



Members

Sen. Joseph Zakas, Chairperson
Sen. Randall Head
Sen. John Broden
Rep. Ed DeLaney, Vice-Chairperson
Rep. Ryan Dvorak
Rep. Ralph Foley
Chris Colpaert
Joseph H. Davis
Kris Fruehwald
Thomas Hardin
Judge Thomas Lowe
James Martin
David Pendergast
Dan Reeves
Timothy Sendak
Jerry Withered

PROBATE CODE STUDY COMMISSION

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Authority: IC 2-5-16-2

MEETING MINUTES¹

Meeting Date: September 21, 2010
Meeting Time: 10:30 A.M.
Meeting Place: State House, 200 W. Washington St., Room 431
Meeting City: Indianapolis, Indiana
Meeting Number: 2

Members Present: Sen. Joseph Zakas, Chairperson; Rep. Ed DeLaney, Vice-Chairperson; Joseph H. Davis; Kris Fruehwald; Thomas Hardin; Judge Thomas Lowe; James Martin; David Pendergast; Dan Reeves.

Members Absent: Sen. Randall Head; Sen. John Broden; Rep. Ryan Dvorak; Rep. Ralph Foley; Chris Colpaert; Timothy Sendak; Jerry Withered.

Sen. Zakas called the meeting to order at 10:40 a.m.

The meeting was devoted to Commission discussion of several Preliminary Drafts (PDs). Most of the PDs were derived from the draft proposals of the Probate, Trust, and Real Property Section of the Indiana State Bar Association that were presented at the Commission's September 7 meeting.

The Commission discussed the following PDs:

¹ These minutes, exhibits, and other materials referenced in the minutes can be viewed electronically at <http://www.in.gov/legislative>. Hard copies can be obtained in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for hard copies may be mailed to the Legislative Information Center, Legislative Services Agency, West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for hard copies.

PD 3233

Makes technical corrections.

PD 3240

Provides that the clerk of the circuit court of each county in which real property described in the inheritance tax order of a nonresident decedent is located shall spread a copy of the order of record upon request by an interested person rather than as a matter of course. Provides that the order of priority of the claims that are not subservient to a claim to recapture Medicaid benefits is: (1) the expenses of administering the recipient's estate, including taxes; (2) reasonable funeral expenses; and (3) the expenses of the recipient's last illness. Removes caps on the amount of funeral expenses that have priority. Provides that the court approved fees of attorneys, personal representatives, and certain attorney surrogates are expenses of administering the recipient's estate.

PD 3277

Provides that the clerk of the circuit court of each county in which real property described in the inheritance tax order of a nonresident decedent is located shall spread a copy of the order of record upon request by an interested person rather than as a matter of course. Provides that the order of priority of claims that are not subservient to a claim to recapture Medicaid benefits is: (1) the expenses of administering the recipient's estate, including taxes; (2) reasonable funeral expenses; and (3) the expenses of the recipient's last illness. Removes caps on the amount of funeral expenses that have priority. Provides that the court approved fees of attorneys, personal representatives, and certain attorney surrogates are expenses of administering the recipient's estate. Disallows claims against the estate of a Medicaid recipient's spouse.

PD 3241

Specifies that in the case of an unsupervised estate in which it has been determined that a decedent died intestate, a will may not be probated unless it is presented before a closing statement is filed. Provides that the will of a decedent may be presented to the court for probate and admitted to probate at any time if no estate proceedings have been commenced for a decedent and an asset of the decedent remains titled or registered in the name of the decedent. Provides that the will may be probated for the sole purpose of transferring ownership of the asset. Provides that a domiciliary foreign personal representative may exercise all powers of a local unsupervised personal representative.

PD 3244

Defines "discretionary interest". Specifies that real property transferred to matrimonial trusts for estate planning purposes continues to enjoy the ownership protection of real property owned as joint tenants by the entireties. Provides that the terms of a matrimonial trust may restrict the transfer of matrimonial property. Specifies when property continues to be matrimonial property. Specifies when claims against the property are barred. Specifies when matrimonial trusts cease to be matrimonial trusts.

PD 3247

Provides that joint owners and other entities that own motor vehicles and watercraft may transfer title to a motor vehicle or watercraft as a transfer on

death transaction. (Current law restricts the procedures to individuals who are the sole owners of motor vehicles or watercraft.) Specifies that the transfer at death of an individual retirement account or a similar account or plan or of benefits under an employee benefit plan is not considered a nonprobate transfer. Provides that the transfer on death act does not apply to certain transfers of retirement or employee benefits. Provides that the endorsement of the county auditor is not necessary to record a transfer on death deed. Removes a provision prohibiting a surviving spouse's election to take against a will from applying to a valid transfer on death transfer. Provides that the affidavit certifying the death of the transferor and cross referencing the transferor's transfer on death deed must be endorsed by the county auditor in order to be recorded.

PD 3248

Specifies the notice requirements following court action on a petition to appoint a temporary guardian. Provides that a delegation of parental powers by power of attorney is effective immediately. Authorizes a parent of a minor or a guardian of a protected person to use a power of attorney as a delegation of authority that takes effect upon the death or incapacity of the parent or guardian. Provides that a delegation taking effect upon death or incapacity is effective for 90 days unless the person receiving the delegation files a petition for guardianship in which case the delegation is effective until the court rules on the petition.

PD 3251

Specifies the notice requirements following court action on a petition to appoint a temporary guardian. Authorizes a parent of a minor or a guardian of a protected person to designate a preneed guardian effective upon the death or incapacity of the parent or guardian. Provides that the declaration is effective for 90 days unless the preneed guardian files a petition for guardianship, in which case the declaration is effective until the court rules on the petition. Provides that a delegation of parental powers by power of attorney is effective immediately.

PD 3236

Authorizes the establishment of asset protection trusts. Prescribes the procedures for establishing an asset protection trust. Bars most claims against an asset protection trust. Permits claims for certain fraudulent transfers, to enforce certain child support orders, and to enforce certain orders for the division of property with respect to a dissolution of marriage or a legal separation. Provides immunity to the trustees and advisers of asset protection trusts and the professionals involved in establishing asset protection trusts. Provides that the rule against perpetuities does not apply to asset protection trusts.

The Commission took no action on the PDs. Sen. Zakas announced that the PDs, as well as a PD based on the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, will be considered at the Commission's October 13 meeting.

Sen. Zakas adjourned the meeting at 11:55 a.m.

Probate Code
Study Commission
Meeting # 2
September 21,
2010



**PRELIMINARY DRAFT
No. 3233**

**PREPARED BY
LEGISLATIVE SERVICES AGENCY
2011 GENERAL ASSEMBLY**

DIGEST

Citations Affected: IC 29-1-6-1; IC 29-2-12-4.

Synopsis: Technical corrections. Makes technical corrections.

Effective: Upon passage.



1 testator's intention can be clearly ascertained by taking into
2 consideration such fact or event even though occurring after the
3 execution of the will.

4 (j) If a testator devises or bequeaths property to be added to a trust
5 or trust fund which is clearly identified in the testator's will and which
6 trust is in existence at the time of the death of the testator, such devise
7 or bequest shall be valid and effective. Unless the will provides
8 otherwise, the property so devised or bequeathed shall be subject to the
9 terms and provisions of the instrument or instruments creating or
10 governing the trust or trust fund, including any amendments or
11 modifications in writing made at any time before or after the execution
12 of the will and before or after the death of the testator.

13 (k) If a testator devises securities in a will and the testator then
14 owned securities that meet the description in the will, the devise
15 includes additional securities owned by the testator at death to the
16 extent the additional securities were acquired by the testator after the
17 will was executed as a result of the testator's ownership of the
18 described securities and are securities of any of the following types:

- 19 (1) Securities of the same organization acquired because of an
20 action initiated by the organization or any successor, related, or
21 acquiring organization, excluding any security acquired by
22 exercise of purchase options.
- 23 (2) Securities of another organization acquired as a result of a
24 merger, consolidation, reorganization, or other distribution by the
25 organization or any successor, related, or acquiring organization.
- 26 (3) Securities of the same organization acquired as a result of a
27 plan of reinvestment.

28 Distributions in cash before death with respect to a described security
29 are not part of the devise.

30 (l) For purposes of this subsection, "incapacitated principal" means
31 a principal who is an incapacitated person. An adjudication of
32 incapacity before death is not necessary. The acts of an agent within the
33 authority of a durable power of attorney are presumed to be for an
34 incapacitated principal. If:

- 35 (1) specifically devised property is sold or mortgaged by; or
 - 36 (2) a condemnation award, insurance proceeds, or recovery for
37 injury to specifically devised property are paid to;
- 38 a guardian or an agent acting within the authority of a durable power
39 of attorney for an incapacitated principal, the specific devisee has the
40 right to a general pecuniary devise equal to the net sale price, the
41 amount of the unpaid loan, the condemnation award, the insurance
42 proceeds, or the recovery.

43 (m) A written statement or list that:
44 (1) complies with this subsection; and
45 (2) is referred to in a will;
46 may be used to dispose of items of tangible personal property, other



1 than property used in a trade or business, not otherwise specifically
 2 disposed of by the will. To be admissible under this subsection as
 3 evidence of the intended disposition, the writing must be signed by the
 4 testator and must describe the items and the beneficiaries with
 5 reasonable certainty. The writing may be prepared before or after the
 6 execution of the will. The writing may be altered by the testator after
 7 the writing is prepared. The writing may have no significance apart
 8 from the writing's effect on the dispositions made by the will. If more
 9 than one (1) otherwise effective writing exists, then, to the extent of a
 10 conflict among the writings, the provisions of the most recent writing
 11 revoke the inconsistent provisions of each earlier writing.

12 (n) A will of a decedent who dies after December 31, 2009, and
 13 before January 1, 2011, that contains a formula referring to:

- 14 (1) the unified credit;
- 15 (2) the estate tax exemption;
- 16 (3) the applicable credit amount;
- 17 (4) the applicable exclusion amount;
- 18 (5) the generation-skipping transfer tax exemption;
- 19 (6) the GST exemption;
- 20 (7) the marital deduction;
- 21 (8) the maximum marital deduction;
- 22 (9) the unlimited marital deduction;
- 23 (10) the inclusion ratio;
- 24 (11) the applicable fraction;
- 25 (12) any section of the Internal Revenue Code:
 - 26 (A) relating to the:
 - 27 (i) federal estate tax; or
 - 28 (ii) generation-skipping transfer tax; and
 - 29 (B) that measures a share of:
 - 30 (i) an estate; or
 - 31 (ii) a trust;

32 based on the amount that can pass free of federal estate taxes
 33 or the amount that can pass free of federal generation-skipping
 34 transfer tax law; or

35 (13) a provision of federal estate tax or generation-skipping
 36 transfer tax law that is similar to subdivisions (1) through (12);
 37 refers to the federal estate tax and generation-skipping transfer tax laws
 38 as they applied with respect to estates of decedents on December 31,
 39 2009.

40 (o) Subsection (n) does not apply to a will:

- 41 (1) that is executed or amended after December 31, 2009; or
- 42 (2) that manifests an intent that a contrary rule apply if the
 43 decedent dies on a date on which there is no then applicable
 44 federal estate or generation-skipping transfer tax.

45 (p) If the federal estate or generation-skipping transfer tax becomes
 46 effective before January 1, 2011, the reference to January 1, 2011, in



1 subsection (n) shall refer instead to the first date on which the tax
2 becomes legally effective.

3 (q) Within three (3) months following the latest to occur of the:

- 4 (1) decedent's death;
- 5 (2) fiduciary's appointment; or
- 6 (3) enactment of this subsection;

7 the personal representative under a will to which subsection (n) applies
8 shall give written notice ~~regarding to~~ the affected beneficiary of the
9 right to commence a proceeding under subsection (r) and to the present
10 income beneficiary of any trust created under the will of the existence
11 of this ~~statute~~; ~~section~~ and the beneficiary's right to commence a
12 proceeding under subsection (r).

13 (r) The personal representative ~~of or~~ an affected beneficiary under
14 a will described in subsection (n) may initiate a proceeding to
15 determine whether the decedent intended that a formula described in
16 subsection (n) be construed with respect to the law as it existed after
17 December 31, 2009. A proceeding under this subsection must be
18 commenced within nine (9) months after the death of the testator or
19 grantor.

20 SECTION 2. IC 29-2-12-4 IS AMENDED TO READ AS
21 FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 4. The portion of
22 ~~such the~~ federal estate tax ~~2001 et seq.)~~ to be paid by each person, heir,
23 or beneficiary of ~~said a~~ **decedent's** estate shall be determined by
24 dividing the value of the property received by ~~such the~~ person, heir, or
25 beneficiary, which is included in the net taxable estate, by the amount
26 of the net taxable estate, and multiplying the result by the amount of the
27 total federal estate tax paid.

28 SECTION 3. **An emergency is declared for this act.**





PRELIMINARY DRAFT
No. 3236

PREPARED BY
LEGISLATIVE SERVICES AGENCY
2011 GENERAL ASSEMBLY

DIGEST

Citations Affected: IC 30-4; IC 34-30-2-132.7.

Synopsis: Trusts. Authorizes the establishment of asset protection trusts. Prescribes the procedures for establishing an asset protection trust. Bars most claims against an asset protection trust. Permits claims for certain fraudulent transfers, to enforce certain child support orders, and to enforce certain orders for the division of property with respect to a dissolution of marriage or a legal separation. Provides immunity to the trustees and advisers of asset protection trusts and the professionals involved in establishing asset protection trusts. Provides that the rule against perpetuities does not apply to asset protection trusts.

Effective: July 1, 2011.



A BILL FOR AN ACT to amend the Indiana Code concerning trusts and fiduciaries.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 30-4-3-2 IS AMENDED TO READ AS FOLLOWS
2 [EFFECTIVE JULY 1, 2011]: Sec. 2. (a) The settlor may provide in the
3 terms of the trust that the interest of a beneficiary may not be either
4 voluntarily or involuntarily transferred before payment or delivery of
5 the interest to the beneficiary by the trustee.

6 (b) Except as otherwise provided in subsection (c), if the settlor is
7 also a beneficiary of the trust, a provision restraining the voluntary or
8 involuntary transfer of ~~his~~ **the settlor's** beneficial interest will not
9 prevent ~~his~~ **the settlor's** creditors from satisfying claims from ~~his~~ **the**
10 **settlor's** interest in the trust estate.

11 (c) Subsection (a) applies to a trust that meets both of the following
12 requirements, regardless of whether or not the settlor is also a
13 beneficiary of the trust:

14 (1) The trust is a qualified trust under 26 U.S.C. 401(a).

15 (2) The limitations on each beneficiary's control over the
16 beneficiary's interest in the trust complies with 29 U.S.C. 1056(d).

17 **(d) Subsection (a) applies to an asset protection trust (as defined**
18 **in IC 30-4-8-2(1)) whether or not the settlor is also a beneficiary of**
19 **the asset protection trust.**

20 ~~(d)~~ (e) A trust containing terms authorized under subsection (a) may
21 be referred to wherever appropriate as a trust with protective
22 provisions.

23 SECTION 2. IC 30-4-8 IS ADDED TO THE INDIANA CODE AS
24 A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY
25 1, 2011]:

26 **Chapter 8. Asset Protection Trusts**

27 **Sec. 1. This chapter applies to:**

28 **(1) qualified dispositions to asset protection trusts; and**

29 **(2) dispositions by transferors who are trustees;**

30 **that are made after June 30, 2011.**

31 **Sec. 2. Unless the context requires otherwise, the following**



1 definitions apply throughout this chapter:

2 (1) "Asset protection trust" means an irrevocable trust
3 established under section 3 of this chapter.

4 (2) "Claim" means a right to payment, regardless of whether
5 the right is reduced to judgment, liquidated, unliquidated,
6 fixed, contingent, matured, immature, disputed, undisputed,
7 legal, equitable, secured, or unsecured.

8 (3) "Creditor" means a person who has a claim against the
9 transferor.

10 (4) "Debt" means liability on a claim.

11 (5) "Disposition" means a transfer, conveyance, or assignment
12 of property, including a change in the legal ownership of
13 property that occurs when a trustee is substituted for another
14 trustee or when at least one (1) trustee is added. The term also
15 includes the exercise of a power that causes a transfer of
16 property to a trustee. However, the term does not include the
17 release or relinquishment of an interest in property that, until
18 the release or relinquishment, was the subject of a qualified
19 disposition.

20 (6) "Investment decision" means the retention, purchase, sale,
21 exchange, or tender of the ownership of or rights in an
22 investment, or another transaction affecting the ownership of
23 or rights in an investment.

24 (7) "Person" means an individual at least eighteen (18) years
25 of age, a corporation, a trust, a limited liability company, a
26 limited liability partnership, a partnership, a governmental
27 entity, the state, or a political subdivision of the state.

28 (8) "Property" means real property, tangible personal
29 property (as defined in IC 6-4.1-1-13), intangible personal
30 property (as defined in IC 6-4.1-1-5), and an interest in real
31 property, tangible personal property, or intangible personal
32 property.

33 (9) "Qualified affidavit" means a sworn affidavit that meets
34 the requirements of section 4 of this chapter.

35 (10) "Qualified disposition" means a disposition by a
36 transferor to an asset protection trust established under
37 section 3 of this chapter.

38 (11) "Qualified trustee" means a person qualified to serve as
39 the trustee of an asset protection trust under section 5 of this
40 chapter.

41 (12) "Transferor" is a person who directly or indirectly
42 makes a disposition or causes a disposition to be made.

43 (13) "Trust adviser" means a person given authority by the
44 terms of an asset protection trust to direct, consent to, or
45 disapprove actual or proposed investment decisions,
46 distribution decisions, or other decisions related to property



1 in an asset protection trust. The term includes a trust
 2 protector or any other person who, in addition to a qualified
 3 trustee, holds at least one (1) trust power.

4 **Sec. 3. (a) Except as otherwise provided in this chapter, a person**
 5 **may establish an asset protection trust.**

6 **(b) A trust is an asset protection trust if the trust satisfies each**
 7 **of the following requirements:**

- 8 **(1) The trust must provide for the appointment of at least one**
 9 **(1) qualified trustee for the property that is the subject of a**
 10 **qualified disposition.**
 11 **(2) The trust must expressly incorporate Indiana law to**
 12 **govern the validity, construction, and administration of the**
 13 **trust.**
 14 **(3) The trust must be irrevocable.**
 15 **(4) The trust must provide that the interests of the transferor**
 16 **or beneficiary in the trust property or the income from the**
 17 **trust property may not voluntarily or involuntarily be**
 18 **transferred, assigned, pledged, or mortgaged before the**
 19 **qualified trustee actually distributes the property or income**
 20 **to the beneficiary.**

21 **Sec. 4. (a) A person establishing an asset protection trust under**
 22 **this chapter must sign a qualified affidavit identifying the property**
 23 **to be transferred to the asset protection trust. The qualified**
 24 **affidavit must state the following:**

- 25 **(1) That the transferor has full right, title, and authority to**
 26 **transfer the property to the asset protection trust.**
 27 **(2) That the transfer of the property to the asset protection**
 28 **trust will not render the transferor insolvent.**
 29 **(3) That the transferor does not intend to defraud a creditor**
 30 **by transferring the property to the asset protection trust.**
 31 **(4) That there are no pending or threatened court actions**
 32 **against the transferor other than the court actions identified**
 33 **by the transferor and attached to the qualified affidavit.**
 34 **(5) That the transferor is not involved in any administrative**
 35 **proceedings other than the administrative proceedings**
 36 **identified by the transferor and attached to the qualified**
 37 **affidavit.**
 38 **(6) That the transferor does not contemplate filing for relief**
 39 **under the federal bankruptcy code.**
 40 **(7) That the property transferred to the asset protection trust**
 41 **is not derived from unlawful activities.**

42 **(b) Except as otherwise provided by this section, the qualified**
 43 **affidavit must be signed by the transferor.**

44 **(c) In the case of a disposition by a transferor who is a trustee,**
 45 **the qualified affidavit must be signed by the transferor who made**
 46 **the original disposition to the trustee. A qualified affidavit signed**



1 under this subsection must state the facts as of the time of the
2 original disposition.

3 (d) If the transferor is a married individual at the time the
4 qualified affidavit is signed, the transferor shall provide a copy of
5 the qualified affidavit to the transferor's spouse.

6 Sec. 5. (a) A person may serve as a qualified trustee of an asset
7 protection trust if the person is not the transferor and satisfies
8 either of the following requirements:

9 (1) In the case of an individual, the individual is a resident of
10 Indiana.

11 (2) In all other cases, the person is:

12 (A) authorized by Indiana law to act as a trustee; and

13 (B) subject to the supervision of:

14 (i) the department of financial institutions; or

15 (ii) The Office of the Comptroller of the Currency, the
16 Federal Deposit Insurance Corporation, the Board of
17 Governors of the Federal Reserve System, the Office of
18 Thrift Supervision, or any successor to these agencies.

19 (b) A qualified trustee shall do the following:

20 (1) Maintain or arrange for providing custody of the property
21 subject to the qualified disposition in Indiana.

22 (2) Maintain complete and accurate records for the asset
23 protection trust on an exclusive or nonexclusive basis.

24 (3) Prepare or arrange for the preparation of all required tax
25 returns for the asset protection trust.

26 (4) Materially participate in the administration of the asset
27 protection trust.

28 Sec. 6. (a) Except as provided in section 7 of this chapter, no
29 cause of action of any kind, including a cause of action to enforce
30 a judgment, may be brought for:

31 (1) an attachment or other provisional remedy against
32 property that is the subject of a qualified disposition to an
33 asset protection trust; or

34 (2) the avoidance of a qualified disposition to an asset
35 protection trust.

36 (b) If a court declines to apply Indiana law in determining the
37 effect of a spendthrift provision in an asset protection trust in an
38 action brought against an asset protection trust, the trustee of the
39 asset protection trust shall immediately resign and, without further
40 order of any court, cease to be the trustee of the asset protection
41 trust. When a trustee resigns under this section, the trustee has
42 only the power to convey the trust property to a successor trustee
43 appointed under this section. A successor trustee shall succeed the
44 resigning trustee in accordance with the terms of the asset
45 protection trust. If the trust does not provide for a successor
46 trustee and the trust would otherwise be without a trustee, any



1 beneficiary of the trust may petition an Indiana court to appoint a
 2 successor trustee. The Indiana court receiving the petition shall
 3 appoint a successor trustee to serve in accordance with the terms
 4 and conditions that the court determines are consistent with the
 5 purposes of the trust and this chapter.

6 (c) An asset protection trust and its property are protected
 7 under this section regardless of whether or not the transferor:

8 (1) serves as a trust adviser under section 11 of this chapter;
 9 or

10 (2) retains a power described in section 12 of this chapter.

11 Sec. 7. (a) Section 6 of this chapter does not prohibit a cause of
 12 action or preclude a claim for the following:

13 (1) Except as provided in subsection (b), an action brought in
 14 Indiana under the Uniform Fraudulent Transfer Act
 15 (IC 32-18-2) where the requirements for recovery under the
 16 act are met by clear and convincing evidence.

17 (2) An action to enforce the child support obligations of the
 18 transferor under a judgment or court order in existence at the
 19 time of the transferor's qualified disposition to the asset
 20 protection trust.

21 (3) A court judgment or order for the division of property in
 22 a dissolution of the transferor's marriage or a legal separation
 23 between the transferor and the transferor's spouse, if either
 24 of the following applies:

25 (A) Both of the following occurred.

26 (i) The transferor's distribution to the asset protection
 27 trust was made within the thirty (30) days before the
 28 date of the transferor's marriage that is subject to the
 29 dissolution or legal separation.

30 (ii) The transferor's spouse was given at least three (3)
 31 days notice before the qualified disposition was made.

32 (B) The transferor's distribution to the asset protection
 33 trust was made after the date of the transferor's marriage
 34 that is subject to the dissolution or legal separation.

35 (b) A claim brought under an action described in subsection
 36 (a)(1) is extinguished unless:

37 (1) the creditor's claim arose before the qualified disposition
 38 to an asset protection trust was made and the action is
 39 brought within the limitations of IC 32-18-2-19, as in effect on
 40 the date of the qualified disposition; or

41 (2) notwithstanding IC 32-18-2-19, the creditor's claim arose
 42 concurrent with or after the qualified disposition and the
 43 action is brought not more than four (4) years after the date
 44 of the qualified disposition.

45 (c) A qualified disposition made by a transferor who is a trustee
 46 is considered for purposes of this chapter to have been made on the



1 date that the property that is subject to the qualified disposition
2 was originally transferred in trust to the trustee or any predecessor
3 trustee in a form that satisfies section 3(b)(3) and 3(b)(4) of this
4 chapter.

5 (d) If more than one (1) qualified disposition is made by means
6 of the same asset protection trust:

7 (1) the making of a subsequent qualified disposition is
8 disregarded when determining whether a creditor's claim
9 with respect to a prior qualified disposition is extinguished
10 under subsection (b); and

11 (2) any distribution to a beneficiary is considered to have been
12 made from the latest qualified disposition.

13 Sec. 8. (a) If a creditor's claim is allowed under section 7 of this
14 chapter, the transferor's qualified disposition to an asset protection
15 trust is subject to the claim only to the extent necessary to satisfy
16 the transferor's debt to the creditor making the allowed claim.

17 (b) If a creditor's claim is allowed under section 7 of this
18 chapter, the claim is limited as follows:

19 (1) If the court is satisfied that a qualified trustee has not
20 acted in bad faith in accepting or administering the property
21 that is the subject of the qualified disposition:

22 (A) the qualified trustee has a first and paramount lien
23 against the property that is the subject of the qualified
24 disposition in an amount equal to the entire cost, including
25 attorneys' fees, properly incurred by the qualified trustee
26 in the defense of the action or proceedings filed by the
27 creditor;

28 (B) the creditor's claim shall be allowed subject to the
29 proper fees, costs, preexisting rights, claims, and interests
30 of the qualified trustee and of any predecessor qualified
31 trustee that had not acted in bad faith; and

32 (C) it is presumed that the qualified trustee did not act in
33 bad faith merely by accepting the property that is the
34 subject of the qualified disposition.

35 (2) If the court is satisfied that a beneficiary of an asset
36 protection trust has not acted in bad faith;

37 (A) the creditor's claim is subject to the right of the
38 beneficiary to retain any distribution made upon the
39 exercise of a trust power or the discretion vested in the
40 qualified trustee that was properly exercised before the
41 creditor commenced an action to enforce the claim; and

42 (B) it is presumed that the beneficiary, including a
43 beneficiary who is also a transferor, did not act in bad faith
44 merely by creating the asset protection trust or by
45 accepting a distribution made in accordance with the terms
46 of the asset protection trust.



1 **Sec. 9.** A spendthrift provision described in section 3(b)(4) of
2 this chapter is considered a restriction on the transfer of the
3 transferor's beneficial interest in the trust that is enforceable
4 under applicable nonbankruptcy law within the meaning of Section
5 541(c)(2) of the Bankruptcy Code (11 U.S.C. 541(c)(2)) or any
6 successor provision of the federal bankruptcy code.

7 **Sec. 10.** Except as permitted by the provisions of an asset
8 protection trust and by sections 11 and 12 of this chapter, the
9 transferor may not have any rights or authority with respect to the
10 principal or income of the asset protection trust. An agreement or
11 understanding purporting to grant or permit the retention of any
12 greater rights or authority is void.

13 **Sec. 11.** A transferor who makes a qualified disposition may also
14 serve as a trust adviser. However, the transferor may not serve as
15 adviser to a trust that is a qualified disposition except with respect
16 to the retention of a veto right permitted by section 12(1) of this
17 chapter.

18 **Sec. 12. (a)** An asset protection trust is not considered revocable
19 because of the inclusion of one (1) or more of the following:

20 (1) A transferor's power to veto a distribution from the trust.

21 (2) A power of appointment (other than the power to appoint
22 to the transferor, the transferor's creditors, the transferor's
23 estate, or the creditors of the transferor's estate) that may be
24 exercised by will or other written instrument of the transferor
25 that is effective only upon the transferor's death.

26 (3) The transferor's potential or actual receipt of income or
27 principal, including right to income retained in the trust.

28 (4) The transferor's potential or actual receipt of income or
29 principal from a charitable remainder unitrust or charitable
30 remainder annuity trust (as those terms are defined in Section
31 664 of the Internal Revenue Code).

32 (5) The transferor's potential or actual receipt of income or
33 principal from a grantor retained annuity trust or grantor
34 retained unitrust that is allowed under Section 2702 of the
35 Internal Revenue Code.

36 (6) The transferor's potential or actual receipt or use of
37 principal when that potential or actual receipt or use results
38 from a qualified trustee's acting:

39 (A) in the qualified trustee's discretion;

40 (B) under a standard that governs the distribution of
41 principal and does not confer upon the transferor a power
42 to consume, invade, or appropriate property for the benefit
43 of the transferor unless the power of the transferor is
44 limited by an ascertainable standard relating to health,
45 education, support, or maintenance within the meaning of
46 Section 2041(b)(1)(A) or Section 2514(c)(1) of the Internal



1 Revenue Code; or
2 (C) at the direction of an adviser described in section 13 of
3 this chapter who acts:

- 4 (i) in the adviser's discretion; or
- 5 (ii) under a standard that governs the distribution of
- 6 principal and does not confer upon the transferor a
- 7 power to consume, invade, or appropriate property for
- 8 the benefit of the transferor unless the power of the
- 9 transferor is limited by an ascertainable standard
- 10 relating to health, education, support, or maintenance
- 11 within the meaning of Section 2041(b)(1)(A) or Section
- 12 2514(c)(1) of the Internal Revenue Code.

13 (7) The transferor's right to remove a trustee or adviser and
14 to appoint a new trustee or adviser as long as that right does
15 not include the appointment of a person who is a related or
16 subordinate party to the transferor within the meaning of
17 Section 672(c) of the Internal Revenue Code.

18 (8) The transferor's potential or actual use of real property
19 held under a qualified personal residence trust (as defined in
20 Section 2702(c) of the Internal Revenue Code).

21 (b) For the purposes of subsection (a)(6)(A), a qualified trustee
22 is presumed to have discretion with respect to the distribution of
23 principal unless that discretion is denied to the qualified trustee by
24 the terms of the asset protection trust.

25 Sec. 13. (a) A transferor may appoint one (1) or more advisers
26 who may have authority under the terms of the trust:

- 27 (1) to remove and appoint qualified trustees or trust advisers;
- 28 and
- 29 (2) to direct, consent to, or disapprove distributions from the
- 30 trust.

31 (b) Trust advisers are not required to satisfy the requirements
32 imposed upon trustees by section 5 of this chapter.

33 Sec. 14. If:

- 34 (1) a qualified trustee of an asset protection trust ceases to
- 35 meet the requirements of section 5 of this chapter; and
- 36 (2) there remains no trustee of the asset protection trust that
- 37 meets the requirements of section 5 of this chapter;
- 38 the qualified trustee described in subdivision (1) is considered to
- 39 have resigned when the qualified trustee ceased to meet the
- 40 requirements of section 5 of this chapter and a successor trustee
- 41 provided for in the asset protection trust shall become a qualified
- 42 trustee. If the asset protection trust does not provide for a
- 43 successor qualified trustee, a court shall appoint a successor
- 44 qualified trustee upon the application of any interested party.

45 Sec. 15. (a) Notwithstanding any provision of law to the
46 contrary, a person is entitled to only the rights with respect to a



1 qualified disposition that are provided by this chapter. No person,
 2 including a creditor whose claim arises before or after a qualified
 3 disposition, may bring a claim or a cause of action against:

- 4 (1) a trustee or an adviser of an asset protection trust; or
 5 (2) any person involved in the counseling, drafting,
 6 preparation, execution, or funding of an asset protection trust.

7 (b) This subsection applies to a cause of action to enforce a
 8 judgment notwithstanding any provision of law to the contrary. A
 9 cause of action to enforce a judgment may not be brought at law or
 10 equity against:

- 11 (1) a trustee or adviser of an asset protection trust; or
 12 (2) any person involved in the counseling, drafting,
 13 preparation, execution, or funding of an asset protection
 14 trust;

15 if, as of the date of the cause of action, a cause of action by a
 16 creditor with respect to the asset protection trust would be barred
 17 by this section.

18 (c) For purposes of this section, the counseling, drafting,
 19 preparation, execution, and funding of an asset protection trust
 20 include the counseling, drafting, preparation, execution, and
 21 funding of a limited partnership or a limited liability company if
 22 interests in the limited partnership or limited liability company are
 23 subsequently transferred to the asset protection trust.

24 Sec. 16. The common law rule against perpetuities and the
 25 Uniform Statutory Rule Against Perpetuities (IC 32-17-8) do not
 26 apply to:

- 27 (1) the property or property interests in an asset protection
 28 trust; or
 29 (2) the terms and provisions of an asset protection trust.

30 SECTION 3. IC 34-30-2-132.7 IS ADDED TO THE INDIANA
 31 CODE AS A NEW SECTION TO READ AS FOLLOWS
 32 [EFFECTIVE JULY 1, 2011]: Sec. 132.7. IC 30-4-8-15 (Concerning
 33 asset protection trusts).





PRELIMINARY DRAFT
No. 3240

PREPARED BY
LEGISLATIVE SERVICES AGENCY
2011 GENERAL ASSEMBLY

DIGEST

Citations Affected: IC 6-4.1-5-15; IC 12-14-21-3; IC 12-15-9;
IC 29-1-14-9.

Synopsis: Priority of claims. Provides that the clerk of the circuit court of each county in which real property described in the inheritance tax order of a nonresident decedent is located shall spread a copy of the order of record upon request by an interested person rather than as a matter of course. Provides that the order of priority of the claims that are not subservient to a claim to recapture Medicaid benefits is: (1) the expenses of administering the recipient's estate, including taxes; (2) reasonable funeral expenses; and (3) the expenses of the recipient's last illness. Removes caps on the amount of funeral expenses that have priority. Provides that the court approved fees of attorneys, personal representatives, and certain attorney surrogates are expenses of administering the recipient's estate.

Effective: July 1, 2011.



1 attorney's fees approved by the court.

2 (b) If a recipient's spouse remarries, the part of the estate of the
3 recipient's spouse that is attributable to the subsequent spouse is not
4 subject to a claim for Medicaid paid on behalf of the recipient.

5 SECTION 5. IC 29-1-14-9, AS AMENDED BY P.L.161-2007,
6 SECTION 39, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
7 JULY 1, 2011]: Sec. 9. (a) All claims shall be classified in one (1) of
8 the following classes. If the applicable assets of the estate are
9 insufficient to pay all claims in full, the personal representative shall
10 make payment in the following order:

11 (1) Costs and expenses of administration, **including the fee of an**
12 **attorney surrogate that has been:**

13 (A) **approved by a court under the rules of the Indiana**
14 **Supreme Court governing attorney surrogates; and**

15 (B) **filed as a claim in the estate of a deceased attorney.**

16 (2) Reasonable funeral expenses. However, in any estate in which
17 the decedent was a recipient of public assistance under IC 12-1-1
18 through IC 12-1-12 (before its repeal) or any of the following, the
19 amount of funeral expenses having priority over any claim for the
20 recovery of public assistance is **subject to IC 12-15-9-1** and shall
21 not exceed the limitations provided for under IC 12-14-6,
22 IC 12-14-17, and IC 12-14-21:

- 23 TANF assistance.
- 24 TANF burials.
- 25 TANF IMPACT/J.O.B.S.
- 26 Temporary Assistance to Other Needy Families (TAONF)
- 27 assistance.
- 28 ARCH.
- 29 Blind relief.
- 30 Child care.
- 31 Child welfare adoption assistance.
- 32 Child welfare adoption opportunities.
- 33 Child welfare assistance.
- 34 Child welfare child care improvement.
- 35 Child welfare child abuse.
- 36 Child welfare child abuse and neglect prevention.
- 37 Child welfare children's victim advocacy program.
- 38 Child welfare foster care assistance.
- 39 Child welfare independent living.
- 40 Child welfare medical assistance to wards.
- 41 Child welfare program review action group (PRAG).
- 42 Child welfare special needs adoption.
- 43 Food Stamp administration.
- 44 Health care for indigent (HCI).
- 45 ICES.
- 46 IMPACT (food stamps).



- 1 Title IV-D (ICETS).
2 Title IV-D child support administration.
3 Title IV-D child support enforcement (parent locator).
4 Medicaid assistance.
5 Medical services for inmates and patients (590).
6 Room and board assistance (RBA).
7 Refugee social service.
8 Refugee resettlement.
9 Repatriated citizens.
10 SSI burials and disabled examinations.
11 Title XIX certification.
12 (3) Allowances made under IC 29-1-4-1.
13 (4) All debts and taxes having preference under the laws of the
14 United States.
15 (5) Reasonable and necessary medical expenses of the last
16 sickness of the decedent, including compensation of persons
17 attending him.
18 (6) All debts and taxes having preference under the laws of this
19 state; but no personal representative shall be required to pay any
20 taxes on any property of the decedent unless such taxes are due
21 and payable before possession thereof is delivered by the personal
22 representative pursuant to the provisions of IC 29-1.
23 (7) All other claims allowed.
24 (b) No preference shall be given in the payment of any claim over
25 any other claim of the same class, nor shall a claim due and payable be
26 entitled to a preference over claims not due.





PRELIMINARY DRAFT
No. 3241

PREPARED BY
LEGISLATIVE SERVICES AGENCY
2011 GENERAL ASSEMBLY

DIGEST

Citations Affected: IC 29-1-7-15.1; IC 29-2-1-6.

Synopsis: Probate administration. Specifies that in the case of an unsupervised estate in which it has been determined that a decedent died intestate, a will may not be probated unless it is presented before a closing statement is filed. Provides that the will of a decedent may be presented to the court for probate and admitted to probate at any time if no estate proceedings have been commenced for a decedent and an asset of the decedent remains titled or registered in the name of the decedent. Provides that the will may be probated for the sole purpose of transferring ownership of the asset. Provides that a domiciliary foreign personal representative may exercise all powers of a local unsupervised personal representative.

Effective: July 1, 2011.



A BILL FOR AN ACT to amend the Indiana Code concerning probate.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 29-1-7-15.1, AS AMENDED BY P.L.95-2007,
2 SECTION 5, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
3 JULY 1, 2011]: Sec. 15.1. (a) When it has been determined that a
4 decedent died intestate and letters of administration have been issued
5 upon the decedent's estate, no will shall be probated unless it is
6 presented for probate before:

7 (1) the court decrees final distribution of the estate; or

8 (2) **a closing statement has been filed in an unsupervised**
9 **estate.**

10 (b) No real estate situate in Indiana of which any person may die
11 seized shall be sold by the executor or administrator of the deceased
12 person's estate to pay any debt or obligation of the deceased person,
13 which is not a lien of record in the county in which the real estate is
14 situate, or to pay any costs of administration of any decedent's estate,
15 unless letters testamentary or of administration upon the decedent's
16 estate are taken out within five (5) months after the decedent's death.

17 (c) The title of any real estate or interest therein purchased in good
18 faith and for a valuable consideration from the heirs of any person who
19 died seized of the real estate shall not be affected or impaired by any
20 devise made by the person of the real estate so purchased, unless:

21 (1) the will containing the devise has been probated and recorded
22 in the office of the clerk of the court having jurisdiction within
23 five (5) months after the death of the testator; or

24 (2) an action to contest the will's validity is commenced within the
25 time provided by law and, as a result, the will is ultimately
26 probated.

27 (d) **Except as provided in subsection (e),** the will of the decedent
28 shall not be admitted to probate unless the will is presented for probate
29 before the latest of the following dates:

30 (1) Three (3) years after the individual's death.

31 (2) Sixty (60) days after the entry of an order denying the probate



1 of a will of the decedent previously offered for probate and
2 objected to under section 16 of this chapter.

3 (3) Sixty (60) days after entry of an order revoking probate of a
4 will of the decedent previously admitted to probate and contested
5 under section 17 of this chapter.

6 However, in the case of an individual presumed dead under
7 IC 29-2-5-1, the three (3) year period commences with the date the
8 individual's death has been established by appropriate legal action.

9 (e) If:

10 (1) no estate proceedings have been commenced for a
11 decedent; and

12 (2) an asset of the decedent remains titled or registered in the
13 name of the decedent;

14 the will of the decedent may be presented to the court for probate
15 and admitted to probate at any time after the expiration of the
16 deadline determined under subsection (d) for the sole purpose of
17 transferring the asset described in subdivision (2). A will presented
18 for probate under this subsection is subject to all rules governing
19 the admission of wills to probate. A will admitted for probate
20 under this subsection may not be used to divest any person of an
21 ownership interest in property acquired before July 1, 2011.

22 SECTION 2. IC 29-2-1-6 IS AMENDED TO READ AS FOLLOWS
23 [EFFECTIVE JULY 1, 2011]: Sec. 6. A domiciliary foreign personal
24 representative who has complied with section 5 may exercise as to
25 assets in this state all powers of a local **unsupervised** personal
26 representative and may maintain actions and proceedings in this state
27 subject to any conditions imposed upon non-resident parties generally.





PRELIMINARY DRAFT
No. 3244

PREPARED BY
LEGISLATIVE SERVICES AGENCY
2011 GENERAL ASSEMBLY

DIGEST

Citations Affected: IC 30-4-2.1; IC 30-4-3-35.

Synopsis: Trust construction. Defines "discretionary interest". Specifies that real property transferred to matrimonial trusts for estate planning purposes continues to enjoy the ownership protection of real property owned as joint tenants by the entireties. Provides that the terms of a matrimonial trust may restrict the transfer of matrimonial property. Specifies when property continues to be matrimonial property. Specifies when claims against the property are barred. Specifies when matrimonial trusts cease to be matrimonial trusts.

Effective: Upon passage.



A BILL FOR AN ACT to amend the Indiana Code concerning trusts and fiduciaries.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 30-4-2.1-14, AS ADDED BY P.L.6-2010,
2 SECTION 14, IS AMENDED TO READ AS FOLLOWS: Sec. 14. (a)
3 The following rules apply only to discretionary interests (**as defined in**
4 **IC 30-4-2.1-14.5**):

5 (1) A discretionary interest is a mere expectancy that is neither a
6 property interest nor an enforceable right.

7 (2) A creditor may not:

8 (A) require a trustee to exercise the trustee's discretion to make
9 a distribution; or

10 (B) cause a court to foreclose a discretionary interest.

11 (3) A court may review a trustee's distribution discretion only if
12 the trustee acts dishonestly or with an improper motive.

13 (b) Words such as sole, absolute, uncontrolled, or unfettered
14 discretion dispense with the trustee acting reasonably.

15 (c) Absent express language to the contrary, if the distribution
16 language in a discretionary interest permits unequal distributions
17 between beneficiaries or distributions to the exclusion of other
18 beneficiaries, a trustee may, in the trustee's discretion, distribute all of
19 the accumulated, accrued, or undistributed income and principal to one
20 (1) beneficiary to the exclusion of the other beneficiaries.

21 (d) Regardless of whether a beneficiary has any outstanding
22 creditors, a trustee of a discretionary interest may directly pay any
23 expense on behalf of the beneficiary and may exhaust the income and
24 principal of the trust for the benefit of the beneficiary. A trustee is not
25 liable to a creditor for paying the expenses of a beneficiary who holds
26 a discretionary interest.

27 SECTION 2. IC 30-4-2.1-14.5 IS ADDED TO THE INDIANA
28 CODE AS A NEW SECTION TO READ AS FOLLOWS
29 [EFFECTIVE UPON PASSAGE]: **Sec. 14.5. (a) As used in this**
30 **section and section 14 of this chapter, "discretionary interest"**
31 **refers to any interest over which the trustee has any discretion to**



1 make or withhold a distribution.

2 (b) A discretionary interest may be evidenced by permissive
3 language such as "may make distributions" or may be evidenced
4 by mandatory distribution language that is negated by the
5 discretionary language of the trust such as "the trustee shall make
6 distributions in the trustee's sole and absolute discretion".

7 (c) An interest that includes distribution language that appears
8 mandatory but is subsequently qualified by discretionary
9 distribution language is considered a discretionary interest.

10 (d) Trust provisions that create discretionary interests include
11 the following examples:

12 (1) "The trustee may, in the trustee's sole and absolute
13 discretion, make distributions for health, education,
14 maintenance, and support."

15 (2) "The trustee shall, in the trustee's sole and absolute
16 discretion, make distributions for health, education,
17 maintenance, and support."

18 (3) "The trustee may make distributions for health, education,
19 maintenance, and support."

20 (4) "The trustee shall make distributions for health,
21 education, maintenance, and support. The trustee may
22 exclude any beneficiary or make unequal distributions among
23 the beneficiaries."

24 (5) "The trustee may make distributions for health, education,
25 maintenance, support, comfort, and general welfare."

26 SECTION 3. IC 30-4-3-35, AS ADDED BY P.L.6-2010, SECTION
27 18, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON
28 PASSAGE]: Sec. 35. (a) This section is intended to ensure that if
29 real property is transferred to one (1) or more revocable trusts
30 created by a husband and wife for estate planning purposes, the
31 husband and wife will enjoy the real estate ownership protections
32 that they would otherwise enjoy if they owned that real property
33 in an estate by the entirety including an estate by the entirety
34 created under IC 32-17-3-1.

35 (a) (b) As used in this section, "joint matrimonial trust" means a
36 single inter vivos trust established under this section by settlors who
37 are related as husband and wife.

38 (b) (c) As used in this section, "matrimonial property" means real
39 property that:

40 (1) is subject to a written election to treat the property as
41 matrimonial property under this section; and

42 (2) is owned by a matrimonial trust.

43 (c) (d) As used in this section, "matrimonial trust" means a trust
44 established under this section to own matrimonial property.

45 (d) (e) As used in this section, "separate matrimonial trust" means
46 a separate trust that is also a matrimonial trust.



1 ~~(e)~~ **(f)** As used in this section, "separate trust" means a trust
2 established by one (1) individual.

3 ~~(f)~~ **(g)** A matrimonial trust may be established:

4 (1) jointly by a husband and wife; or

5 (2) in two (2) or more separate trusts.

6 ~~(g)~~ **(h)** A husband and wife may elect to treat real property as
7 matrimonial property with a written statement of the election:

8 (1) in an instrument or instruments conveying the real property to
9 a matrimonial trust or trusts; or

10 (2) in a separate writing that must be recorded in the county
11 where the real property is situated and indexed in the records of
12 the county recorder's office to the instrument or instruments that
13 convey the real property to a matrimonial trust or trusts.

14 ~~(h)~~ **(i)** A guardian of a husband ~~and~~ or wife may make an election
15 under this section:

16 (1) without the approval of the court if the guardian has unlimited
17 powers under IC 29-3-8-4; and

18 (2) with the approval of the court in all other cases.

19 ~~(i)~~ **(j)** An attorney in fact of a husband and wife may ~~make~~ **join in**
20 **the making of** an election under this section under the powers
21 conferred upon the attorney in fact by IC 30-5-5-2 if the power of
22 attorney is recorded in the county where the real property is situated
23 and indexed in the records of the county recorder's office to the
24 instrument or instruments that convey the real property to a
25 matrimonial trust or trusts.

26 ~~(j)~~ **(k)** **The terms of a separate matrimonial trust or a joint**
27 **matrimonial trust may (but are not required to) restrict the sale or**
28 **transfer of the matrimonial property for:**

29 (1) **the lifetime of the settlor who dies first;**

30 (2) **the lifetime of the surviving settlor; or**

31 (3) **another defined time period.**

32 **(l)** An interest in matrimonial property is not severable during the
33 marriage of the husband and wife unless:

34 (1) both the husband and wife join in the severance in writing; or

35 (2) a third party owns and forecloses a mortgage or other lien
36 against the interests of both the husband and wife in the
37 matrimonial property.

38 ~~(k)~~ **(m)** Notwithstanding any other provision of this section, the
39 legal rights of a lienholder that exist at the time of an election to treat
40 the real property subject to the lien as matrimonial property may not be
41 subject to a severance described in subsection ~~(j)~~ **(l)** without the
42 lienholder's written consent.

43 ~~(l)~~ **(n)** **To the extent that a matrimonial trust** established by an individual **(n)** **To the**
44 **extent that a matrimonial trust** continues to be a matrimonial trust
45 after the death of ~~the~~ a settlor **(as provided by subsections (o) and**
46 **(p):**



1 (1) real property held or owned in a separate trust and for
 2 which an earlier election was made under this section,
 3 continues to be marital property; and

4 (2) an unsecured creditor or judgment lien creditor who has
 5 a claim only against the deceased settlor but not against the
 6 surviving settlor cannot enforce that claim against the
 7 deceased settlor's interest or the surviving settlor's interest in
 8 the marital property.

9 (o) Marital property held in a separate marital trust
 10 or in a joint marital trust continues to be marital
 11 property after the death of one (1) settlor:

12 (1) if the settlors reserved a life estate in the marital
 13 property for each settlor when they conveyed the marital
 14 property to the marital trust or trusts; or

15 (2) if the deceased settlor's separate trust provides to the surviving
 16 spouse: settlor:

17 (1) (A) a life estate;

18 (2) (B) an interest that qualifies for a deduction from the gross
 19 estate of the decedent under Section 2056 of the Internal
 20 Revenue Code regardless of whether an election is made to
 21 qualify the interest for the deduction; or

22 (3) (C) in some respect the current right to occupy or receive
 23 rent, royalties, or other kinds of income with respect to the
 24 marital property.

25 (m) (p) A separate marital trust established by a deceased
 26 settlor ceases to be a marital trust upon the termination of
 27 payments to the surviving spouse settlor as a result of the surviving
 28 spouse's settlor's death or as a result of the surviving spouse's
 29 settlor's valid disclaimer of all interests in the separate marital
 30 property held in the deceased settlor's trust.

31 (n) (q) A joint separate marital trust ceases established by a
 32 settlor who remains alive continues to be a marital trust upon
 33 the death of one (1) of the settlors: during that settlor's remaining
 34 lifetime, so long as the settlor retains the right to use or occupy
 35 marital property held in the settlor's separate trust.

36 (o) (r) A marital trust ceases to be a marital trust upon the
 37 dissolution of the marriage of the settlors.

38 (p) (s) A husband and wife may revoke a marital trust by
 39 together executing a writing expressing the revocation.

40 SECTION 4. An emergency is declared for this act.





PRELIMINARY DRAFT
No. 3247

PREPARED BY
LEGISLATIVE SERVICES AGENCY
2011 GENERAL ASSEMBLY

DIGEST

Citations Affected: IC 9-17-3-9; IC 9-31-2-30; IC 32-17-13-1;
IC 32-17-14.

Synopsis: Transfer on death matters. Provides that joint owners and other entities that own motor vehicles and watercraft may transfer title to a motor vehicle or watercraft as a transfer on death transaction. (Current law restricts the procedures to individuals who are the sole owners of motor vehicles or watercraft.) Specifies that the transfer at death of an individual retirement account or a similar account or plan or of benefits under an employee benefit plan is not considered a nonprobate transfer. Provides that the transfer on death act does not apply to certain transfers of retirement or employee benefits. Provides that the endorsement of the county auditor is not necessary to record a transfer on death deed. Removes a provision prohibiting a surviving spouse's election to take against a will from applying to a valid transfer on death transfer. Provides that the affidavit certifying the death of the transferor and cross referencing the transferor's transfer on death deed must be endorsed by the county auditor in order to be recorded.

Effective: Upon passage.



A BILL FOR AN ACT to amend the Indiana Code concerning property.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 9-17-3-9, AS AMENDED BY P.L.6-2010,
2 SECTION 4, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
3 UPON PASSAGE]: Sec. 9. (a) ~~An individual whose certificate of title~~
4 ~~for a vehicle indicates that the individual is the sole owner of The~~
5 **owner or owners of a** vehicle may create an interest in the vehicle that
6 is transferrable on the death of the ~~individual~~ **owner or owners** by
7 obtaining a certificate of title conveying the interest in the vehicle to
8 one (1) or more named individuals as transfer on death beneficiaries.

9 (b) Subject to subsection (e), an interest in a vehicle transferred
10 under this section vests upon the death of the ~~transferor.~~ **owner or**
11 **owners.**

12 (c) A certificate of title that is:

13 (1) worded in substance as "A.B. transfers on death to C.D." or
14 "A.B. and C.D. transfer on death to E.F."; and

15 (2) signed by the ~~transferor;~~ **owner or owners;**

16 is a good and sufficient conveyance on the death of the ~~transferor~~
17 **owner or owners** to the transferee **or transferees.**

18 (d) A certificate of title obtained under this section is not required
19 to be:

20 (1) supported by consideration; or

21 (2) delivered to the named transfer on death beneficiary or
22 **beneficiaries;**

23 to be effective.

24 (e) Upon the death of ~~an individual~~ **the owner or owners** conveying
25 an interest in a vehicle in a certificate of title obtained under this
26 section, the interest in the vehicle is transferred to each beneficiary who
27 is described by either of the following:

28 (1) The beneficiary:

29 (A) is named in the certificate; and

30 (B) survives the transferor.

31 (2) The beneficiary:



- 1 (A) survives the transferor; and
 2 (B) is entitled to an interest in the vehicle under
 3 IC 32-17-14-22 following the death of a beneficiary who:
 4 (i) is named in the certificate; and
 5 (ii) did not survive the transferor.
- 6 (f) A transfer of an interest in a vehicle under this section is subject
 7 to IC 6-4.1.
- 8 (g) A certificate of title designating a transfer on death beneficiary
 9 is not testamentary.
- 10 (h) In general, IC 32-17-14 applies to a certificate of title
 11 designating a transfer on death beneficiary. However, a particular
 12 provision of IC 32-17-14 does not apply if it is inconsistent with the
 13 requirements of this section or IC 9-17-2-2(b).
- 14 SECTION 2. IC 9-31-2-30, AS AMENDED BY P.L.6-2010,
 15 SECTION 5, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
 16 UPON PASSAGE]: Sec. 30. (a) ~~An individual whose certificate of title~~
 17 ~~for a watercraft indicates that the individual is the sole owner of The~~
 18 **owner or owners of a** watercraft may create an interest in the
 19 watercraft that is transferrable on the death of the ~~individual owner or~~
 20 **owners** by obtaining a certificate of title conveying the interest in the
 21 watercraft to one (1) or more named individuals as transfer on death
 22 beneficiaries.
- 23 (b) Subject to subsection (e), an interest in a watercraft transferred
 24 under this section vests upon the death of the ~~transferor. owner or~~
 25 **owners.**
- 26 (c) A certificate of title that is:
 27 (1) worded in substance as "A.B. transfers on death to C.D." or
 28 **"A.B. and C.D. transfer on death to E.F.";** and
 29 (2) signed by the ~~transferor; owner or owners;~~
 30 is a good and sufficient conveyance on the death of the ~~transferor~~
 31 **owner or owners** to the transferee **or transferees.**
- 32 (d) A certificate of title obtained under this section is not required
 33 to be:
 34 (1) supported by consideration; or
 35 (2) delivered to the named transfer on death beneficiary **or**
 36 **beneficiaries;**
 37 to be effective.
- 38 (e) Upon the death of ~~an individual the owner or owners~~ conveying
 39 an interest in a watercraft in a certificate of title obtained under this
 40 section, the interest in the watercraft is transferred to each beneficiary
 41 who is described by either of the following:
 42 (1) The beneficiary:
 43 (A) is named in the certificate; and
 44 (B) survives the transferor.
 45 (2) The beneficiary:
 46 (A) survives the transferor; and



1 (B) is entitled to an interest in the watercraft under
2 IC 32-17-14-22 following the death of a beneficiary who:

- 3 (i) is named in the certificate; and
4 (ii) did not survive the transferor.

5 (f) A transfer of an interest in a watercraft under this section is
6 subject to IC 6-4.1.

7 (g) A certificate of title designating a transfer on death beneficiary
8 is not testamentary.

9 (h) In general, IC 32-17-14 applies to a certificate of title
10 designating a transfer on death beneficiary. However, a particular
11 provision of IC 32-17-14 does not apply if it is inconsistent with the
12 requirements of this section or IC 9-31-2-16.

13 SECTION 3. IC 32-17-13-1, AS AMENDED BY P.L.6-2010,
14 SECTION 22, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
15 UPON PASSAGE]: Sec. 1. (a) As used in this chapter, "nonprobate
16 transfer" means a valid transfer, effective at death, by a transferor:

- 17 (1) whose last domicile was in Indiana; and
18 (2) who immediately before death had the power, acting alone, to
19 prevent transfer of the property by revocation or withdrawal and:
20 (A) use the property for the benefit of the transferor; or
21 (B) apply the property to discharge claims against the
22 transferor's probate estate.

23 (b) The term does not include a transfer at death (**other than a**
24 **transfer to or from the decedent's probate estate**) of:

- 25 (1) a survivorship interest in a tenancy by the entireties real
26 estate;
27 transfer of (2) a life insurance policy or annuity; or payment of
28 (3) the death proceeds of a life insurance policy or annuity;
29 (4) **an individual retirement account or a similar account or**
30 **plan; or**
31 (5) **benefits under an employee benefit plan.**

32 (b) With respect to a nonprobate transfer involving a multiple party
33 account, a nonprobate transfer occurs if the last domicile of the
34 depositor whose interest is transferred under IC 32-17-11 was in
35 Indiana.

36 (c) With respect to a motor vehicle or a watercraft, a nonprobate
37 transfer occurs if the transferee obtains a certificate of title in Indiana
38 for:

- 39 (1) the motor vehicle under IC 9-17-2-2(b); or
40 (2) the watercraft as required by IC 9-31-2-16(a)(1)(C).

41 (d) A transfer on death transfer completed under IC 32-17-14 is a
42 nonprobate transfer.

43 SECTION 4. IC 32-17-14-2.5 IS ADDED TO THE INDIANA
44 CODE AS A NEW SECTION TO READ AS FOLLOWS
45 [EFFECTIVE UPON PASSAGE]: **Sec. 2.5. This chapter does not**
46 **apply to property, money, or benefits paid or transferred at death**



1 **under:**

2 (1) **an employee benefit plan governed by the Employees**
3 **Retirement Income Security Act of 1974;**

4 (2) **an individual retirement account; or**

5 (3) **a similar account or plan intended to qualify for a tax**
6 **exemption or deferral under the Internal Revenue Code;**

7 **unless the provisions of this chapter are incorporated into the**
8 **governing instrument or beneficiary designation in whole or in**
9 **part by express reference.**

10 SECTION 5. IC 32-17-14-3, AS AMENDED BY P.L.6-2010,
11 SECTION 26, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
12 UPON PASSAGE]: Sec. 3. The following definitions apply throughout
13 this chapter:

14 (1) "Beneficiary" means a person designated or entitled to receive
15 property because of another person's death under a transfer on
16 death transfer.

17 (2) "Beneficiary designation" means a written instrument other
18 than a will or trust that designates the beneficiary of a transfer on
19 death transfer.

20 (3) "Governing instrument" refers to a written instrument agreed
21 to by an owner that establishes the terms and conditions of an
22 ownership in beneficiary form.

23 (4) "Joint owners" refers to persons who hold property as joint
24 tenants with a right of survivorship. However, the term does not
25 include a husband and wife who hold property as tenants by the
26 entirety.

27 (5) "LDPS" means an abbreviation of lineal descendants per
28 stirpes, which may be used in a beneficiary designation to
29 designate a substitute beneficiary as provided in section 22 of this
30 chapter.

31 (6) "Owner" refers to a person or persons who have a right to
32 designate the beneficiary of a transfer on death transfer.

33 (7) "Ownership in beneficiary form" means holding property
34 under a registration in beneficiary form or other written
35 instrument that:

36 (A) names the owner of the property;

37 (B) directs ownership of the property to be transferred upon
38 the death of the owner to the designated beneficiary; and

39 (C) designates the beneficiary.

40 (8) "Person" means an individual, a sole proprietorship, a
41 partnership, an association, a fiduciary, a trustee, a corporation,
42 a limited liability company, or any other business entity.

43 (9) "Proof of death" means a death certificate or a record or report
44 that is prima facie proof or evidence of an individual's death.

45 (10) "Property" means any present or future interest in real
46 property, intangible personal property (as defined in



- 1 IC 6-4.1-1-5), or tangible personal property (as defined in
- 2 IC 6-4.1-1-13). The term includes:
- 3 (A) a right to direct or receive payment of a debt;
- 4 (B) a right to direct or receive payment of money or other
- 5 benefits due under a contract, account agreement, deposit
- 6 agreement, employment contract, ~~compensation plan; pension~~
- 7 ~~plan; individual retirement plan; employee benefit plan;~~ or
- 8 trust or by operation of law;
- 9 (C) a right to receive performance remaining due under a
- 10 contract;
- 11 (D) a right to receive payment under a promissory note or a
- 12 debt maintained in a written account record;
- 13 (E) rights under a certificated or uncertificated security;
- 14 (F) rights under an instrument evidencing ownership of
- 15 property issued by a governmental agency; and
- 16 (G) rights under a document of title (as defined in
- 17 IC 26-1-1-201).
- 18 (11) "Registration in beneficiary form" means titling of an
- 19 account record, certificate, or other written instrument that:
- 20 (A) provides evidence of ownership of property in the name of
- 21 the owner;
- 22 (B) directs ownership of the property to be transferred upon
- 23 the death of the owner to the designated beneficiary; and
- 24 (C) designates the beneficiary.
- 25 (12) "Security" means a share, participation, or other interest in
- 26 property, in a business, or in an obligation of an enterprise or
- 27 other issuer. The term includes a certificated security, an
- 28 uncertificated security, and a security account.
- 29 (13) "Transfer on death deed" means a deed that conveys an
- 30 interest in real property to a grantee by beneficiary designation.
- 31 (14) "Transfer on death transfer" refers to a transfer of property
- 32 that takes effect upon the death of the owner under a beneficiary
- 33 designation made under this chapter.
- 34 (15) "Transferring entity" means a person who:
- 35 (A) owes a debt or is obligated to pay money or benefits;
- 36 (B) renders contract performance;
- 37 (C) delivers or conveys property; or
- 38 (D) changes the record of ownership of property on the books,
- 39 records, and accounts of an enterprise or on a certificate or
- 40 document of title that evidences property rights.
- 41 The term includes a governmental agency, business entity, or
- 42 transfer agent that issues certificates of ownership or title to
- 43 property and a person acting as a custodial agent for an owner's
- 44 property. However, the term does not include a governmental
- 45 office charged with endorsing, entering, or recording the transfer
- 46 of real property in the public records.



1 SECTION 6. IC 32-17-14-11, AS AMENDED BY P.L.6-2010,
 2 SECTION 30, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
 3 UPON PASSAGE]: Sec. 11. (a) A transfer on death deed transfers the
 4 interest provided to the beneficiary if the transfer on death deed is:

- 5 (1) executed by the owner or owner's legal representative; and
- 6 (2) recorded with the recorder of deeds in the county in which the
 7 real property is situated before the death of the owner.

8 (b) A transfer on death deed is void if it is not recorded with the
 9 recorder of deeds in the county in which the real property is situated
 10 before the death of the owner.

11 (c) A transfer on death deed is not required to be supported by
 12 consideration or delivered to the grantee beneficiary.

13 (d) A transfer on death deed may be used to transfer an interest in
 14 real property to either a revocable or an irrevocable trust.

15 (e) If the owner records a transfer on death deed, the effect of the
 16 recording the transfer on death deed is determined as follows:

- 17 (1) If the owner's interest in the real property is as a tenant by the
 18 entirety, the conveyance is inoperable and void unless the other
 19 spouse joins in the conveyance.
- 20 (2) If the owner's interest in the real property is as a joint tenant
 21 with rights of survivorship, the conveyance severs the joint
 22 tenancy and the cotenancy becomes a tenancy in common.
- 23 (3) If the owner's interest in the real property is as a joint tenant
 24 with rights of survivorship and the property is subject to a
 25 beneficiary designation, a conveyance of any joint owner's interest
 26 has no effect on the original beneficiary designation for the
 27 nonsevering joint tenant.
- 28 (4) If the owner's interest is as a tenant in common, the owner's
 29 interest passes to the beneficiary as a transfer on death transfer.
- 30 (5) If the owner's interest is a life estate determined by the owner's
 31 life, the conveyance is inoperable and void.
- 32 (6) If the owner's interest is any other interest, the interest passes
 33 in accordance with this chapter and the terms and conditions of
 34 the conveyance establishing the interest. If a conflict exists
 35 between the conveyance establishing the interest and this chapter,
 36 the terms and conditions of the conveyance establishing the
 37 interest prevail.

38 (f) A beneficiary designation in a transfer on death deed may be
 39 worded in substance as "(insert owner's name) conveys and warrants
 40 (or quitclaims) to (insert owner's name), TOD to (insert beneficiary's
 41 name)". This example is not intended to be exhaustive.

42 (g) A transfer on death deed using the phrase "pay on death to" or
 43 the abbreviation "POD" may not be construed to require the liquidation
 44 of the real property being transferred.

45 (h) This section does not preclude other methods of conveying real
 46 property that are permitted by law and have the effect of postponing



1 enjoyment of an interest in real property until after the death of the
 2 owner. This section applies only to transfer on death deeds and does
 3 not invalidate any deed that is otherwise effective by law to convey title
 4 to the interest and estates provided in the deed.

5 **(i) The endorsement of the auditor under IC 36-2-11-14 is not**
 6 **necessary to record a transfer on death deed.**

7 SECTION 7. IC 32-17-14-23, AS ADDED BY P.L.143-2009,
 8 SECTION 41, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
 9 UPON PASSAGE]: Sec. 23. (a) If, after an owner makes a beneficiary
 10 designation, the owner's marriage is dissolved or annulled, any
 11 provision of the beneficiary designation in favor of the owner's former
 12 spouse is revoked on the date the marriage is dissolved or annulled.
 13 Revocation under this subsection is effective regardless of whether the
 14 beneficiary designation refers to the owner's marital status. The
 15 beneficiary designation is given effect as if the former spouse had not
 16 survived the owner.

17 (b) Subsection (a) does not apply to a provision of a beneficiary
 18 designation that:

19 (1) has been made irrevocable, or revocable only with the spouse's
 20 consent;

21 (2) is made after the marriage is dissolved or annulled; or

22 (3) expressly states that the dissolution or annulment of the
 23 marriage does not affect the designation of a spouse or a relative
 24 of the spouse as a beneficiary.

25 (c) A provision of a beneficiary designation that is revoked solely
 26 by subsection (a) is revived by the owner's remarriage to the former
 27 spouse or by a nullification of the dissolution or annulment of the
 28 marriage.

29 ~~(d) This section does not apply to any employee benefit plan~~
 30 ~~governed by the Employee Retirement Income Security Act of 1974.~~

31 SECTION 8. IC 32-17-14-25, AS AMENDED BY P.L.6-2010,
 32 SECTION 33, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
 33 UPON PASSAGE]: Sec. 25. (a) ~~An election under IC 29-1-3-1 does not~~
 34 ~~apply to a valid transfer on death transfer.~~ In accordance with
 35 IC 32-17-13, a transfer on death transfer may be subject to the payment
 36 of the surviving spouse and family allowances under IC 29-1-4-1.

37 (b) A beneficiary designation designating the children of the owner
 38 or children of any other person as a class and not by name includes all
 39 children of the person regardless of whether the child is born or
 40 adopted before or after the beneficiary designation is made.

41 (c) Except as provided in subsection (d), a child of the owner born
 42 or adopted after the owner makes a beneficiary designation that names
 43 another child of the owner as the beneficiary is entitled to receive a
 44 fractional share of the property that would otherwise be transferred to
 45 the named beneficiary. The share of the property to which each child
 46 of the owner is entitled to receive is expressed as a fraction in which



1 the numerator is one (1) and the denominator is the total number of the
2 owner's children.

3 (d) A beneficiary designation or a governing instrument may
4 provide that subsection (c) does not apply to an owner's beneficiary
5 designation. In addition, a transferring entity is not obligated to apply
6 subsection (c) to property registered in beneficiary form.

7 (e) If a beneficiary designation does not name any child of the
8 owner as the designated beneficiary with respect to a particular
9 property interest, a child of the owner born or adopted after the owner
10 makes the beneficiary designation is not entitled to any share of the
11 property interest subject to the designation.

12 SECTION 9. IC 32-17-14-26, AS AMENDED BY P.L.6-2010,
13 SECTION 34, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
14 UPON PASSAGE]: Sec. 26. (a) If an agreement between the owner and
15 a transferring entity is required to carry out a transfer on death transfer
16 as described in section 7 of this chapter, a transferring entity may not
17 adopt rules for the making, execution, acceptance, and revocation of a
18 beneficiary designation that are inconsistent with this chapter. A
19 transferring entity may adopt the rules imposed by subsection (b) in
20 whole or in part by incorporation by reference.

21 (b) Except as otherwise provided in a beneficiary designation, a
22 governing instrument, or any other applicable law, the following rules
23 apply to a beneficiary designation:

24 (1) A beneficiary designation or a request for registration of
25 property in beneficiary form must be made in writing, signed by
26 the owner, dated, and, in the case of a transfer on death deed,
27 compliant with all requirements for the recording of deeds.

28 (2) A security that is not registered in the name of the owner may
29 be registered in beneficiary form on instructions given by a broker
30 or person delivering the security.

31 (3) A beneficiary designation may designate one (1) or more
32 primary beneficiaries and one (1) or more contingent
33 beneficiaries.

34 (4) On property registered in beneficiary form, a primary
35 beneficiary is the person shown immediately following the
36 transfer on death direction. Words indicating that the person is a
37 primary beneficiary are not required. The name of a contingent
38 beneficiary in the registration must have the words "contingent
39 beneficiary" or words of similar meaning to indicate the
40 contingent nature of the interest being transferred.

41 (5) Multiple surviving beneficiaries share equally in the property
42 being transferred unless a different percentage or fractional share
43 is stated for each beneficiary. If a percentage or fractional share
44 is designated for multiple beneficiaries, the surviving
45 beneficiaries share in the proportion that their designated shares
46 bear to each other.



- 1 (6) A transfer of unequal shares to multiple beneficiaries for
 2 property registered in beneficiary form may be expressed in
 3 numerical form following the name of the beneficiary in the
 4 registration.
- 5 (7) A transfer on death transfer of property also transfers any
 6 interest, rent, royalties, earnings, dividends, or credits earned or
 7 declared on the property but not paid or credited before the
 8 owner's death.
- 9 (8) If a distribution by a transferring entity under a transfer on
 10 death transfer results in fractional shares in a security or other
 11 property that is not divisible, the transferring entity may distribute
 12 the fractional shares in the name of all beneficiaries as tenants in
 13 common or as the beneficiaries may direct, or the transferring
 14 entity may sell the property that is not divisible and distribute the
 15 proceeds to the beneficiaries in the proportions to which they are
 16 entitled.
- 17 (9) On the death of the owner, the property, minus all amounts
 18 and charges owed by the owner to the transferring entity, belongs
 19 to the surviving beneficiaries and, in the case of substitute
 20 beneficiaries permitted under section 22 of this chapter, the lineal
 21 descendants of designated beneficiaries who did not survive the
 22 owner are entitled to the property as follows:
- 23 (A) If there are multiple primary beneficiaries and a primary
 24 beneficiary does not survive the owner and does not have a
 25 substitute under section 22 of this chapter, the share of the
 26 nonsurviving beneficiary is allocated among the surviving
 27 beneficiaries in the proportion that their shares bear to each
 28 other.
- 29 (B) If there are no surviving primary beneficiaries and there
 30 are no substitutes for the nonsurviving primary beneficiaries
 31 under section 22 of this chapter, the property belongs to the
 32 surviving contingent beneficiaries in equal shares or according
 33 to the percentages or fractional shares stated in the
 34 registration.
- 35 (C) If there are multiple contingent beneficiaries and a
 36 contingent beneficiary does not survive the owner and does not
 37 have a substitute under section 22 of this chapter, the share of
 38 the nonsurviving contingent beneficiary is allocated among the
 39 surviving contingent beneficiaries in the proportion that their
 40 shares bear to each other.
- 41 (10) If a trustee designated as a beneficiary:
- 42 (A) does not survive the owner;
- 43 (B) resigns; or
- 44 (C) is unable or unwilling to execute the trust as trustee and
 45 no successor trustee is appointed in the twelve (12) months
 46 following the owner's death;



- 1 the transferring entity may make the distribution as if the trust did
2 not survive the owner.
- 3 (11) If a trustee is designated as a beneficiary and no affidavit of
4 certification of trust or probated will creating an express trust is
5 presented to the transferring entity within the twelve (12) months
6 after the owner's death, the transferring entity may make the
7 distribution as if the trust did not survive the owner.
- 8 (12) If the transferring entity is not presented evidence during the
9 twelve (12) months after the owner's death that there are lineal
10 descendants of a nonsurviving beneficiary for whom LDPS
11 distribution applies who survived the owner, the transferring
12 entity may make the transfer as if the nonsurviving beneficiary's
13 descendants also failed to survive the owner.
- 14 (13) If a beneficiary cannot be located at the time the transfer is
15 made to located beneficiaries, the transferring entity shall hold the
16 missing beneficiary's share. If the missing beneficiary's share is
17 not claimed by the beneficiary or by the beneficiary's personal
18 representative or successor during the twelve (12) months after
19 the owner's death, the transferring entity shall transfer the share
20 as if the beneficiary did not survive the owner.
- 21 (14) A transferring entity has no obligation to attempt to locate a
22 missing beneficiary, to pay interest on the share held for a missing
23 beneficiary, or to invest the share in any different property.
- 24 (15) Cash, interest, rent, royalties, earnings, or dividends payable
25 to a missing beneficiary may be held by the transferring entity at
26 interest or reinvested by the transferring entity in the account or
27 in a dividend reinvestment account associated with a security held
28 for the missing beneficiary.
- 29 (16) If a transferring entity is required to make a transfer on death
30 transfer to a minor or an incapacitated adult, the transfer may be
31 made under the Indiana Uniform Transfers to Minors Act, the
32 Indiana Uniform Custodial Trust Act, or a similar law of another
33 state.
- 34 (17) A written request for the execution of a transfer on death
35 transfer may be made by any beneficiary, a beneficiary's legal
36 representative or attorney in fact, or the owner's personal
37 representative.
- 38 (18) A transfer under a transfer on death deed occurs
39 automatically upon the owner's death subject to the requirements
40 of subdivision (20) and does not require a request for the
41 execution of the transfer.
- 42 (19) A written request for the execution of a transfer on death
43 transfer must be accompanied by the following:
- 44 (A) A certificate or instrument evidencing ownership of the
45 contract, account, security, or property.
- 46 (B) Proof of the deaths of the owner and any nonsurviving



1 beneficiary.

2 (C) An inheritance tax waiver from states that require it.

3 (D) In the case of a request by a legal representative, a copy of

4 the instrument creating the legal authority or a certified copy

5 of the court order appointing the legal representative.

6 (E) Any other proof of the person's entitlement that the

7 transferring entity may require.

8 (20) On the death of an owner whose transfer on death deed has

9 been recorded, the beneficiary shall file an affidavit in the office

10 of the recorder of the county in which the real property is located.

11 **The affidavit must be endorsed by the county auditor under**

12 **IC 36-2-11-14 in order to be recorded.** The affidavit must

13 contain the following:

14 (A) The legal description of the property.

15 (B) A certified copy of the death certificate certifying the

16 owner's death.

17 (C) The name and address of each designated beneficiary who

18 survives the owner or is in existence on the date of the owner's

19 death.

20 (D) The name of each designated beneficiary who has not

21 survived the owner's death or is not in existence on the date of

22 the owner's death.

23 (E) A cross-reference to the recorded transfer on death deed.

24 (c) A beneficiary designation is presumed to be valid. A party may

25 rely on the presumption of validity unless the party has actual

26 knowledge that the beneficiary designation was not validly executed.

27 A person who acts in good faith reliance on a transfer on death deed is

28 immune from liability to the same extent as if the person had dealt

29 directly with the named owner and the named owner had been

30 competent and not incapacitated.

31 SECTION 10. **An emergency is declared for this act.**





**PRELIMINARY DRAFT
No. 3248**

**PREPARED BY
LEGISLATIVE SERVICES AGENCY
2011 GENERAL ASSEMBLY**

DIGEST

Citations Affected: IC 29-3.

Synopsis: Guardianships. Specifies the notice requirements following court action on a petition to appoint a temporary guardian. Provides that a delegation of parental powers by power of attorney is effective immediately. Authorizes a parent of a minor or a guardian of a protected person to use a power of attorney as a delegation of authority that takes effect upon the death or incapacity of the parent or guardian. Provides that a delegation taking effect upon death or incapacity is effective for 90 days unless the person receiving the delegation files a petition for guardianship in which case the delegation is effective until the court rules on the petition.

Effective: July 1, 2011.



A BILL FOR AN ACT to amend the Indiana Code concerning probate.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 29-3-3-4 IS AMENDED TO READ AS FOLLOWS
2 [EFFECTIVE JULY 1, 2011]: Sec. 4. (a) If:

- 3 (1) a guardian has not been appointed for an incapacitated person
4 or minor;
5 (2) an emergency exists;
6 (3) the welfare of the incapacitated person or minor requires
7 immediate action; and
8 (4) no other person appears to have authority to act in the
9 circumstances;

10 the court, on petition by any person or on its own motion, may appoint
11 a temporary guardian for the incapacitated person or minor for a
12 specified period not to exceed sixty (60) days. No such appointment
13 shall be made except after notice and hearing unless it is alleged and
14 found by the court that immediate and irreparable injury to the person
15 or injury, loss, or damage to the property of the alleged incapacitated
16 person or minor may result before the alleged incapacitated person or
17 minor can be heard in response to the petition. If a temporary guardian
18 is appointed without **advance** notice and the alleged incapacitated
19 person or minor files a petition that the guardianship be terminated or
20 the court order modified, the court shall hear and determine the petition
21 at the earliest possible time.

22 **(b) If:**

- 23 **(1) a petition is filed under this section for the appointment of**
24 **a temporary guardian; and**
25 **(2) each person required to receive notice under**
26 **IC 29-3-6-1(a) has not:**
27 **(A) received a complete copy of the petition and notice**
28 **required by IC 29-3-6-2 before the court considers and acts**
29 **on the petition; or**
30 **(B) received actual notice of the filing of the petition and**
31 **specifically waived in writing the necessity for service of**



1 the notice required under IC 29-36-2 before the court
 2 considers and acts on the petition;
 3 the petitioner shall, immediately after the court enters an order
 4 scheduling a hearing on the petition or enters an order appointing
 5 a temporary guardian, serve complete copies of the petition, the
 6 court order, and the notice required by IC 29-3-6-2 on every
 7 person entitled to receive notice under IC 29-3-6-1(a) and on each
 8 additional person to whom the court directs that notice be given.
 9 The requirements of this subsection are in addition to the
 10 petitioner's obligations under Rule 65 of the Indiana Rules of Trial
 11 Procedure to make a specific showing of the petitioner's efforts to
 12 provide advance notice to all interested persons or the reasons why
 13 advance notice cannot or should not be given.

14 ~~(b)~~ (c) If the court finds that a previously appointed guardian is not
 15 effectively performing fiduciary duties and that the welfare of the
 16 protected person requires immediate action, the court may suspend the
 17 authority of the previously appointed guardian and appoint a temporary
 18 guardian for the protected person for any period fixed by the court. The
 19 authority of the previously appointed guardian is suspended as long as
 20 a temporary guardian appointed under this subsection has authority to
 21 act.

22 ~~(c)~~ (d) A temporary guardian appointed under this section has only
 23 the responsibilities and powers that are ordered by the court. The court
 24 shall order only the powers that are necessary to prevent immediate and
 25 substantial injury or loss to the person or property of the alleged
 26 incapacitated person or minor in an appointment made under this
 27 section.

28 ~~(d)~~ (e) Proceedings under this section are not subject to the
 29 provisions of IC 29-3-4.

30 ~~(e)~~ (f) A proceeding under this section may be joined with a
 31 proceeding under IC 29-3-4 or IC 29-3-5.

32 SECTION 2. IC 29-3-6-1, AS AMENDED BY P.L.143-2009,
 33 SECTION 15, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
 34 JULY 1, 2011]: Sec. 1. (a) When a petition for appointment of a
 35 guardian or for the issuance of a protective order is filed with the court,
 36 notice of the petition and the hearing on the petition shall be given by
 37 first class postage prepaid mail as follows:

38 (1) If the petition is for the appointment of a successor guardian,
 39 notice shall be given unless the court, for good cause shown,
 40 orders that notice is not necessary.

41 (2) If the petition is for the appointment of a temporary guardian,
 42 notice shall be given as required by ~~IC 29-3-3-4(a)~~ IC 29-3-3-4.

43 (3) If the subject of the petition is a minor, notice of the petition
 44 and the hearing on the petition shall be given to the following
 45 persons whose whereabouts can be determined upon reasonable
 46 inquiry:



- 1 (A) The minor, if at least fourteen (14) years of age, unless the
- 2 minor has signed the petition.
- 3 (B) Any living parent of the minor, unless parental rights have
- 4 been terminated by a court order.
- 5 (C) Any person alleged to have had the principal care and
- 6 custody of the minor during the sixty (60) days preceding the
- 7 filing of the petition.
- 8 (D) Any other person that the court directs.
- 9 (4) If it is alleged that the person is an incapacitated person,
- 10 notice of the petition and the hearing on the petition shall be given
- 11 to the following persons whose whereabouts can be determined
- 12 upon reasonable inquiry:
- 13 (A) The alleged incapacitated person, the alleged incapacitated
- 14 person's spouse, and the alleged incapacitated person's adult
- 15 children, or if none, the alleged incapacitated person's parents.
- 16 (B) Any person who is serving as a guardian for, or who has
- 17 the care and custody of, the alleged incapacitated person.
- 18 (C) In case no person other than the incapacitated person is
- 19 notified under clause (A), at least one (1) of the persons most
- 20 closely related by blood or marriage to the alleged
- 21 incapacitated person.
- 22 (D) Any person known to the petitioner to be serving as the
- 23 alleged incapacitated person's attorney-in-fact under a durable
- 24 power of attorney.
- 25 (E) Any other person that the court directs.
- 26 Notice is not required under this subdivision if the person to be
- 27 notified waives notice or appears at the hearing on the petition.
- 28 (b) Whenever a petition (other than one for the appointment of a
- 29 guardian or for the issuance of a protective order) is filed with the
- 30 court, notice of the petition and the hearing on the petition shall be
- 31 given to the following persons, unless they appear or waive notice:
- 32 (1) The guardian.
- 33 (2) Any other persons that the court directs, including the
- 34 following:
- 35 (A) Any department, bureau, agency, or political subdivision
- 36 of the United States or of this state that makes or awards
- 37 compensation, pension, insurance, or other allowance for the
- 38 benefit of an alleged incapacitated person.
- 39 (B) Any department, bureau, agency, or political subdivision
- 40 of this state that may be charged with the supervision, control,
- 41 or custody of an alleged incapacitated person.
- 42 SECTION 3. IC 29-3-9-1, AS AMENDED BY P.L.101-2008,
- 43 SECTION 7, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
- 44 JULY 1, 2011]: Sec. 1. (a) By a properly executed power of attorney,
- 45 a parent of a minor or a guardian (other than a temporary guardian) of
- 46 a protected person may delegate to another person for:



1 (1) any period during which the care and custody of the minor or
 2 protected person is entrusted to an institution furnishing care,
 3 custody, education, or training; or

4 (2) **except as provided in subsection (b)**, a period not exceeding
 5 twelve (12) months;

6 any powers regarding support, custody, or property of the minor or
 7 protected person, except the power to consent to the marriage or
 8 adoption of a protected person who is a minor.

9 **(b) Unless otherwise stated in the power of attorney executed**
 10 **under subsection (a), the delegation is effective immediately.**
 11 **However, a parent of a minor or a guardian (other than a**
 12 **temporary guardian) of a protected person may specifically**
 13 **provide in the power of attorney that the delegation becomes**
 14 **effective upon the death or incapacity (as defined in IC 29-3-1-7.5)**
 15 **of the parent or guardian. A delegation that is effective by reason**
 16 **of death or incapacity of the parent or guardian shall terminate**
 17 **ninety (90) days after it becomes effective. However, if the person**
 18 **to whom the delegation is given files a petition for a guardianship**
 19 **of the minor or protected person during that ninety (90) day**
 20 **period, the delegation remains in effect until the court rules on the**
 21 **petition.**

22 ~~(b)~~ (c) A person having a power of attorney executed under
 23 subsection (a) has and shall exercise, for the period during which the
 24 power is effective, all other authority of the parent or guardian
 25 respecting the support, custody, or property of the minor or protected
 26 person except any authority expressly excluded in the written
 27 instrument delegating the power. However, the parent or guardian
 28 remains responsible for any act or omission of the person having the
 29 power of attorney with respect to the affairs, property, and person of the
 30 minor or protected person as though the power of attorney had never
 31 been executed.

32 ~~(c)~~ (d) Except as otherwise stated in the power of attorney
 33 delegating powers under this section, a delegation of powers under this
 34 section may be revoked by a written instrument of revocation that:

35 (1) identifies the power of attorney revoked; and

36 (2) is signed by the:

37 (A) parent of a minor; or

38 (B) guardian of a protected person;

39 who executed the power of attorney.





PRELIMINARY DRAFT
No. 3251

PREPARED BY
LEGISLATIVE SERVICES AGENCY
2011 GENERAL ASSEMBLY

DIGEST

Citations Affected: IC 29-3.

Synopsis: Guardianships. Specifies the notice requirements following court action on a petition to appoint a temporary guardian. Authorizes a parent of a minor or a guardian of a protected person to designate a preneed guardian effective upon the death or incapacity of the parent or guardian. Provides that the declaration is effective for 90 days unless the preneed guardian files a petition for guardianship, in which case the declaration is effective until the court rules on the petition. Provides that a delegation of parental powers by power of attorney is effective immediately.

Effective: July 1, 2011.



A BILL FOR AN ACT to amend the Indiana Code concerning probate.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 29-3-3-4 IS AMENDED TO READ AS FOLLOWS
2 [EFFECTIVE JULY 1, 2011]: Sec. 4. (a) If:

- 3 (1) a guardian has not been appointed for an incapacitated person
4 or minor;
5 (2) an emergency exists;
6 (3) the welfare of the incapacitated person or minor requires
7 immediate action; and
8 (4) no other person appears to have authority to act in the
9 circumstances;

10 the court, on petition by any person or on its own motion, may appoint
11 a temporary guardian for the incapacitated person or minor for a
12 specified period not to exceed sixty (60) days. No such appointment
13 shall be made except after notice and hearing unless it is alleged and
14 found by the court that immediate and irreparable injury to the person
15 or injury, loss, or damage to the property of the alleged incapacitated
16 person or minor may result before the alleged incapacitated person or
17 minor can be heard in response to the petition. If a temporary guardian
18 is appointed without **advance** notice and the alleged incapacitated
19 person or minor files a petition that the guardianship be terminated or
20 the court order modified, the court shall hear and determine the petition
21 at the earliest possible time.

22 **(b) If:**

- 23 **(1) a petition is filed under this section for the appointment of**
24 **a temporary guardian; and**
25 **(2) each person required to receive notice under**
26 **IC 29-3-6-1(a) has not:**
27 **(A) received a complete copy of the petition and notice**
28 **required by IC 29-3-6-2 before the court considers and acts**
29 **on the petition; or**
30 **(B) received actual notice of the filing of the petition and**
31 **specifically waived in writing the necessity for service of**



1 the notice required under IC 29-3-6-2 before the court
 2 considers and acts on the petition;
 3 the petitioner shall, immediately after the court enters an order
 4 scheduling a hearing on the petition or enters an order appointing
 5 a temporary guardian, serve complete copies of the petition, the
 6 court's order, and the notice required by IC 29-3-6-2 on every
 7 person entitled to receive notice under IC 29-3-6-1(a) and on each
 8 additional person to whom the court directs that notice be given.
 9 The requirements of this subsection are in addition to the
 10 petitioner's obligations under Rule 65 of the Indiana Rules of Trial
 11 Procedure to make a specific showing of the petitioner's efforts to
 12 provide advance notice to all interested persons or the reasons why
 13 advance notice cannot or should not be given.

14 (ⓑ) (c) If the court finds that a previously appointed guardian is not
 15 effectively performing fiduciary duties and that the welfare of the
 16 protected person requires immediate action, the court may suspend the
 17 authority of the previously appointed guardian and appoint a temporary
 18 guardian for the protected person for any period fixed by the court. The
 19 authority of the previously appointed guardian is suspended as long as
 20 a temporary guardian appointed under this subsection has authority to
 21 act.

22 (Ⓒ) (d) A temporary guardian appointed under this section has only
 23 the responsibilities and powers that are ordered by the court. The court
 24 shall order only the powers that are necessary to prevent immediate and
 25 substantial injury or loss to the person or property of the alleged
 26 incapacitated person or minor in an appointment made under this
 27 section.

28 (Ⓓ) (e) Proceedings under this section are not subject to the
 29 provisions of IC 29-3-4.

30 (Ⓔ) (f) A proceeding under this section may be joined with a
 31 proceeding under IC 29-3-4 or IC 29-3-5.

32 SECTION 2. IC 29-3-3-7 IS ADDED TO THE INDIANA CODE
 33 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
 34 1, 2011]: **Sec. 7. (a) A parent of a minor or the guardian of a
 35 protected person may designate a preneed guardian by making a
 36 written declaration naming the individual designated to serve as a
 37 preneed guardian. A declarant may name an alternate to the
 38 designated preneed guardian if the designated preneed guardian
 39 refuses to serve, renounces the appointment, dies, or becomes
 40 incapacitated after the death of the declarant.**

41 (b) A declaration under this section must contain the following
 42 information:

43 (1) The names of the declarant and the designated preneed
 44 guardian.

45 (2) The following information concerning each minor child or
 46 protected person to be placed in the care and custody of the



1 **designated preneed guardian:**

2 **(A) The person's full name as it appears on the birth**
 3 **certificate or as ordered by a court.**

4 **(B) The person's date of birth.**

5 **(C) The person's Social Security number, if any.**

6 **(c) A declaration executed under this section must be signed by**
 7 **the declarant in the presence of a notary public.**

8 **(d) A declaration executed under this section becomes effective**
 9 **upon the death or incapacity (as defined in IC 29-3-1-7.5) of the**
 10 **parent or guardian and shall terminate ninety (90) days after the**
 11 **declaration becomes effective. However, if the designated preneed**
 12 **guardian files a petition for a guardianship of the minor or**
 13 **protected person during that ninety (90) day period, the**
 14 **declaration remains in effect until the court rules on the petition.**

15 SECTION 3. IC 29-3-6-1, AS AMENDED BY P.L.143-2009,
 16 SECTION 15, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
 17 JULY 1, 2011]: Sec. 1. (a) When a petition for appointment of a
 18 guardian or for the issuance of a protective order is filed with the court,
 19 notice of the petition and the hearing on the petition shall be given by
 20 first class postage prepaid mail as follows:

21 (1) If the petition is for the appointment of a successor guardian,
 22 notice shall be given unless the court, for good cause shown,
 23 orders that notice is not necessary.

24 (2) If the petition is for the appointment of a temporary guardian,
 25 notice shall be given as required by ~~IC 29-3-3-4~~(a) **IC 29-3-3-4.**

26 (3) If the subject of the petition is a minor, notice of the petition
 27 and the hearing on the petition shall be given to the following
 28 persons whose whereabouts can be determined upon reasonable
 29 inquiry:

30 (A) The minor, if at least fourteen (14) years of age, unless the
 31 minor has signed the petition.

32 (B) Any living parent of the minor, unless parental rights have
 33 been terminated by a court order.

34 (C) Any person alleged to have had the principal care and
 35 custody of the minor during the sixty (60) days preceding the
 36 filing of the petition.

37 (D) Any other person that the court directs.

38 (4) If it is alleged that the person is an incapacitated person,
 39 notice of the petition and the hearing on the petition shall be given
 40 to the following persons whose whereabouts can be determined
 41 upon reasonable inquiry:

42 (A) The alleged incapacitated person, the alleged incapacitated
 43 person's spouse, and the alleged incapacitated person's adult
 44 children, or if none, the alleged incapacitated person's parents.

45 (B) Any person who is serving as a guardian for, or who has
 46 the care and custody of, the alleged incapacitated person.



1 (C) In case no person other than the incapacitated person is
2 notified under clause (A), at least one (1) of the persons most
3 closely related by blood or marriage to the alleged
4 incapacitated person.

5 (D) Any person known to the petitioner to be serving as the
6 alleged incapacitated person's attorney-in-fact under a durable
7 power of attorney.

8 (E) Any other person that the court directs.
9 Notice is not required under this subdivision if the person to be
10 notified waives notice or appears at the hearing on the petition.

11 (b) Whenever a petition (other than one for the appointment of a
12 guardian or for the issuance of a protective order) is filed with the
13 court, notice of the petition and the hearing on the petition shall be
14 given to the following persons, unless they appear or waive notice:

- 15 (1) The guardian.
- 16 (2) Any other persons that the court directs, including the
17 following:

18 (A) Any department, bureau, agency, or political subdivision
19 of the United States or of this state that makes or awards
20 compensation, pension, insurance, or other allowance for the
21 benefit of an alleged incapacitated person.

22 (B) Any department, bureau, agency, or political subdivision
23 of this state that may be charged with the supervision, control,
24 or custody of an alleged incapacitated person.

25 SECTION 4. IC 29-3-9-1, AS AMENDED BY P.L.101-2008,
26 SECTION 7, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
27 JULY 1, 2011]: Sec. 1. (a) By a properly executed power of attorney,
28 a parent of a minor or a guardian (other than a temporary guardian) of
29 a protected person may delegate to another person for:

30 (1) any period during which the care and custody of the minor or
31 protected person is entrusted to an institution furnishing care,
32 custody, education, or training; or

33 (2) a period not exceeding twelve (12) months;
34 any powers regarding support, custody, or property of the minor or
35 protected person, except the power to consent to the marriage or
36 adoption of a protected person who is a minor. **A delegation described
37 in this subsection is effective immediately unless otherwise stated
38 in the power of attorney.**

39 (b) A person having a power of attorney executed under subsection
40 (a) has and shall exercise, for the period during which the power is
41 effective, all other authority of the parent or guardian respecting the
42 support, custody, or property of the minor or protected person except
43 any authority expressly excluded in the written instrument delegating
44 the power. However, the parent or guardian remains responsible for any
45 act or omission of the person having the power of attorney with respect
46 to the affairs, property, and person of the minor or protected person as



1 though the power of attorney had never been executed.
2 (c) Except as otherwise stated in the power of attorney delegating
3 powers under this section, a delegation of powers under this section
4 may be revoked by a written instrument of revocation that:
5 (1) identifies the power of attorney revoked; and
6 (2) is signed by the:
7 (A) parent of a minor; or
8 (B) guardian of a protected person;
9 who executed the power of attorney.





PRELIMINARY DRAFT
No. 3277

PREPARED BY
LEGISLATIVE SERVICES AGENCY
2011 GENERAL ASSEMBLY

DIGEST

Citations Affected: IC 6-4.1-5-15; IC 12-14; IC 12-15-9;
IC 29-1-14-9.

Synopsis: Priority of claims. Provides that the clerk of the circuit court of each county in which real property described in the inheritance tax order of a nonresident decedent is located shall spread a copy of the order of record upon request by an interested person rather than as a matter of course. Provides that the order of priority of claims that are not subservient to a claim to recapture Medicaid benefits is: (1) the expenses of administering the recipient's estate, including taxes; (2) reasonable funeral expenses; and (3) the expenses of the recipient's last illness. Removes caps on the amount of funeral expenses that have priority. Provides that the court approved fees of attorneys, personal representatives, and certain attorney surrogates are expenses of administering the recipient's estate. Disallows claims against the estate of a Medicaid recipient's spouse.

Effective: July 1, 2011.



A BILL FOR AN ACT to amend the Indiana Code concerning probate.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 6-4.1-5-15 IS AMENDED TO READ AS
2 FOLLOWS [EFFECTIVE JULY 1, 2011]: Sec. 15. (a) The department
3 of state revenue shall, with respect to a nonresident decedent's estate,
4 enter an order which:

- 5 (1) states the fair market value of all property interests transferred
6 by the decedent under taxable transfers;
7 (2) describes all Indiana real property so transferred by the
8 decedent; and
9 (3) states the inheritance tax imposed as a result of the decedent's
10 death.

11 (b) The clerk of the circuit court of each county in which real
12 property described in the order is located shall spread a copy of the
13 order of record **upon request by an interested person.**

14 SECTION 2. IC 12-14-17-4, AS AMENDED BY P.L.9-2006,
15 SECTION 4, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
16 JULY 1, 2011]: Sec. 4. The division:

- 17 (1) may not consider a combined total of one thousand seven
18 hundred fifty dollars (\$1,750) that is contributed by:
19 (A) friends;
20 (B) relatives; and
21 (C) the resources of the deceased; and
22 (2) may consider any amount that exceeds one thousand seven
23 hundred fifty dollars (\$1,750) contributed by:
24 (A) friends;
25 (B) relatives; and
26 (C) the resources of the deceased;

27 when determining the amount to be paid to the funeral director for
28 expenses under this chapter. ~~However, the resources of the deceased~~
29 ~~may not be used if the deceased has prepaid funeral expenses that were~~
30 ~~excluded as a resource for Medicaid eligibility under IC 12-15-2.~~

31 SECTION 3. IC 12-14-21-3 IS AMENDED TO READ AS



1 FOLLOWS [EFFECTIVE JULY 1, 2011]: Sec. 3. Notwithstanding any
2 other law, a claim filed for recovery of aged assistance has priority in
3 order of payment from the estate over all other claims, except the
4 following:

- 5 (1) Prior recorded encumbrances.
- 6 (2) Taxes.
- 7 (3) Reasonable costs of administration.
- 8 (4) **Reasonable** funeral expenses. ~~in an amount not to exceed five~~
9 ~~hundred fifty dollars (\$550). However, this amount is zero (0) if~~
10 ~~the decedent has~~ **To determine whether the amount of claimed**
11 **funeral expenses is reasonable, the court may consider the**
12 **amount of funds for** prepaid funeral expenses that were excluded
13 as a resource for Medicaid eligibility under IC 12-15-2.

14 SECTION 4. IC 12-15-9-0.5, AS AMENDED BY P.L.246-2005,
15 SECTION 107, IS AMENDED TO READ AS FOLLOWS
16 [EFFECTIVE JULY 1, 2011]: Sec. 0.5. (a) As used in this chapter,
17 "estate" includes:

- 18 (1) ~~all real and personal property and other assets included within~~
19 ~~an individual's probate estate; assets described in~~
20 **IC 29-1-1-3(a)(9);**
- 21 (2) any interest in real property owned by the individual at the
22 time of death that was conveyed to the individual's survivor
23 through joint tenancy with right of survivorship, if the joint
24 tenancy was created after June 30, 2002;
- 25 (3) any real or personal property conveyed through a nonprobate
26 transfer; and
- 27 (4) any sum due after June 30, 2005, to a person after the death of
28 a Medicaid recipient that is under the terms of an annuity contract
29 purchased after May 1, 2005, with the assets of
30 ~~(A) the Medicaid recipient. or~~
31 ~~(B) the Medicaid recipient's spouse.~~

32 (b) As used in this chapter, "nonprobate transfer" means a valid
33 transfer, effective at death, by a transferor:

- 34 (1) whose last domicile was in Indiana; and
- 35 (2) who immediately before death had the power, acting alone, to
36 prevent transfer of the property by revocation or withdrawal and:
37 (A) use the property for the benefit of the transferor; or
38 (B) apply the property to discharge claims against the
39 transferor's probate estate.

40 The term does not include transfer of a survivorship interest in a
41 tenancy by the entireties real estate or payment of the death proceeds
42 of a life insurance policy.

43 SECTION 5. IC 12-15-9-1, AS AMENDED BY P.L.246-2005,
44 SECTION 108, IS AMENDED TO READ AS FOLLOWS
45 [EFFECTIVE JULY 1, 2011]: Sec. 1. ~~(a) Subject to subsection (b);~~
46 Upon the death of a Medicaid recipient, ~~or upon the death of a~~



1 ~~deceased Medicaid recipient's spouse~~; the total amount of Medicaid
2 paid on behalf of the recipient after the recipient became fifty-five (55)
3 years of age must be allowed as a preferred claim against the estate of
4 the recipient ~~or the recipient's spouse~~ in favor of the state. The affidavit
5 of a person designated by the secretary to administer this section is
6 evidence of the amount of the claim and is payable after the payment
7 of the following in accordance with IC 29-1-14-9:

8 **(1) The expenses of administering the estate, including**
9 **attorney's fees and personal representative fees approved by**
10 **the court and all taxes, interest, and penalties imposed by the**
11 **federal, state, and local governments.**

12 ~~(1)~~ **(2) Reasonable** funeral expenses for the recipient, and the
13 recipient's spouse, not to exceed in each individual case three
14 hundred fifty dollars (\$350):

15 ~~(2)~~ **(3)** The expenses of the last illness of the recipient and the
16 recipient's spouse that are authorized or paid by the office.

17 ~~(3)~~ The expenses of administering the estate, including the
18 attorney's fees approved by the court.

19 (b) If a recipient's spouse remarries, the part of the estate of the
20 recipient's spouse that is attributable to the subsequent spouse is not
21 subject to a claim for Medicaid paid on behalf of the recipient.

22 SECTION 6. IC 12-15-9-5, AS AMENDED BY P.L.246-2005,
23 SECTION 109, IS AMENDED TO READ AS FOLLOWS
24 [EFFECTIVE JULY 1, 2011]: Sec. 5. ~~(a)~~ The office may not recover
25 on a claim filed against the estate of a surviving spouse, while the
26 individual is survived by a child who is:

27 (1) less than twenty-one ~~(21)~~ years of age; or

28 (2) permanently and totally disabled under criteria established by
29 the federal Supplemental Security Income program.

30 (b) The office may not recover on a claim filed against the estate of
31 a surviving spouse from any part of the estate described in section ~~1~~(b)
32 of this chapter.

33 SECTION 7. IC 29-1-14-9, AS AMENDED BY P.L.161-2007,
34 SECTION 39, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
35 JULY 1, 2011]: Sec. 9. (a) All claims shall be classified in one (1) of
36 the following classes. If the applicable assets of the estate are
37 insufficient to pay all claims in full, the personal representative shall
38 make payment in the following order:

39 (1) Costs and expenses of administration, **including the fee of an**
40 **attorney surrogate that has been:**

41 (A) **approved by a court under the rules of the Indiana**
42 **supreme court governing attorney surrogates; and**

43 (B) **filed as a claim in the estate of a deceased attorney.**

44 (2) Reasonable funeral expenses. However, in any estate in which
45 the decedent was a recipient of public assistance under IC 12-1-1
46 through IC 12-1-12 (before its repeal) or any of the following, the



- 1 amount of funeral expenses having priority over any claim for the
 2 recovery of public assistance **is subject to IC 12-15-9-1** and shall
 3 not exceed the limitations provided for under IC 12-14-6,
 4 IC 12-14-17, and IC 12-14-21:
- 5 TANF assistance.
 - 6 TANF burials.
 - 7 TANF IMPACT/J.O.B.S.
 - 8 Temporary Assistance to Other Needy Families (TAONF)
 - 9 assistance.
 - 10 ARCH.
 - 11 Blind relief.
 - 12 Child care.
 - 13 Child welfare adoption assistance.
 - 14 Child welfare adoption opportunities.
 - 15 Child welfare assistance.
 - 16 Child welfare child care improvement.
 - 17 Child welfare child abuse.
 - 18 Child welfare child abuse and neglect prevention.
 - 19 Child welfare children's victim advocacy program.
 - 20 Child welfare foster care assistance.
 - 21 Child welfare independent living.
 - 22 Child welfare medical assistance to wards.
 - 23 Child welfare program review action group (PRAG).
 - 24 Child welfare special needs adoption.
 - 25 Food Stamp administration.
 - 26 Health care for indigent (HCI).
 - 27 ICES.
 - 28 IMPACT (food stamps).
 - 29 Title IV-D (ICETS).
 - 30 Title IV-D child support administration.
 - 31 Title IV-D child support enforcement (parent locator).
 - 32 Medicaid assistance.
 - 33 Medical services for inmates and patients (590).
 - 34 Room and board assistance (RBA).
 - 35 Refugee social service.
 - 36 Refugee resettlement.
 - 37 Repatriated citizens.
 - 38 SSI burials and disabled examinations.
 - 39 Title XIX certification.
 - 40 (3) Allowances made under IC 29-1-4-1.
 - 41 (4) All debts and taxes having preference under the laws of the
 - 42 United States.
 - 43 (5) Reasonable and necessary medical expenses of the last
 - 44 sickness of the decedent, including compensation of persons
 - 45 attending him.
 - 46 (6) All debts and taxes having preference under the laws of this



1 state; but no personal representative shall be required to pay any
2 taxes on any property of the decedent unless such taxes are due
3 and payable before possession thereof is delivered by the personal
4 representative pursuant to the provisions of IC 29-1.

5 (7) All other claims allowed.

6 (b) No preference shall be given in the payment of any claim over
7 any other claim of the same class, nor shall a claim due and payable be
8 entitled to a preference over claims not due.



UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-SIXTEENTH YEAR
PASADENA, CALIFORNIA

July 27 – August 3, 2007

WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

December 3, 2007

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**DRAFTING COMMITTEE ON UNIFORM ADULT GUARDIANSHIP AND
PROTECTIVE PROCEEDINGS JURISDICTION ACT**

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**UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS
JURISDICTION ACT**

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UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT

PREFATORY NOTE

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

States may enact the UAGPPJA either separately or as part of the broader UGPPA or the even broader Uniform Probate Code (UPC), of which the UGPPA forms a part. Conforming amendments to the UGPPA and UPC are expected to be approved in 2009 that will facilitate enactment of the UAGPPJA by states that have enacted the UGPPA or UPC.

The Problem of Multiple Jurisdiction

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

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

The Problem of Transfer

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

The Problem of Out-of-State Recognition

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

The Proposed Uniform Law and the Child Custody Analogy

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

The Objectives and Key Concepts of the Proposed UAGPPJA

The UAGPPJA is organized into five articles. Article 1 contains definitions and provisions designed to facilitate cooperation between courts in different states. Article 2 is the heart of the Act, specifying which court has jurisdiction to appoint a guardian or conservator or issue another type of protective order and contains definitions applicable only to that article. Its principal objective is to assure that an appointment or order is made or issued in only one state except in cases of emergency or in situations where the individual owns property located in multiple states. Article 3 specifies a procedure for transferring a guardianship or conservatorship proceedings from one state to another state. Article 4 deals with enforcement of guardianship and protective orders in other states. Article 5 contains an effective date provision, a place to list provisions of existing law to be repealed or amended, and boilerplate provisions common to all uniform acts.

Key Definitions (Section 201)

To determine which court has primary jurisdiction under the UAGPPJA, the key factors are to determine the individual's "home state" and "significant-connection state." A "home state" (Section 201(a)(2)) is the state in which the individual was physically present, including

any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or appointment of a guardian. If the respondent was not physically present in a single state for the six months immediately preceding the filing of the petition, the home state is the place where the respondent was last physically present for at least six months as long as such presence ended within the six months prior to the filing of the petition. Section 201(a)(2). Stated another way, the ability of the home state to appoint a guardian or enter a protective order for an individual continues for up to six months following the individual's physical relocation to another state.

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

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

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

Jurisdiction (Article 2)

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

- *Home State:* The home state has primary jurisdiction to appoint a guardian or conservator or issue another type of protective order.
- *Significant-connection State:* A significant-connection state has jurisdiction to appoint a guardian or conservator or issue another type of protective order if on the date the petition was filed:
 - the respondent does not have a home state or the home state has declined jurisdiction on the basis that the significant-connection state is a more appropriate forum; or
 - the respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant-connection state, and, before the court makes the appointment or issues the order (i) a

petition for an appointment or order is not filed in the respondent's home state; (ii) an objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding; and (iii) the court in this state concludes that it is an appropriate forum under the factors set forth in Section 206.

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

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

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

Transfer to Another State (Article 3)

Article 3 specifies a procedure for transferring an already existing guardianship or conservatorship to another state. To make the transfer, court orders are necessary from both the court transferring the case and from the court accepting the case. The transferring court must find that the incapacitated or protected person is physically present in or is reasonably expected to move permanently to the other state, that adequate arrangements have been made for the person or the person's property in the other state, and that the court is satisfied the case will be accepted by the court in the other state. To assure continuity, the court in the transferring state cannot dismiss the local proceeding until the order from the state accepting the case is filed with the transferring court. To expedite the transfer process, the court in the accepting state must give

deference to the transferring court's finding of incapacity and selection of the guardian or conservator. Much of Article 3 is based on the pioneering work of the National Probate Court Standards, a 1993 joint project of the National College of Probate Judges and the National Center for State Courts.

Out of State Enforcement (Article 4)

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

International Application (Section 103)

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

The Problem of Differing Terminology

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

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

UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS

JURISDICTION ACT

[ARTICLE] 1

GENERAL PROVISIONS

General Comment

Article 1 contains definitions and general provisions used throughout the Act. Definitions applicable only to Article 2 are found in Section 201. Section 101 is the title, Section 102 contains the definitions, and Sections 103-106 the general provisions. Section 103 provides that a court of an enacting state may treat a foreign country as a state for the purpose of applying all portions of the Act other than Article 4, Section 104 addresses communication between courts, Section 105 requests by a court to a court in another state for assistance, and Section 106 the taking of testimony in other states. These Article 1 provisions relating to court communication and assistance are essential tools to assure the effectiveness of the provisions of Article 2 determining jurisdiction and in facilitating transfer of a proceeding to another state as authorized in Article 3.

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

Comment

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

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

SECTION 102. DEFINITIONS. In this [act]:

- (1) "Adult" means an individual who has attained [18] years of age.
- (2) "Conservator" means a person appointed by the court to administer the property of an adult, including a person appointed under [insert reference to enacting state's conservatorship or

protective proceedings statute].

(3) “Guardian” means a person appointed by the court to make decisions regarding the person of an adult, including a person appointed under [insert reference to enacting state’s guardianship statute].

(4) “Guardianship order” means an order appointing a guardian.

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

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

(7) “Party” means the respondent, petitioner, guardian, conservator, or any other person allowed by the court to participate in a guardianship or protective proceeding.

(8) “Person,” except in the term incapacitated person or protected person, means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(9) “Protected person” means an adult for whom a protective order has been issued.

(10) “Protective order” means an order appointing a conservator or other order related to management of an adult’s property.

(11) “Protective proceeding” means a judicial proceeding in which a protective order is sought or has been issued.

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

(13) “Respondent” means an adult for whom a protective order or the appointment of a guardian is sought.

(14) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

Legislative Note: A state that uses a different term than guardian or conservator for the person appointed by the court or that defines either of these terms differently may, but is not encouraged to, substitute its own term or definition. Use of common terms and definitions by states enacting this Act will facilitate resolution of cases involving multiple jurisdictions.

Comment

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

Three of the other definitions are standard uniform law terms. These are the definitions of “person” (paragraph (8)), “record” (paragraph (12)), and “state” (paragraph (14)). Two are common procedural terms. The individual for whom a guardianship or protective order is sought is a “respondent” (paragraph (13)). A person who may participate in a guardianship or protective proceeding is referred to as a “party” (paragraph (7)).

The remaining definitions refer to standard guardianship terminology used in a majority of states. A “guardian” (paragraph (3)) is appointed in a “guardianship order” (paragraph (4)) which is issued as part of a “guardianship proceeding” (paragraph (5)) and which authorizes the guardian to make decisions regarding the person of an “incapacitated person” (paragraph (6)). A “conservator” (paragraph (2)) is appointed pursuant to a “protective order” (paragraph (10)) which is issued as part of a “protective proceeding” (paragraph (11)) and which authorizes the conservator to manage the property of a “protected person” (paragraph (9)).

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

The Act does not limit the types of conservatorships or guardianships to which the Act applies. The Act applies whether the conservatorship or guardianship is denominated as plenary, limited, temporary or emergency. The Act, however, would not ordinarily apply to a guardian

ad litem, who is ordinarily appointed by the court to represent a person or conduct an investigation in a specified legal proceeding.

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

SECTION 103. INTERNATIONAL APPLICATION OF [ACT]. A court of this state may treat a foreign country as if it were a state for the purpose of applying this [article] and [Articles] 2, 3, and 5.

Comment

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

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

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

SECTION 104. COMMUNICATION BETWEEN COURTS.

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

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

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

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

Comment

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

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

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

This section does not prescribe the extent of the record that the court must make, leaving that issue to the court. A record might include notes or transcripts of a court reporter who

listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum summarizing a conversation, and email communications. No record need be made of relatively inconsequential matters such as scheduling, calendars, and court records.

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

SECTION 105. COOPERATION BETWEEN COURTS.

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

(1) hold an evidentiary hearing;

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

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

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

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

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

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

(b) If a court of another state in which a guardianship or protective proceeding is pending requests assistance of the kind provided in subsection (a), a court of this state has jurisdiction for the limited purpose of granting the request or making reasonable efforts to comply with the request.

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

Comment

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

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

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

SECTION 106. TAKING TESTIMONY IN ANOTHER STATE.

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

manner in which and the terms upon which the testimony is to be taken.

(b) In a guardianship or protective proceeding, a court in this state may permit a witness located in another state to be deposed or to testify by telephone or audiovisual or other electronic means. A court of this state shall cooperate with the court of the other state in designating an appropriate location for the deposition or testimony.

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

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

Comment

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

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

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

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

This section is consistent with and complementary to the Uniform Interstate Depositions

and Discovery Act (2007), which specifies the procedure for taking depositions in other states.

[ARTICLE] 2

JURISDICTION

General Comment

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

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

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

SECTION 201. DEFINITIONS; SIGNIFICANT CONNECTION FACTORS.

(a) In this [article]:

(1) "Emergency" means a circumstance that likely will result in substantial harm

to a respondent's health, safety, or welfare, and for which the appointment of a guardian is necessary because no other person has authority and is willing to act on the respondent's behalf;

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

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

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

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

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

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

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

Comment

The terms "emergency," "home state," and "significant-connection state" are defined in

this section and not in Section 102 because they are used only in Article 2.

The definition of “emergency” (subsection (a)(1)) is taken from the emergency guardianship provision of the Uniform Guardianship and Protective Proceedings Act (1997), Section 312.

Pursuant to Section 204 of this Act, a court has jurisdiction to appoint a guardian in an emergency for a period of up to 90 days even though it does not otherwise have jurisdiction. However, the emergency appointment is subject to the direction of the court in the respondent’s home state. Pursuant to Section 204(b), the emergency proceeding must be dismissed at the request of the court in the respondent’s home state.

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

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

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

The definition of “significant-connection state” (subsection (a)(3)) is similar to Section 201(a)(2) of the Uniform Child Custody Jurisdiction and Enforcement Act (1997). However, subsection (b) of this Section adds a list of factors relevant to adult guardianship and protective

proceedings to aid the court in deciding whether a particular place is a significant-connection state. Under Section 301(e)(1), the significant connection factors listed in the definition are to be taken into account in determining whether a conservatorship may be transferred to another state.

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

Comment

Similar to Section 201(b) of the Uniform Child Custody Jurisdiction and Enforcement Act (1997), which provides that the UCCJEA is the exclusive basis for determining jurisdiction to issue a child custody order, this section provides that this article is the exclusive jurisdictional basis for determining jurisdiction to appoint a guardian or issue a protective order for an adult. An enacting jurisdiction will therefore need to repeal any existing provisions addressing jurisdiction in guardianship and protective proceedings cases. A Legislative Note to Section 503 provides guidance on which provisions need to be repealed or amended. The drafters of this Act concluded that limiting the Act to “interstate” cases was unworkable. Such cases are hard to define, but even if they could be defined, overlaying this Act onto a state’s existing jurisdictional rules would leave too many gaps and inconsistencies. In addition, if the particular case is truly local, the local court would likely have jurisdiction under both this Act as well as under prior law.

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

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

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

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

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

(i) a petition for an appointment or order is not filed in the respondent’s

home state;

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

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

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

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

Comment

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

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

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

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

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

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

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

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

SECTION 204. SPECIAL JURISDICTION.

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

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

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

(3) appoint a guardian or conservator for an incapacitated or protected person for whom a provisional order to transfer the proceeding from another state has been issued under procedures similar to Section 301.

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

Comment

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

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

through repeated temporary appointments.

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

Subsection (a)(2) grants a court jurisdiction to issue a protective order with respect to real and tangible personal property located in the state even though the court does not otherwise have jurisdiction. Such orders are most commonly issued when a conservator has been appointed but the protected person owns real property located in another state. The drafters specifically rejected using a general reference to any property located in the state because of the tendency of some courts to issue protective orders with respect to intangible personal property such as a bank account where the technical situs of the asset may have little relationship to the protected person.

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

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

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

Comment

While this Act relies heavily on the Uniform Child Jurisdiction and Enforcement Act (1997) for many basic concepts, the identity is not absolute. Section 202 of the UCCJEA specifies a variety of circumstances whereby a court can lose jurisdiction based on loss of physical presence by the child and others, loss of a significant connection, or unavailability of

substantial evidence. Section 203 of the UCCJEA addresses the jurisdiction of the court to modify a custody determination made in another state. Nothing comparable to either UCCJEA section is found in this Act. Under this Act, a guardianship or protective order may be modified only upon request to the court that made the appointment or issued the order, which retains exclusive and continuing jurisdiction over the proceeding. Unlike child custody matters, guardianships and protective proceedings are ordinarily subject to continuing court supervision. Allowing the court's jurisdiction to terminate other than by its own order would open the possibility of competing guardianship or conservatorship appointments in different states for the same person at the same time, the problem under current law that enactment of this Act is designed to avoid. Should the incapacitated or protected person and others with an interest in the proceeding relocate to a different state, the appropriate remedy is to seek transfer of the proceeding to the other state as provided in Article 3.

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

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

SECTION 206. APPROPRIATE FORUM.

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

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

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

relevant factors, including:

- (1) any expressed preference of the respondent;
- (2) whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation;
- (3) the length of time the respondent was physically present in or was a legal resident of this or another state;
- (4) the distance of the respondent from the court in each state;
- (5) the financial circumstances of the respondent's estate;
- (6) the nature and location of the evidence;
- (7) the ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;
- (8) the familiarity of the court of each state with the facts and issues in the proceeding; and
- (9) if an appointment were made, the court's ability to monitor the conduct of the guardian or conservator.

Comment

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

This section is similar to Section 207 of the Uniform Child Custody Jurisdiction and

Enforcement Act (1997) except that the factors in Section 206(c) of this Act have been adapted to address issues most commonly encountered in adult guardianship and protective proceedings as opposed to child custody determinations.

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

SECTION 207. JURISDICTION DECLINED BY REASON OF CONDUCT.

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

(1) decline to exercise jurisdiction;

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

(3) continue to exercise jurisdiction after considering:

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

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

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

(b) If a court of this state determines that it acquired jurisdiction to appoint a guardian or issue a protective order because a party seeking to invoke its jurisdiction engaged in unjustifiable

conduct, it may assess against that party necessary and reasonable expenses, including attorney's fees, investigative fees, court costs, communication expenses, witness fees and expenses, and travel expenses. The court may not assess fees, costs, or expenses of any kind against this state or a governmental subdivision, agency, or instrumentality of this state unless authorized by law other than this [act].

Comment

This section is similar to the Section 208 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997). Like the UCCJEA, this Act does not attempt to define "unjustifiable conduct," concluding that this issue is best left to the courts. However, a common example could include the unauthorized removal of an adult to another state, with that state acquiring emergency jurisdiction under Section 204 immediately upon the move and home state jurisdiction under Section 203 six months following the move if a petition for a guardianship or protective order is not filed during the interim in the soon-to-be former home state. Although child custody cases frequently raise different issues than do adult guardianship matters, the element of unauthorized removal is encountered in both types of proceedings. For the caselaw on unjustifiable conduct under the predecessor Uniform Child Custody Jurisdiction Act (1968), see David Carl Minneman, *Parties' Misconduct as Grounds for Declining Jurisdiction Under §8 of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 16 A.L.R. 5th 650 (1993).

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

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

SECTION 208. NOTICE OF PROCEEDING. If a petition for the appointment of a guardian or issuance of a protective order is brought in this state and this state was not the respondent's home state on the date the petition was filed, in addition to complying with the

notice requirements of this state, notice of the petition must be given to those persons who would be entitled to notice of the petition if a proceeding were brought in the respondent's home state.

The notice must be given in the same manner as notice is required to be given in this state.

Comment

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

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

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

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

Comment

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

Under the Act only one court in which a petition is pending will have jurisdiction under Section 203. If a petition is brought in the respondent's home state, that court has jurisdiction over that of any significant-connection or other state. If the petition is first brought in a significant-connection state, that jurisdiction will be lost if a petition is later brought in the home state prior to an appointment or issuance of an order in the significant-connection state. Jurisdiction will also be lost in the significant-connection state if the respondent has a home state and an objection is filed in the significant-connection state that jurisdiction is properly in the home state. If petitions are brought in two significant-connection states, the first state has a right to proceed over that of the second state, and if a petition is brought in any other state, any claim to jurisdiction of that state is subordinate to that of the home state and all significant-connection states.

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

[ARTICLE] 3

TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP

General Comment

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

Section 301 addresses procedures in the transferring state. Section 302 addresses procedures in the accepting state.

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

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

The final steps are largely ministerial. Pursuant to Section 301(f), the provisional order from the accepting court must be filed in the transferring court. The transferring court will then issue a final order terminating the proceeding, subject to local requirements such as filing of a

final report or account and the release of any bond. Pursuant to Section 302(e), the final order terminating the proceeding in the transferring court must then be filed in the accepting court, which will then convert its provisional order accepting the case into a final order appointing the petitioning guardian or conservator as guardian or conservator in the accepting state.

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

The transfer procedure in this article responds to numerous problems that have arisen in connection with attempted transfers under the existing law of most states. Sometimes a court will dismiss a case on the assumption a proceeding will be brought in another state, but such proceeding is never filed. Sometimes a court will refuse to dismiss a case until the court in the other state accepts the matter, but the court in the other state refuses to consider the petition until the already existing guardianship or conservatorship has been terminated. Oftentimes the court will conclude that it is without jurisdiction to make an appointment until the respondent is physically present in the state, a problem which Section 204(a)(3) addresses by granting a court special jurisdiction to consider a petition to accept a proceeding from another state. But the most serious problem is the need to prove the case in the second state from scratch, including proving the respondent’s incapacity and the choice of guardian or conservator. Article 3 eliminates this problem. Section 302(g) requires that the court accepting the case recognize a guardianship or conservatorship order from the other state, including the determination of the incapacitated or protected person’s incapacity and the appointment of the guardian or conservator, if otherwise eligible to act in the accepting state.

**SECTION 301. TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP
TO ANOTHER STATE.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**SECTION 302. ACCEPTING GUARDIANSHIP OR CONSERVATORSHIP
TRANSFERRED FROM ANOTHER STATE.**

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

(b) Notice of a petition under subsection (a) must be given to those persons that would be entitled to notice if the petition were a petition for the appointment of a guardian or issuance of a protective order in both the transferring state and this state. The notice must be given in the same manner as notice is required to be given in this state.

(c) On the court's own motion or on request of the guardian or conservator, the incapacitated or protected person, or other person required to be notified of the proceeding, the

court shall hold a hearing on a petition filed pursuant to subsection (a).

(d) The court shall issue an order provisionally granting a petition filed under subsection (a) unless:

(1) an objection is made and the objector establishes that transfer of the proceeding would be contrary to the interests of the incapacitated or protected person; or

(2) the guardian or conservator is ineligible for appointment in this state.

(e) The court shall issue a final order accepting the proceeding and appointing the guardian or conservator as guardian or conservator in this state upon its receipt from the court from which the proceeding is being transferred of a final order issued under provisions similar to Section 301 transferring the proceeding to this state.

(f) Not later than [90] days after issuance of a final order accepting transfer of a guardianship or conservatorship, the court shall determine whether the guardianship or conservatorship needs to be modified to conform to the law of this state.

(g) In granting a petition under this section, the court shall recognize a guardianship or conservatorship order from the other state, including the determination of the incapacitated or protected person's incapacity and the appointment of the guardian or conservator.

(h) The denial by a court of this state of a petition to accept a guardianship or conservatorship transferred from another state does not affect the ability of the guardian or conservator to seek appointment as guardian or conservator in this state under [insert statutory references to this state's ordinary procedures law for the appointment of guardian or conservator] if the court has jurisdiction to make an appointment other than by reason of the provisional order of transfer.

[ARTICLE] 4

REGISTRATION AND RECOGNITION OF ORDERS FROM OTHER STATES

General Comment

Article 4 is designed to facilitate the enforcement of guardianship and protective orders in other states. This article does not make distinctions among the types of orders that can be enforced. This article is applicable whether the guardianship or conservatorship is full or limited. While some states have expedited procedures for sales of real estate by conservators appointed in other states, few states have enacted statutes dealing with enforcement of guardianship orders, such as when a care facility questions the authority of a guardian appointed in another state. Sometimes, these sorts of refusals necessitate that the proceeding be transferred to the other state or that an entirely new petition be filed, problems that could often be avoided if guardianship and protective orders were entitled to recognition in other states.

Article 4 provides for such recognition. The key concept is registration. Section 401 provides for registration of guardianship orders, and Section 402 for registration of protective orders. Following registration of the order in the appropriate county of the other state, and after giving notice to the appointing court of the intent to register the order in the other state, Section 403 authorizes the guardian or conservator to thereafter exercise all powers authorized in the order of appointment except as prohibited under the laws of the registering state.

The drafters of the Act concluded that the registration of certified copies provides sufficient protection and that it was not necessary to mandate the filing of authenticated copies.

SECTION 401. REGISTRATION OF GUARDIANSHIP ORDERS. If a guardian has been appointed in another state and a petition for the appointment of a guardian is not pending in this state, the guardian appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship order in this state by filing as a foreign judgment in a court, in any appropriate [county] of this state, certified copies of the order and letters of office.

SECTION 402. REGISTRATION OF PROTECTIVE ORDERS. If a conservator has been appointed in another state and a petition for a protective order is not pending in this state, the conservator appointed in the other state, after giving notice to the appointing court of an intent to register, may register the protective order in this state by filing as a foreign judgment

in a court of this state, in any [county] in which property belonging to the protected person is located, certified copies of the order and letters of office and of any bond.

SECTION 403. EFFECT OF REGISTRATION.

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

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

[ARTICLE] 5

MISCELLANEOUS PROVISIONS

SECTION 501. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 502. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 503. REPEALS. The following acts and parts of acts are hereby repealed:

- (1)
- (2)
- (3)

Legislative Note: Upon enactment, the state should repeal existing provisions on subject matter jurisdiction for adult guardianship and protective proceedings. If existing provisions address proceedings for both minors and adults, the provisions should be amended to limit their application to minors. In addition, the state should repeal or limit to minors any existing provisions authorizing transfer of a guardianship or conservatorship proceeding to another state and any provisions authorizing a guardian or conservator to act in another state.

SECTION 504. TRANSITIONAL PROVISION.

- (a) This [act] applies to guardianship and protective proceedings begun on or after [the effective date].
- (b) [Articles] 1, 3, and 4 and Sections 501 and 502 apply to proceedings begun before

[the effective date], regardless of whether a guardianship or protective order has been issued.

Comment

This Act applies retroactively to guardianships and conservatorships in existence on the effective date. The guardian or conservator appointed prior to the effective date of the Act may petition to transfer the proceeding to another state under Article 3 and register and enforce the order in other states pursuant to Article 4. The jurisdictional provisions of Article 2 also apply to proceedings begun on or after the effective date. What the Act does not do is change the jurisdictional rules midstream for petitions filed prior to the effective date for which an appointment has not been made or order issued as of the effective date. Jurisdiction in such cases is governed by prior law. Nor does the Act affect the validity of already existing appointments even though the court might not have had jurisdiction had this Act been in effect at the time the appointment was made.

SECTION 505. EFFECTIVE DATE. This [act] takes effect.....