardianship) and "disability."

The concept of conservatorship includes both limited and unlimited conservatorships.

MASSACHUSETTS COMMENT

This section refers to the appointment of a conservator and identifies situations requiring the management of assets rather than the person. G.L. c. 201, § 16 (Conservators) and § 10 (Spendthrift Guardian) addressed such cases in less specific terms. Chapter 200 on estates of absentees is not affected.

Conservatorship and guardianship proceedings may be consolidated for hearing, However, separate petitions should be filed. See § 1-302(d).

Section 5-402. [Protective Proceedings; Jurisdiction of Business Affairs of Protected Persons.]

After the service of notice in a proceeding seeking the appointment of a conservator or other protective order and until termination of the proceeding, the court in which the petition is filed has:

(1) exclusive jurisdiction to determine the need for a conservator or other protective order until the proceedings are terminated; and

(2) exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this commonwealth must be managed, expended, or distributed to or for the use of the protected person, the protected person's dependents, or other claimants.

COMMENT

While the bulk of all judicial proceedings involving the conservator will be in the court supervising the conservatorship, third parties may bring suit against the conservator or the protected person on some matters in other courts. Claims against the conservator after appointment are dealt with by § 5-427.

MASSACHUSETTS COMMENT

A conservator must record his or her appointment or other protective order in the registry of deeds in any county where the protected person owns real estate. § 5-420. See G.L. c. 201, § 10.

Section 5-403. [Reserved.]

Section 5-404. [Original Petition for Appointment or Protective Order.]

(a) The person to be protected or any person who is interested in the estate, affairs, or welfare of the person, including a parent, guardian, custodian, or any person who would be adversely affected by lack of effective management of the person's property and business affairs may petition for a determination of disability, in whole or in part, and the appointment of a conservator or for other appropriate protective order.

(b) The petition must set forth the petitioner's name, residence address, current street address if different, relationship to the person to be protected, and interest in the appointment or other protective order, and, to the extent known, state the following with respect to the person to be protected and the relief requested:

(1) the name of the person to be protected, his or her age, principal residence, current street address, and, if different, the address of the dwelling where it is proposed that the person to be protected will reside if the appointment is made, and the date residence was established;

(2) a brief description of the nature of the alleged incapacity;

(3) if the petition is being brought because the individual is detained or is otherwise unable to return to the United States, a statement of the relevant circumstances, including the time and nature of the detention or inability to return and a description of any search or inquiry concerning the person's whereabouts;

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

(A) spouse; and

(B) adult children, or if none, parents and adult brothers and sisters, or, if none, heirs apparent or presumptive;

(5) the name and address of the person who has care or custody of the person or with whom the person has resided during the 60 days exclusive of any period of hospitalization or institutionalization preceding the filing of the petition;

(6) the name and address of any representative payee, trustee or custodian of a trust or custodianship of which the person to be protected is a beneficiary;

(7) the name and address of any person nominated as conservator by the person to be protected under a durable power of attorney, if known to the petitioner, and the name and address of any guardian or conservator currently acting for him or her in this commonwealth or elsewhere;

(8) the name and address of any agent designated under a durable power of attorney of which the person to be protected is the principal, if known to the petitioner, and the petitioner shall attach a copy of any such power of attorney, if available;

(9) a general statement of the person's property with an estimate of its value, including any insurance, pension, and the source and amount of any anticipated income or receipts;

(10) the reason why appointment of a conservator or other protective order is in the best interest of the person to be protected;

(11) except for a conservatorship of a minor filed pursuant to section 5-401(b), a statement:

(A) that a medical certificate conforming to section 5-303(c), dated within 30 days of the filing of the petition; provided that such medical certificate is based upon an examination of such minor that was conducted with 30 days of the filing of the petition or, in the case of a person alleged to be

developmentally disabled, a clinical team report dated within 180 days of the filing of the petition, is in the possession of the court or accompanies the petition; or

(B) of the nature of any circumstance which renders obtaining a medical certificate or clinical team report impossible, supported by affidavit or affidavits meeting the requirements set forth in Massachusetts Rule of Civil Procedure 4.1(h), in which case the court may waive or postpone the requirement of filing a medical certificate or clinical team report.

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

(1) the name and address of the proposed conservator, his or her relationship to the person to be protected, the reason why he or she should be selected, and the basis of the claim, if any, for priority for appointment;

(2) the name and address of any person nominated as conservator by the person to be protected if 14 or more years of age;

(3) the type of conservatorship requested, and if a general conservatorship, the reason why a limited conservatorship is inappropriate, and if a limited conservatorship, the powers to be granted to the limited conservator or property to be placed under the conservator's control; and

(d) Reasonable expenses incurred in any examination conducted pursuant to this section shall be paid by the petitioner, the estate of the person to be protected, or by the commonwealth as the court may determine.

COMMENT

Although the person to be protected can petition for the appointment of a conservator, the person should investigate the use of a durable power of attorney. The petition should list names and addresses of the spouse, domestic partner or companion and adult siblings or if none, heirs.

MASSACHUSETTS COMMENT

Subsections (b) and (c) are taken from the ABA Senior Lawyers Division, Task Force on Guardianship Reform (Second Working Draft, January 27, 1994) and require more comprehensive information than past Massachusetts practice or the UPC version.

Subsection (d) makes applicable to conservatorship a provision which was apropos only to guardianship of the mentally retarded, G.L. c. 201, § 6A (f).

See § 5-303(c) for the requirements of a medical certificate. Although § 5-404(b)(11) requires in most cases the filing of a medical certificate with the petition, § 5-407(b) also requires that a certificate show an exam not more than 30 days prior to hearing. Thus, it is possible that a new certificate might have to be procured prior to hearing.

Medical certificates and clinical team reports are not required in conservatorships of minors. See new Standing Order 05-09.

Medical certificates may be made by physicians, certified psychiatric nurse specialists and licensed psychologists. See amended Uniform Practice XXII.

If it is impossible to obtain a medical certificate because the respondent will not submit to an exam, a motion pursuant to M.R.C.P. Rule 35 may be presented.

New Standing Order 01-09 provides that medical certificates, clinical team reports, treatment plans and medical affidavits will be impounded and not available for public inspection. A request of interested party to access impounded medical information may be made on a new form provided by the court (MPC 303). Interested parties may request impoundment of additional documents or the entire file under Trial Court Rule VIII, Uniform Rules on Impoundment Procedure. If a case is dismissed without a decree having entered, the entire file will be impounded.

Subsection (b)(8) has been altered to require disclosure of durable powers of attorney "if known to the petitioner." This should not be understood to lessen the obligation of the petitioner and counsel to inquire as to the existence of such documents, especially in light of priorities of appointment under § 5-409.

Chapter 140 of the Acts of 2012 changed subsection (b)(11) to remove the requirement of a medical certificate for persons alleged to be mentally retarded (in which cases clinical team reports are a necessity) and in conservatorships of minors.

Section 5-405. [Notice.]

(a) On a petition for appointment of a conservator or other protective order, the requirements for notice described in section 5-304 apply, but (i) if the person to be protected has disappeared or is otherwise situated so as to make personal service of notice impracticable, notice to the person must be given by leaving a copy of the petition and citation at the last and usual place of abode of the person to be protected, and (ii) if the person to be protected is a minor, the provisions of section 5-206(b) also apply.

(b) Notice of hearing on a petition for an order subsequent to appointment of a conservator or other protective order must be given to the protected person, any conservator of the protected person's estate, and any other person as ordered by the court.

COMMENT

The primary sections providing for notice in this Code are §§ 1-401 and 5-304.

MASSACHUSETTS COMMENT

This section provides for notice in accordance with § 5-304 (guardians) and would replace G.L. c. 201, § 17.

Section 5-406. [Reserved.]

Section 5-407. [Findings; Order of Appointment; Permissible Court Orders.]

(a) The court shall exercise the authority conferred in this part to encourage the development of maximum self-reliance and independence of a protected person and make protective orders only to the extent necessitated by the protected person's limitations and other conditions warranting the procedure.

(b) Upon hearing, the court may appoint a conservator as requested if it finds that:

(1) a qualified person seeks appointment;

(2) venue is proper;

(3) the required notices have been given;

(4) any required medical certificate is dated and the examination has taken place within 30 days prior to the hearing;

(5) any required clinical team report is dated and the examinations have taken place within 180 days prior to the filing of the petition;

(6) the person for whom a conservator is sought is a disabled person;

(7) the appointment is necessary or desirable as a means of providing continuing care and supervision of the property and business affairs of the person to be protected; and

(8) the person's needs cannot be met by less restrictive means, including use of appropriate technological assistance.

The court, on appropriate findings, may enter any appropriate order or dismiss the proceedings.

(c) After full hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without other disability, the court, after making appropriate findings of fact, has all those powers over the property and business affairs of the minor which are or may be necessary for the best interest of the minor and members of the minor's immediate family. Those powers include, but are not limited to, the power to create revocable trusts of the property of the estate which may extend beyond the minority of the minor, provided that:

(1) the court determines that it is in the best interest of the minor to extend the management and protection of the minor's money and property beyond the minor attaining the age of 18;

(2) the minor and issue of the minor are the only beneficiaries of the trust during the minor's lifetime;

(3) upon the termination of the trust during the minor's lifetime, the trust property will be distributed only to the minor;

(4) the ward, upon attaining the age of 18 shall have the inter vivos and testamentary power to appoint to or among such person or persons and in such proportions and upon such terms, whether outright or in trust or otherwise, all or any part of the property of the trust as the minor may determine;

(5) upon the death of the minor, to the extent that the minor fails to exercise the power to appoint, the trust will provide that the trust property be distributed to or be held in trust for the benefit of such relatives as would be likely recipients of legacies from the minor as determined by the court pursuant to subsection (e).

After full hearing and upon determining that an amendment, extension, or revocation is in the best interest of the minor, the court may amend, extend, or revoke the trust whether or not the minor has attained the age of 18. The court shall retain jurisdiction over the trust while it continues to exist.

(d) After full hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person to be protected for reasons other than minority, the court, after making appropriate findings of fact, has all those powers over the property and business affairs of the protected person which are or may be necessary for the best interest of the protected person and members of his or her immediate family. Those powers include, but are not limited to the power to:

(1) make gifts, except as otherwise provided in section 5-424(b);

(2) convey, release, or disclaim contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entireties;

(3) exercise or release a power of appointment;

(4) create a revocable or irrevocable trust of property of the estate, whether the trust does or does not extend beyond the duration of the conservatorship, or to revoke or amend a trust revocable by the protected person;

(5) exercise rights to elect options and change beneficiaries under insurance policies and annuities or surrender the policies and annuities for their cash value;

(6) exercise any right to an elective share in the estate of the protected person's deceased spouse and to renounce or disclaim any interest by testate or intestate succession or by transfer inter vivos; and

(7) make, amend, or revoke the protected person's will. The conservator, in making, amending, or revoking the protected person's will, shall comply with section 2-502 of this chapter.

(e) The court, in exercising or in approving a conservator's exercise of the powers listed in subsection (d), shall consider primarily the decision that the protected person would have made if not disabled, to the extent that the decision can be ascertained. In the absence of any evidence of the personal preference of the protected person, the court shall consider the following factors, and may exercise or approve a conservator's exercise of such powers even in the absence of one or more such factors:

(1) the financial needs of the protected person and the needs of individuals who are dependent on the protected person for support and the interest of creditors;

(2) reduction of income, estate, inheritance, or other tax liabilities;

(3) eligibility for governmental assistance;

(4) the protected person's previous pattern of giving or level of support;

(5) the existing estate plan;

(6) the likely recipients of the protected person's bounty;

(7) the protected person's life expectancy; the probability that the conservatorship will terminate before the protected person's death; and

(8) any other factors the court considers relevant.

(f) A determination that a basis for appointment of a conservator or other protective order exists is not a determination of incapacity of the protected person.

(g) The conservator shall have custody of all wills, codicils and other estate planning documents executed by the protected person.

COMMENT

The court which is supervising a conservatorship is given all the powers that the individual would have if the person were of full capacity. These powers are given to the court that is managing the protected person's property, because the exercise of these powers has important consequences with respect to the protected person's property.

Subsection (a) is the general admonition against an overly intrusive exercise of its authority by the court adopting the concept of a limited guardianship. The court should not assume any greater authority over the protected person than the capacity and ability of that person necessitates.

MASSACHUSETTS COMMENT

Subsection (d) incorporates the same powers contained in G.L. c. 201, § 38 which was drawn from the UPC in the 1976 Omnibus Probate Bill. See Strange v. Powers, 358 Mass. 126, 260 NE 2d 704 (1970) for a review of the estate planning powers of a conservator. The language of (d) and (e) is drawn from the Uniform Guardianship and Protective Proceedings Act (May 29, 1997 Draft) with modification to highlight a similarity of the determination of the person's intent to a substituted judgment proceeding in a proceeding for consent to medical treatment. Subsection (e)(6) is added to conform to c. 201, § 38.

Chapter 140 of the Acts of 2012 added subsection (b)(5).

Section 5-408. [Protective Arrangements and Single Transactions Authorized.]

(a) Upon petition, after notice as provided in section 5-405 and hearing, and if a basis exists as described in section 5-401 for affecting the property and business affairs of a person, the court, without appointing a conservator, may authorize, direct or ratify any transaction necessary or desirable to achieve any arrangement for security, service, or care meeting the foreseeable needs of the protected person. Protective arrangements include payment, delivery, deposit, or retention of funds or property; sale, mortgage, lease, or other transfer of tangible or intangible personal property; entry

into an annuity contract, a contract for life care, a deposit contract, or a contract for training and education; or addition to or establishment of a suitable trust including a trust created under the uniform custodial trust act.

(b) Upon petition, after notice as provided in section 5-405 and hearing, and if a basis exists as described in section 5-401 for affecting the property and business affairs of a person, the court, without appointing a conservator, may authorize, direct, or ratify any contract, trust, or other transaction relating to the protected person's property and business affairs, including settlement of a claim, if the Court determines that the transaction is in the best interest of the protected person.

(c) Before approving a protective arrangement or other transaction under this section, the court shall consider the factors listed in section 5-407(e). The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the court of all matters done pursuant to the order of appointment.

COMMENT

It is important that the provision be made for the approval of single transactions or the establishment of protective arrangements as alternatives to full conservatorship. Under present law, a conservatorship often must be established simply to make possible a valid transfer of land or securities. This section, consistent with the concept of a limited conservatorship, eliminates the necessity of the establishment of long-term arrangements in this situation.

MASSACHUSETTS COMMENT

This section is intended to provide authority for approval of single transactions or an alternative to a full conservatorship. It may be useful for execution of a disclaimer, contract for life care of the person to be protected or appointment of a special conservator to pursue a tort claim, none of which may involve continuing management of property. Note that sale of real estate may be authorized not by this procedure, but under G.L. c. 202.

Section 5-409. [Who May Be Appointed Conservator; Priorities.]

(a) Subject to subsection (c), the court may appoint an individual or a corporation with general power to serve as trustee or conservator of the estate of a protected person. The following are entitled to consideration for appointment in the order listed:

(1) Unless lack of qualification or other good cause dictates the contrary, a person nominated in the protected person's most recent durable power of attorney;

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

(3) an individual or corporation nominated by the protected person 14 or more years of age and of sufficient mental capacity to make an intelligent choice;

(4) an agent appointed by the protected person under a durable power of

attorney;

(5) a parent of the protected person, or any parental nominee; and

(6) any person deemed appropriate by the court.

(b) The court, acting in the best interest of the protected person, may pass over a person having priority and appoint a person having a lower priority or no priority.

(c) An owner, operator, or employee of a long-term care institution at which the protected person is receiving care or a paid caretaker may not be appointed as conservator unless related to the protected person by blood, marriage, or adoption.

COMMENT

Priority for consideration of appointment as conservator is given first to the person's nominee or agent under a durable power of attorney, then to a fiduciary such as a conservator or guardian before preference is given to spouse or relatives. Paid care givers and anyone affiliated with a long-term care facility at which the person is receiving care is ineligible to be conservator absent a blood, marital or adoptive arrangement. Section (a) allows someone who has been nominated as conservator to have a statutory preference when the court determines who should be appointed as conservator of the person. However, the person so designated has no authority to act without a court order and must follow the procedures for the establishment of a conservatorship. The process for nominating a guardian is much more detailed because of the need to protect the person in such circumstances and because there are many mechanisms available to the nominating individual to protect the property besides a conservatorship. However, in some circumstances, conservatorship may be necessary, so it is incumbent on the appointed guardian to determine whether there is a need for a conservatorship, and if so, petition for appointment. A person named in a writing, will or otherwise, should be appointed unless not qualified.

MASSACHUSETTS COMMENT

The UPC hierarchy of priorities is not adopted as it may create an impediment to appointment of one better suited but of lesser standing. See G.L. c. 201, §16 which contained no priorities. Section 5-503 allows one to nominate a conservator in a durable power of attorney.

Section 5-410. [Bond.]

(a) A conservator, temporary conservator and special conservator shall furnish a bond conditioned upon faithful discharge of all duties of the trust according to law and containing a statement of acceptance of the duties of the office. A surety shall be required on the bond of a conservator, except the court may waive the requirement of sureties for good cause shown by the conservator. A bond with sureties must be in the amount established by the court.

(b) Notwithstanding subsection (a), but subject to section 5-415, a conservator shall not be required to furnish sureties on his or her bond if the conservator has a priority for appointment under section 5-409(a)(1) and the person nominating the conservator expressly waives the requirement.

MASSACHUSETTS COMMENT

See G.L. c. 205, §5 and c. 201, § 2. The bond and surety requirement has been altered to follow generally those for personal representatives under Article III, Part 6 of this is Code.

Section 5-411. [Terms and Requirements of Bonds.]

(a) The following requirements and provisions apply to any bond required under sections 5-208, 5-305 and 5-307.

(1) Bonds shall name the first judge of the court making the appointment and his or her successors as obligee for the benefit of the persons interested in the estate and shall be conditioned upon the faithful discharge by the fiduciary of all duties according to law.

(2) Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the guardian or conservator and with each other.

(3) By executing an approved bond of a guardian or conservator, the surety consents to the jurisdiction of the court that issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the guardian or conservator and naming the surety as a party respondent. Notice of any proceeding on the bond shall be delivered to the surety or mailed by registered or certified mail to the address listed with the court at the place where the bond is filed and to the address as then known to the petitioner.

(4) On petition of a successor guardian or conservator or any interested person, a proceeding may be initiated against a surety for breach of the obligation of the bond of the guardian or conservator.

(5) The bond of the guardian or conservator is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(6) If a new bond is required, the sureties on the prior bond shall be liable for all breaches of the conditions thereof committed before the new bond is approved and filed.

(7) In no event shall any surety be liable for any claim or cause of action arising out of or in any way connected with acts or omissions of the guardian or conservator occurring prior to the appointment of such person as guardian or conservator.

(b) No proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred.

MASSACHUSETTS COMMENT

This section reflects the authority contained in G.L. c. 205, §§ 1-7A.

Chapter 140 of the Acts of 2012 changed the reference in subsection (a) to “sections 5-208, 5-305 and 5-410” to read “sections 5-208, 5-305 and 5-307.”

Section 5-412. [Acceptance of Appointment; Consent to Jurisdiction.]

Prior to receiving letters, a conservator, temporary conservator and special conservator shall accept appointment by filing a bond containing a statement of acceptance of the duties of the office. By accepting appointment, a conservator submits personally to the jurisdiction of the court in any proceeding relating to the estate which may be instituted by any interested person. Notice of any proceeding must be delivered to the conservator or mailed by registered or certified mail to the address as listed in the petition for appointment or as thereafter reported to the court and to the address as then known to the petitioner.

MASSACHUSETTS COMMENT

This section is similar to § 5-307 (Guardian) and § 5-208 (Guardian of Minor). Unlike many states where a bond, if required, is always with sureties; in Massachusetts a bond is always required, but sureties may, in certain circumstances, be waived.

Section 5-412A. [Emergency Orders; Temporary Conservators.]

(a) While a petition for appointment of a conservator or other protective order is pending and after hearing and without notice to others, the court may make orders to preserve and apply the property of the person to be protected as may be required for the support of the person to be protected or his or her dependents.

(b) While a petition for appointment of a conservator is pending, if a person to be protected has no conservator, and the court finds that following the procedures of this article will likely result in substantial harm to the property, income or entitlements of the person to be protected or those entitled to the person's support occurring prior to the return date, and no other person appears to have authority to act in the circumstances, on appropriate motion the court may appoint a temporary conservator having the powers who may exercise only those powers granted in the order. A motion for appointment of a temporary conservator shall state the nature of the circumstances requiring appointment, the particular harm sought to be avoided, the actions which will be necessary by the temporary conservator to avoid the occurrence of the harm and the name and address of any attorney in fact designated under a durable power of attorney of which the person to be protected is the principal, and the petitioner shall attach a copy of any such durable power of attorney, if available. Such motion shall be accompanied by an affidavit containing facts supporting the statements and requests in the motion. The appointment may be for a period of up to 90 days except that upon a finding of extraordinary circumstances set forth in its order, the court may order an appointment for a longer period to a date certain. The court may for good cause shown extend the appointment for additional 90 day periods.

(c) If an appointed conservator is not effectively performing duties and the court further finds that the welfare of the person to be protected requires immediate action, it may appoint, with or without notice, a special conservator for the protected person having the powers of a general conservator, except as limited in the letters of appointment. The authority of any conservator previously appointed by the court is suspended as long as a special conservator has authority. The appointment may be for a period of up to 90 days except that upon a finding of extraordinary circumstances set forth in its order the court may order an appointment for a longer period to a date

certain. The court may for good cause shown extend the appointment for additional 90 day periods.

(d) The petitioner must give written notice 7 days prior to any hearing for the appointment of a temporary conservator in hand to the person to be protected and by delivery or by mail to all persons named in the petition for appointment of conservator. A certificate that such notice has been given, setting forth the names and addresses of those to whom notice has been given, shall be prima facie evidence thereof.

(e) If the court determines that an immediate emergency situation exists which requires the immediate appointment of a temporary conservator, it may shorten or waive the notice requirements in whole or in part and grant the motion, provided, however, that prior notice shall be given to the person to be protected as the court may order and post-appointment notice of any appointment is given to the person to be protected and those named in the petition for appointment of conservator stating further that any such person may move to vacate the order of the court or request that the court take any other appropriate action on the matter, and on said motion to vacate, the court shall hear said motion as a de novo matter, as expeditiously as possible. A certificate stating that such notice has been given shall be filed with the court within 7 days following the appointment. Upon failure to file such certificate the court may on its own motion vacate said order.

(f) In the event that any person to whom notice is required is of parts unknown, such notice shall be delivered or mailed to that person's last known address, and the fact of such delivery or mailing shall be recited in the certificate of notice.

(g) Appointment of a temporary conservator, with or without notice, is not a determination of a person’s incapacity or disability.

(h) The court may remove a temporary or special conservator at any time. A temporary conservator and a special conservator shall make any report the Court requires. In other respects the provisions of parts 1, 2, 3 and 4 of this Article concerning conservators apply to temporary and special conservators.

Section 5-413. [Compensation and Expenses.]

If not otherwise compensated for services rendered, any guardian ad litem, attorney, physician, licensed psychologist, clinical team, guardian, special guardian, temporary guardian, conservator, temporary conservator or special conservator appointed in a protective proceeding and any attorney whose services resulted in a protective order or in an order that was beneficial to a protected person's estate is entitled to reasonable compensation from the estate. Compensation may be paid and expenses reimbursed without court order, but, if the court later determines that the compensation is excessive or the expenses are inappropriate, the excessive or inappropriate amount must be repaid to the estate on such terms as the court may order, including, but not limited to, costs, interest and attorney fees. The court may order that such compensation be paid by any party or parties as it shall determine.

COMMENT

Compensation for services rendered or expenses incurred by those serving the person or representing the person or anyone else appointed by the court are paid from the estate without court order. Excessive or inappropriate payments must be repaid to the estate. If the estate is limited or inadequate, the estate would be divided amongst those entitled to compensation or reimbursement. The reasonableness of the compensation or expenses would be determined by looking at the size of the estate.

MASSACHUSETTS COMMENT

This section has substituted guardian ad litem for visitor which seems to be a distinction without difference in Massachusetts. The last sentence is added to preserve the flexibility of G.L. c. 201, § 35 to charge the petitioner with expenses of the proceeding. See also §§ 5-303(d) and 5-404(d) for expenses of obtaining medical certificates and clinical team reports.

Chapter 140 of the Acts of 2012 replaced the last sentence which previously read "The court may order that such compensation be paid by the petitioner."

Section 5-414. [Reserved.]

MASSACHUSETTS COMMENT

The UPC section on death, resignation or removal of conservators has been removed to § 5-429 and revised to be consistent with § 5-311 which applies to guardians.

Section 5-415. [Petitions for Orders Subsequent to Appointment.]

(a) Any person interested in the welfare of a person for whom a conservator has been appointed may file a petition in the appointing court for an order:

(1) requiring sureties or collateral or additional sureties or collateral, or reducing bond;

(2) requiring an inventory or accounting for the administration of the trust;

(3) directing distribution;

(4) removing the conservator and appointing a temporary or successor conservator; or

(5) granting other appropriate relief.

(b) A conservator may petition the appointing court for instructions concerning fiduciary responsibility.

(c) Upon notice and hearing, the court may give appropriate instructions or make any appropriate order.

COMMENT

Once a conservator has been appointed, the Court supervising the trust acts only upon the request of some moving party.

Section 5-416. [General Duty of Conservator; Plan.]

(a) A conservator, in relation to powers conferred by this Part, or implicit in the title acquired by virtue of the proceeding, shall act as a fiduciary and observe the standards of care applicable to trustees as described by chapter 203C.

(b) A conservator shall exercise authority only as necessitated by the mental and adaptive limitations of the protected person, and to the extent possible, encourage the person to participate in decisions, to act in the person's own behalf, and to develop or regain the ability to manage the person's estate and business affairs.

(c) The court may order a conservator to file with the appointing court a plan for managing, expending, and distributing the assets of the protected person's estate. The plan must be based on the actual needs of the person and take into consideration the best interest of the person. The conservator shall include in the plan steps to develop or restore the person's ability to manage the person's property, an estimate of the duration of the conservatorship, and projections for expenses and resources.

(d) In investing an estate, selecting assets of the estate for distribution, and invoking powers of revocation or withdrawal available for the use and benefit of the protected person and exercisable by the conservator, a conservator shall take into account any estate plan of the person known to the conservator and may examine the will and any other donative, nominative, or other appointive instrument of the person.

COMMENT

This section as revised adopts for conservators the standard of care and performance otherwise applicable to trustees in the enacting jurisdiction.

MASSACHUSETTS COMMENT

This section makes clear that conservators will be held to the same standards as trustees.

Section 5-417. [Inventory and Records.]

(a) Within 90 days after qualification, each conservator shall prepare and file with the appointing court a detailed inventory of the estate subject to the conservatorship together with an oath or affirmation that the inventory is believed to be complete and accurate as far as information permits. The conservator shall provide a copy thereof to the protected person if the person has attained the age of 14 years. A copy also shall be provided to any guardian or parent with whom the protected person resides.

(b) The conservator shall keep suitable records of the administration and exhibit the same on request of any interested person.

MASSACHUSETTS COMMENT

This section is more specific that G.L. c. 201, § 46 and c. 201, § 6.

Section 5-418. [Accounts.]

(a) Each conservator shall account to the court for administration of the trust not less than annually unless the court directs otherwise, upon resignation or removal and at other times as the court may direct. On termination of the protected person's minority or disability, a conservator shall account to the court. Subject to appeal or vacation within the time permitted, an order allowing an intermediate account of a conservator adjudicates as to liabilities of the conservator concerning the matters set forth therein or shown thereby; and an order allowing a final account adjudicates as to all previously unsettled liabilities of the conservator to the protected person or the protected person's successors relating to the conservatorship.

(b) A conservator or any interested person may petition for an order of complete settlement of an account. Notice shall be given in the manner prescribed by section 1-401 by the petitioner to all interested persons.

(c) An account must state or contain:

(1) a listing of the balance of the prior account or inventory, receipts, disbursements and distributions during the reporting period and the assets of the estate under the conservator's control at the end of the reporting period;

(2) a listing of the services provided to the protected person; and

(3) any recommended changes in any conservatorship plan as well as a recommendation as to the continued need for conservatorship and any recommended changes in the scope of the conservatorship.

(d) If there are persons interested to whom notice has not been given, or if the interests of persons incapacitated or under disability are not represented except by the accountant, the Court shall appoint as guardian ad litem an individual or any public or charitable agency to review the account and make appropriate recommendations to the court.

(e) Objections to a conservator's account shall be filed in the manner prescribed by section 1-401. After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the conservator from further claim or demand of any interested person. Such discharge shall forever exonerate the conservator and the conservator’s sureties from all liability under such decree unless the conservator’s account is impeached for fraud or manifest error.

(f) The court shall establish a system for monitoring of conservatorships, including the filing and review of conservators' accounts and plans.

COMMENT

The persons who are to receive notice of intermediate and final accounts will be identified by court order as provided in § 5-405. Notice is given as described in § 1-401. In other respects, procedures applicable to accountings will be as provided by court rule.

MASSACHUSETTS COMMENT

This section restates what is required in G.L. c. 206. See also Probate Rule 29A. Requirements for notice and objections are set out in § 1-401. See also M.R.C.P. 72. "Complete settlement" in (b) is akin to "allowance" under present procedure.

Chapter 140 of the Acts of 2012 added the last sentence of subsection (e) to match a similar provision for personal representatives in 3-1001(b).

Section 5-419. [Conservators; Title By Appointment.]

(a) The appointment of a conservator vests in the conservator title as fiduciary to all property, or to the part thereof specified in the order, of the protected person, held at the time of appointment or thereafter acquired. An order vesting title to only a part of the property of the protected person creates a conservatorship limited to assets specified in the order.

(b) Except as otherwise provided herein, the interest of the protected person in property vested in a conservator by this section is not transferable or assignable by the protected person. An attempted transfer or assignment by the protected person, though ineffective to affect property rights, may generate a claim for restitution or damage.

COMMENT

This section permits independent administration of the property of the protected person once the appointment of a conservator has been obtained. Any interested person may require the conservator to account in accordance with § 5-418. As a trustee, a conservator holds title to the property of the protected person. The appointment of a conservator is a serious matter and the court must select the fiduciary with great care. Once appointed, the conservator is free to carry on all fiduciary responsibilities. If the conservator defaults in these in any way, the conservator may be made to account to the court.

Unlike a situation involving appointment of a guardian, the appointment of a conservator has no bearing on the capacity of the disabled person to contract or engage in other transactions except insofar as the spendthrift provisions of subsection (b) of this section apply to property transactions.

Subsection (b) provides a spendthrift effect for real and personal property of the protected person vested in the conservator, except as limited by order of the court pursuant to a limited conservatorship. An attempt by the protected person to transfer or alienate property may nevertheless generate a claim for restitution. The concept is analogous to spendthrift trust provisions often included when the beneficiary is incapable of managing his or her own property. The concept is also consistent with a conservatorship arrangement for protecting the estate of an incapacitated person.

MASSACHUSETTS COMMENT

The title of conservator vests the fiduciary with title equivalent as a fiduciary. The conservator succeeds to property held by custodians.

Section 5-420. [Recording of Conservator's Letters.]

(a) Letters of conservatorship are evidence of transfer of all assets or the part thereof specified in the letters, of a protected person to the conservator. An order terminating a conservatorship is evidence of transfer of all assets subjected to the conservatorship from the conservator to the protected person, or to successors of the person.

(b) Subject to the requirements of general statutes governing the filing or recordation of documents of title to land or other property, letters of conservatorship and orders terminating conservatorships, shall be filed or recorded in each registry district in which the protected person owns real property to give record notice of title as between the conservator and the protected person.

MASSACHUSETTS COMMENT

This section clarifies the intent that letters of conservatorship or order of termination be self-executing. Letters of conservatorship serve the same function that certificates of appointment of conservators served in prior practice. See § 5-101(11).

Section 5-421. [Sale, Encumbrance, or Transaction Involving Conflict of Interest Voidable; Exceptions.]

Any sale or encumbrance to a conservator, the spouse, agent, attorney of a conservator or any corporation, trust, or other organization in which the conservator has a substantial beneficial interest, or any other transaction involving the estate being administered by the conservator which is affected by a substantial conflict between fiduciary and personal interests is voidable unless the transaction is approved by the Court after notice as directed by the court.

MASSACHUSETTS COMMENT

The attorney of a conservator has been added to the list of persons to whom a sale or encumbrance may not be made. Such a limitation may restrict the actions the attorney may utilize in acting for the conservator.

Section 5-422. [Persons Dealing With Conservators; Protection.]

(a) A person who in good faith either assists or deals with a conservator for value in any transaction other than those requiring a court order as provided in section 5-407 is protected as if the conservator properly exercised the power. The fact that a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, but restrictions on powers of conservators which are endorsed on letters as provided in section 5-425 are effective as to third persons. A person is not bound to see to the proper application of estate assets paid or delivered to a conservator.

(b) The protection expressed in this section extends to any procedural irregularity or jurisdictional defect occurring in proceedings leading to the issuance of letters and is not a substitution for protection provided by comparable provisions of the law relating to commercial transactions or to simplifying transfers of securities by fiduciaries.

COMMENT

The section codifies the b.f.p. rule generally followed in transactions with fiduciaries. Nevertheless, any person dealing with a known conservator for another should examine the letters of appointment of the conservator for any limitations on the conservator's authority endorsed on the letters pursuant to § 5-425.

Section 5-423. [Powers of Conservator in Administration.]

(a) Subject to limitation provided in section 5-425, a conservator has all of the powers conferred in this section and any additional powers conferred by law.

(b) A conservator without court authorization or confirmation, may invest and reinvest funds of the estate as would a trustee.

(c) A conservator, acting reasonably in efforts to accomplish the purpose of the appointment, may act without court authorization or confirmation, to

(1) collect, hold, and retain assets of the estate including land in this or another state, until judging that disposition of the assets should be made, and the assets may be retained even though they include an asset in which the conservator is personally interested;

(2) receive additions to the estate;

(3) continue or participate in the operation of any business or other enterprise;

(4) acquire an undivided interest in an estate asset in which the conservator, in any fiduciary capacity, holds an undivided interest;

(5) invest and reinvest estate assets in accordance with subsection (b);

(6) deposit estate funds in a state or federally insured financial institution, including one operated by the conservator, not in excess of $100,000, or such other amount as is protected by federal or state insurance, in any single institution;

(7) dispose of tangible and intangible personal property for cash or on credit, at public or private sale

(8) subject to court approval, acquire estate assets, including land in this or another state at public or private sale, and lease, manage, develop, improve, exchange, change the character of, or abandon an estate asset;

(9) subject to court approval, make repairs or alterations in buildings or other structures; demolish any structures; and raze existing or erect new party walls or buildings;

(10) subject to court approval, subdivide, develop, or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; adjust differences in

valuation by giving or receiving considerations; and dedicate easements to public use without consideration;

(11) subject to court approval, enter for any purpose into a lease as lessor or lessee or renew for a term within or extending beyond the term of the conservatorship;

(12) subject to court approval, enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(13) subject to court approval, grant an option involving disposition of an estate asset and take an option for the acquisition of any asset;

(14) vote a security, in person or by general or limited proxy;

(15) pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(16) sell or exercise stock-subscription or conversion rights;

(17) consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(18) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery, but the conservator is liable for any act of the nominee in connection with the stock so held;

(19) insure the assets of the estate against damage or loss and the conservator against liability with respect to third persons;

(20) borrow money to be repaid from estate assets or otherwise; advance money for the protection of the estate or the protected person and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any estate assets, for which the conservator has a lien on the estate as against the protected person for advances so made;

(21) pay or contest any claim; settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise; and release, in whole or in part, any claim belonging to the estate to the extent the claim is uncollectible;

(22) pay taxes, assessments, compensation of the conservator, and other expenses incurred in the collection, care, administration, and protection of the estate;

(23) allocate items of income or expense to either estate income or principal, as

provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(24) pay any sum distributable to a protected person or individual who is dependent on the protected person by paying the sum to the distributee or by paying the sum for the use of the distributee:

(A) to the guardian of the distributee;

(B) to a distributee's custodian under the uniform transfers to minors act or custodial trustee under the uniform custodial trust act; or

(C) if there is no guardian, custodian or custodial trustee, to a relative or other person having custody of the distributee;

(25) employ persons, including attorneys, auditors, investment advisors, or agents, even though they are associated with the conservator, to advise or assist in the performance of administrative duties; act upon their recommendation without independent investigation;

(26) commence, prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of fiduciary duties;

(27) make funeral and burial arrangements and enter into pre-paid funeral contracts;

(28) resign the office of fiduciary held by the protected or incapacitated or person pursuant to any court appointment or written instrument; and

(29) execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the conservator.

(d) A conservator may not sell, mortgage or grant options in real estate, except as provided in chapter 202.

COMMENT

Any limitations or enlargements of the powers provided in this section for the conservator must be endorsed on the conservator's letters of appointment as provided in § 5-425.

MASSACHUSETTS COMMENT

The UPC delegation of duties to agents under subsection (c)(24) has been deleted. But see § 5-423A. The account limitation of $100,000 in (c)(6) has been inserted in recognition of FDIC limitations. Note that conservators have power to invest in insurance or annuity contracts as do trustees pursuant to sub-section (b) and § 7-401(5). See G.L. c. 201, § 47A. The UPC power to sell real estate without a license is not adopted. A Conservator may proceed under G.L. c. 202 for a license to sell or mortgage real estate.

Chapter 140 of the Acts of 2012 renumbered the second subsection (c) as subsection (d).

Section 5-423A. [Delegation.]

(a) A conservator may not delegate to an agent or another conservator the entire administration of the estate, but a conservator may otherwise delegate the management of investments that a prudent conservator of comparable skills may delegate under similar circumstances.

(b) The conservator shall exercise reasonable care, skill, and caution in:

(1) selecting an agent;

(2) establishing the scope and terms of a delegation, consistent with the purposes and terms of the conservatorship; and

(3) periodically reviewing an agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(c) In performing a delegated function, an agent owes a duty to the estate to exercise reasonable care to comply with the terms of the delegation.

(d) A conservator who complies with subsections (a) and (b) is not liable to the protected person or to the estate for the decisions or actions of the agent to whom a function was delegated.

(e) By accepting a delegation from a conservator subject to the law of this commonwealth, an agent submits to the jurisdiction of the courts of this commonwealth.

COMMENT

This section is based on the Uniform Prudent Investor Act and refers to the Restatement 3d, Trusts. The Committee supports the enactment of the Prudent Investor Act will be enacted in Massachusetts and anticipates that it will be made applicable to conservators.

Section 5-424. [Distributive Duties and Powers of Conservator.]

(a) Unless otherwise specified in the order of appointment and endorsed on the letters of appointment or contrary to the plan filed pursuant to section 5-416, a conservator may expend or distribute income or principal of the estate without court authorization or confirmation for the support, education, care, or benefit of the protected person and dependents in accordance with the following principles:

(1) The conservator shall consider recommendations relating to the appropriate standard of support, education, and benefit for the protected person or dependent made by a parent or guardian, if any. The conservator may not be surcharged for sums paid to persons or organizations furnishing support, education, or care to the protected person or a dependent pursuant to the recommendations of a parent or guardian of the protected person unless the conservator knows that the parent or guardian derives undue or disproportionate personal financial benefit therefrom, including relief from any personal duty of

support or the recommendations are clearly not in the best interest of the protected person.

(2) The conservator shall expend or distribute sums reasonably necessary for the support, education, care, or benefit of the protected person and dependents with due regard to (i) the size of the estate, the probable duration of the conservatorship, and the likelihood that the protected person, at some future time, may be fully able to be wholly self-sufficient and able to manage business affairs and the estate; (ii) the accustomed standard of living of the protected person and dependents; and (iii) other funds or sources used for the support of the protected person.

(3) The conservator may expend funds of the estate for the support, funeral expenses and burial expenses of persons legally dependent on the protected person and others who are members of the protected person's household who are unable to support themselves, and who are in need of support.

(4) Funds expended under this subsection may be paid by the conservator to any person, including the protected person, to reimburse for expenditures that the conservator might have made, or in advance for services to be rendered to the protected person if it is reasonable to expect the services will be performed and advance payments are customary or reasonably necessary under the circumstances.

(5) A conservator, in discharging the responsibilities conferred by court order and this part, shall implement the principles described in section 5-407(a), to the extent possible.

(b) If the estate is ample to provide for the purposes implicit in the distributions authorized by the preceding subsections, a conservator for a protected person other than a minor has power to make gifts to charity and persons which the protected person has expressed an intent to benefit, in amounts that do not exceed in total for any year 10 percent of the income from the estate.

(c) When a minor who has not been adjudged disabled under section 5-401(c) attains majority, the conservator, after meeting all claims and expenses of administration, shall pay over and distribute all funds and properties to the formerly protected person as soon as possible.

(d) If satisfied that a protected person's disability, other than minority, has ceased, the conservator, after meeting all claims and expenses of administration, shall pay over and distribute all funds and properties to the formerly protected person as soon as possible.

(e) If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the deceased protected person which may have come into the conservator's possession, inform the personal representative or beneficiary named therein of the delivery, and retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto. If, 40 days after the death of the protected person, no other person has been appointed personal

representative and no application or petition for appointment is before the court, the conservator may apply to exercise the powers and duties of a personal representative in order to be able to proceed to administer and distribute the decedent's estate. Upon application for an order granting the powers of a personal representative to a conservator, after notice to any person nominated personal representative by any will of which the applicant is aware, the court may grant the application upon determining that there is no objection and endorse the letters of the conservator to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative. The making and entry of an order under this section has the effect of an order of appointment of a personal representative as provided in section 3-308 and parts 6 through 10 of article III, but the estate in the name of the conservator, after administration, may be distributed to the decedent's successors without prior re-transfer to the conservator as personal representative.

COMMENT

This section sets out those situations wherein the conservator may distribute property or disburse funds during the continuance of or on termination of the trust. Section 5-415(b) makes it clear that a conservator may seek instructions from the court on questions arising under this section. Subsection (e) is derived in part from § 11.80.150 Revised Code of Washington (RCWA 11.80.150).

Wording has been added to paragraphs (a)(1) and (a)(2) to make it clear that those provisions apply to dependents of the protected person as well as to the protected person. The additions are consistent with provisions in paragraphs (a)(3) and (a)(4).

Paragraph (a)(5) is a cross reference to the admonition in § 5-407(a) reiterating the principle that the conservator should continually be conscious of the policies of this Article against an overly intrusive exercise of control over property of the protected person.

Section 5-425. [Enlargement or Limitation of Powers of Conservator.]

Subject to the restrictions in section 5-407(c), the court may confer on a conservator at the time of appointment or later, in addition to the powers conferred by sections 5-423 and 5-424, any power that the court itself could exercise under sections 5-407(c) and 5-407(d). The court, at the time of appointment or later, may limit the powers of a conservator otherwise conferred by sections 5-423 and 5-424 or previously conferred by the court and may at any time remove or modify any limitation. If the court limits any power conferred on the conservator by section 5-423 or section 5-424, or specifies, as provided in section 5-419(a), that title to some but not all assets of the protected person vest in the conservator, the limitation or specification of assets subject to the conservatorship must be endorsed upon the letters of appointment.

COMMENT

This section makes it possible to appoint a fiduciary whose powers are limited to part of the estate or who may conduct important transactions only with special court authorization. In the latter case, a conservator would be in much the same position of a guardian of property under the law currently in force in most states, but he would have title to the property. The purpose of giving conservators title as trustees is to ensure that the provisions for protection of third parties have full effect. The Veterans Administration may insist, when it is paying benefits to a minor or disabled person, that the letters of conservatorship limit powers to those of a guardian under the Uniform Veteran's Guardianship Act and require the conservator to file annual accounts.

The court may not only limit the powers of the conservator, but it may expand powers of the

conservator so as to make it possible to act as the court itself might act.

Section 5-426. [Preservation of Estate Plan; Right to Examine.]

In (i) investing the estate, (ii) selecting assets of the estate for distribution under subsections (a) and (b) of Section 5-424, and (iii) utilizing powers of revocation or withdrawal available for the support of the protected person and exercisable by the conservator or the court, the conservator and the court shall take into account any estate plan of the protected person known to them, including a will, any revocable trust of which the person is settlor, and any contract, transfer, or joint ownership arrangement originated by the protected person with provisions for payment or transfer of benefits or interests at the person's death to another or others.

MASSACHUSETTS COMMENT

Custody of estate planning documents is given to the conservator. See G.L. c. 201, § 38.

Section 5-427. [Claims Against Protected Person.]

A conservator may pay or secure from the estate claims against the estate or against the protected person arising before or after the conservatorship.

Section 5-428. [Personal Liability of Conservator.]

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

(b) The conservator is not personally liable unless the conservator is personally at fault for either (i) obligations arising from ownership or control of property of the estate, or (ii) torts committed in the course of administration of the estate.

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

(d) Any question of liability between the estate and the conservator personally may be determined in a proceeding for accounting, surcharge, or indemnification, or other appropriate proceeding or action.

Section 5-429. [Removal or Resignation of Conservator; Termination of Disability; Termination of Proceedings.]

(a) On petition of the protected person or any person interested in the protected

person's welfare, the court, after notice and hearing, may remove a conservator if the person under conservatorship is no longer disabled or for other good cause. On petition of the conservator, the court, after hearing, may accept a resignation.

(b) An order adjudicating disability may specify a minimum period, not exceeding 6 months, during which a petition for an adjudication that the protected person is no longer disabled may not be filed without special leave. Subject to that restriction, the protected person or any person interested in the welfare of the protected person may petition for an order that the person is no longer disabled and for termination of the conservatorship. A request for an order may also be made informally to the court and any person who knowingly interferes with transmission of the request may be adjudged guilty of contempt of court.

(c) Upon removal, resignation, or death of the conservator, or if the conservator is determined to be incapacitated or disabled, the court may appoint a successor conservator and make any other appropriate order. Before appointing a successor conservator, or ordering that a person's disability has terminated, the court shall follow the same procedures to safeguard the rights of the protected person that apply to a petition for appointment of a conservator.

(d) A conservatorship terminates upon the death of the protected person or upon order of the court.

(e) Upon the death of a protected person, the conservator shall conclude the administration of the estate by distribution to the person's successors. The conservator shall file a final accounting and petition for discharge within 30 days after distribution.

(f) Unless created for reasons other than minority, a conservatorship created for a minor terminates when the protected person attains majority or is emancipated.

(g) On petition of a protected person, a conservator, or another person interested in a protected person's welfare, the court may terminate the conservatorship if the protected person no longer needs the assistance or protection of a conservator. Termination of the conservatorship does not affect a conservator's liability for previous acts or the obligation to account for funds and assets of the protected person.

(h) Upon termination of a conservatorship and whether or not formally distributed by the conservator, title to assets of the estate passes to the formerly protected person or the person's successors. The order of termination must provide for expenses of administration and direct the conservator to execute appropriate instruments to evidence the transfer of title or confirm a distribution previously made and to file a final accounting and a petition for discharge upon approval of the final accounting.

(i) The court shall enter a final order of discharge upon the approval of the final accounting and satisfaction by the conservator of any other conditions placed by the court on the conservator's discharge.

COMMENT

Persons entitled to notice of a petition to terminate a conservatorship are identified by § 5-405. For appointment of a guardian ad litem, see § 5-106.

Any interested person may seek the termination of a conservatorship if there is some question as to whether the trust is still needed. In some situations (e.g., the individual who returns after being missing) it may be perfectly clear that the person is no longer in need of a conservatorship.

An order terminating a conservatorship may be recorded as evidence of the transfer of title from the estate. See § 5-420.

MASSACHUSETTS COMMENT

Subsections (a) to (c) are added to make this section consistent with § 5-311 on guardians. Section 5-414 of the UPC is combined herein.

Chapter 140 of the Acts of 2012 changed the word “incapacitated” in subsection (b) to read, “disabled”.

Section 5-430. [Payment of Debt and Delivery of Property to Foreign Conservator without Local Proceedings.]

(a) Any person indebted to a protected person or having possession of property or of an instrument evidencing a debt, stock, or chose in action belonging to a protected person may pay or deliver it to a conservator, guardian of the estate, or other like fiduciary appointed by a court of the state of residence of the protected person upon being presented with proof of appointment and an affidavit made by or on behalf of the fiduciary stating:

(1) that no protective proceeding relating to the protected person is pending in this commonwealth; and

(2) that the foreign fiduciary is entitled to payment or to receive delivery.

(b) If the person to whom the affidavit is presented is not aware of any protective proceeding pending in this commonwealth, payment or delivery in response to the demand and affidavit discharges the debtor or possessor.

COMMENT

Section 5-409(a)(1) gives a foreign conservator or guardian of property, appointed in the jurisdiction in which the protected person resides, first priority for appointment as conservator in this commonwealth. A foreign conservator may easily obtain any property in this commonwealth and take it to the residence of the protected person for management.

Section 5-431. [Foreign Conservator; Proof of Authority; Bond; Powers.]

(a) If a conservator has not been appointed in this commonwealth and no petition in a protective proceeding is pending in this commonwealth, a conservator appointed in the state in which the protected person resides may file in a court of this commonwealth 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 domiciliary foreign conservator may exercise as to assets in this commonwealth all powers of a conservator appointed in this commonwealth and may maintain actions and

proceedings in this commonwealth subject to any conditions imposed upon non-resident parties generally.

(b) If a ward, incapacitated or protected person removes from or resides out of this commonwealth, a guardian or conservator appointed within this commonwealth may transfer and pay over the whole or any part of the personal property of such person to a guardian, conservator, trustee or committee or other official appointed by competent authority in the state or country where such person resides, upon such terms and such manner as the court by which he or she was appointed may, after notice to all parties interested, order upon petition filed therefor.

MASSACHUSETTS COMMENT

Subsection (b) is added to preserve G.L. c 201, § 31.

PART 5

DURABLE POWER OF ATTORNEY

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 contains 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.

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 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) 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.

(b) References in this part to the disability or incapacity of the principal shall mean the mental illness or other disability of the principal recognized under the General Laws.

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.

MASSACHUSETTS COMMENT

G.L. c. 201B, § 1 does not contain words "lapse of time" or "unless it states a time of termination, notwithstanding the lapse of the time since the execution of the instrument".

Section 5-502. [Durable Power of Attorney Not Affected By Lapse 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

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.

MASSACHUSETTS COMMENT

G.L. c. 201B, § 2 is identical except that the last sentence has been deleted.

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 such principal were not disabled or incapacitated.

(b) A principal may nominate, by a durable power of attorney, the conservator, or guardian of the person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. A principal may in a nomination of a conservator or guardian request that sureties on any bond of a conservator or guardian be waived. 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

An agent in fact is accountable both to the principal and a conservator or guardian if a court has appointed a 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 do-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 court 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.

MASSACHUSETTS COMMENT

This section differs from G.L. c. 201B, § 3 only as follows:

Subsection (a)
Line 2 - "of the principal's domicile" deleted
Line 4 - "principal's property" changed "to property of principal"
Lines 5 & 6 - "is" changed to "shall be", "the fiduciary" changed to "such fiduciary"
Line 8 - "he" changed to "such principal"

Subsection (b)
Line 4 - "principal's person or estate" changed to "person or estate of such principal"
Line 5 - "principal's most recent nomination" changed to "such nomination by the principal."

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.

(c) No revocation by a principal under a written power of attorney, durable or otherwise, shall revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the revocation, acts in good faith under the power or relies in good faith on acts under the power. Any action so taken or relied upon, unless otherwise invalid or unenforceable, binds the principal and successors in interest of the principal. As to a person other than the attorney in fact, such person shall not be deemed to have actual knowledge unless the revocation is in a writing executed by the principal or a duly appointed personal representative of the principal and is actually received by such person or, in the case of transactions involving real estate or any interest therein, is recorded in due course as provided in section 25 of chapter 184.

COMMENT

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 5-505.

MASSACHUSETTS COMMENT

This section differs from G.L. c. 201B, § 4 only as follows:

Subsection (a)
Line 2 - "does" changed to "shall"
Line 5 - "the" changed to "such"
Line 6 - "binds successors" changed to "shall bind a successor"

Subsection (b)
Line 2 - "does" changed to "shall"
Line 6 - "binds" changed to "shall bind"

Chapter 140 of the Acts of 2012, § 50 added subsection (c). § 61 of the Act makes the addition applicable to transactions under powers of attorney occurring before, on or after the effective date of the Act, except with respect to a transaction that has been invalidated by a final decision of a court of competent jurisdiction prior to such effective date.

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

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.

MASSACHUSETTS COMMENT

G.L. c. 201B, § 5 differs from this section as follows:

Line 5 - "principal's" deleted, "of the principal" inserted after "incapacity"
Line 8 - "the" changed to "such"
Line 10 - "does" changed to "shall"

Section 5-506. [Enforcement.]

The attorney in fact under a durable power of attorney is authorized to prosecute legal action for damages in behalf of the principal in the event of an unreasonable refusal of a third party to honor the authority of a valid durable power of attorney.

MASSACHUSETTS COMMENT

This section does not appear in either the UPC version or G.L. c. 201B.

Section 5-507. [Protection; Third Parties.]

No third party acting in good faith reliance on a durable power of attorney shall be held liable for action taken in such reliance.

MASSACHUSETTS COMMENT

This section does not appear in either the UPC version or G.L. c. 201B.

7/2012