

Probate & Trust Law Section CLE

Legislation Update for 2009 and Looking Ahead to 2010

Scott M. Nelson

Lommen, Abdo, Cole, King
& Stageberg, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
612-336-9320
scott@lommen.com
www.lommen.com

Robert McLeod

Lindquist & Vennum, PLLP
4800 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
rmcleod@lindquist.com
www.lindquist.com

Peter Hatinen

Fredrikson & Byron, P.A.
Suite 4000
200 South Sixth Street
Minneapolis, MN 55402
612-492-7319
phatinen@fredlaw.com
www.fredlaw.com

FEDERAL TRANSFER TAX CHANGES

**DESCRIPTION OF REVENUE PROVISIONS CONTAINED IN THE
PRESIDENT'S FISCAL YEAR 2010 BUDGET PROPOSAL
PART ONE: INDIVIDUAL INCOME TAX AND
ESTATE AND GIFT TAX PROVISIONS**

Prepared by the Staff of the
JOINT COMMITTEE ON TAXATION
September 2009
U.S. Government Printing Office
Washington: 2009
JCS-2-09

II. MAKE PERMANENT CERTAIN TAX CUTS ENACTED IN 2001 AND 2003

**F. Modify and Make Permanent the Estate, Gift, and Generation
Skipping Transfer Taxes After 2009**

Description of Proposal

The proposal generally makes permanent the present-law estate, gift, and generation skipping transfer tax laws in effect for 2009. Under the proposal, the unified credit effective exemption amount for estate tax purposes generally is \$3.5 million for decedents dying during 2010 and later years. The unified credit effective exemption amount for gift tax purposes is \$1 million for 2010 and later years. The highest estate and gift tax rate under the proposal is 45 percent, as under present law in effect for 2009. As under present law, the tax on taxable transfers for a year is determined by computing a tentative tax on the cumulative value of current year transfers and all gifts made by a decedent after December 31, 1976, and subtracting from the tentative tax the amount of gift tax that would have been paid by the decedent on taxable gifts after December 31, 1976, if the estate tax rate schedule in effect on the date of the decedent's death had been in effect on the date of the prior-year gifts.

As under present law, the generation skipping transfer tax exemption for a given year is equal to the unified credit effective exemption amount for estate tax purposes (e.g., \$3.5 million in 2010), and the generation skipping transfer tax rate for a given year will be determined using the highest estate and gift tax rate in effect for such year.

The proposal makes permanent the repeal of the State death tax credit; as under present law in effect for 2009, the proposal allows a deduction for death taxes paid to any State or the District of Columbia. In addition, the proposal makes permanent the repeal of the qualified family-owned business deduction.

The proposal also repeals the modified carryover basis rules that, under EGTRRA, would apply for purposes of determining basis in property acquired from a decedent who dies in 2010.

Under the proposal, a recipient of property acquired from a decedent who dies after December 31, 2009, generally will receive date-of-death fair market value basis (i.e., “stepped up” basis) under the basis rules in effect under present law with respect to decedents dying prior to 2010. Under the proposal, the sunset of the EGTRRA estate, gift, and generation skipping transfer tax provisions scheduled to occur for decedents dying, gifts made, and generation skipping transfers made after December 31, 2010, is repealed. As a result, the proposal makes permanent the above-described EGTRRA modifications to the rules regarding (1) qualified conservation easements, (2) installment payment of estate taxes, and (3) various technical aspects of the generation skipping transfer tax.

Effective date: The proposal is effective for estates of decedents dying, generation skipping transfers made, and gifts made after December 31, 2009.

V. ESTATE AND GIFT TAX REFORM PROVISIONS

A. Require Consistency in Value for Transfer and Income Tax Purposes

Description of Proposal

The proposal requires that the basis of property received by reason of death under section 1014 generally must equal the value of that property claimed by the decedent’s estate for estate tax purposes. The basis of property received by lifetime gift generally must equal the donor’s basis determined under section 1015. Under the proposal, the basis in the hands of the recipient can be no greater than the value of that property as determined for estate or gift tax purposes (subject to subsequent adjustments).

In addition to requiring consistency in values for transfer and income tax purposes, the proposal imposes a reporting requirement. The executor of a decedent’s estate and the donor of a lifetime gift are required to report to both the recipient and the IRS the information necessary to determine the recipient’s basis under the proposal.

The proposal provides for regulatory authority necessary to implement and administer the requirements of the proposal, including establishing rules for: (1) situations in which no estate tax return is required to be filed or gifts are excluded from gift tax under section 2503 (e.g., pursuant to the gift tax annual exclusion); (2) situations in which the surviving joint tenant or other recipient may have better information than the executor; and (3) the timing of the required reporting in the event of adjustments to the reported value subsequent to the filing of an estate or gift tax return.

Effective date: The proposal is effective on the date of enactment.

B. Modify Rules on Transfer Tax Valuation Discounts

Description of Proposal

The proposal modifies section 2704(b) to create a category of “disregarded restrictions” that would be ignored when valuing an interest in a family-controlled entity transferred to a

member of the family if, after the transfer, the restriction will lapse or may be removed by the transferor and/or the transferor's family. The proposal provides that the transferred interest would be valued by substituting for the disregarded restrictions certain assumptions to be specified in regulations.

The proposal provides that disregarded restrictions would include limitations on a holder's right to liquidate that holder's interest in the family-controlled entity that are more restrictive than a standard to be specified in regulations. A disregarded restriction also would include a limitation on a transferee's ability to be admitted as a full partner or holder of an equity interest in the entity. In determining whether a restriction may be removed by one or more members of the family after a transfer, certain interests held by charities or others who are not family members would be deemed to be held by the family. Such interests are to be identified in regulations.

Under the proposal, regulatory authority is granted, including the ability to create safe harbors under which the governing documents of a family-controlled entity could be drafted so as to avoid the application of section 2704 if certain standards are met. The proposal includes conforming changes relating to the interaction of the proposal with the transfer tax marital and charitable deductions.

Effective date: The proposal is effective for transfers after the date of enactment of property subject to restrictions created after October 8, 1990 (the effective date of section 2704).

C. Require Minimum Term for Grantor Retained Annuity Trusts (GRATs)

Description of Proposal

The proposal imposes a requirement that a GRAT have a minimum term of 10 years.

Effective date: The proposal is effective for trusts created after the date of enactment.

2009 LEGISLATION

I. UNIFORM PROBATE CODE AMENDMENTS

524.1-301 Practice in Court.

(a) Unless inconsistent with the provisions of this chapter or chapter 525, pleadings, practice, procedure and forms in all probate proceedings shall be governed insofar as practicable by Rules of Civil Procedure provided for in section 487.23 and adopted pursuant thereto.

(b) Notwithstanding paragraph (a), and in addition to its general powers, the court shall have power to correct, modify, vacate, or amend its records, orders, and decrees:

(1) at any time, for the correction of clerical error or pursuant to the provisions of section [524.3-413](#);

(2) within the time for taking an appeal, for the correction of judicial error;

(3) within two years after petitioner's discovery thereof, for fraud, whether intrinsic or extrinsic, or misrepresentation unless petitioner be a party to such fraud; or

(4) within two years after the date of filing of any record, order, or decree, for excusable neglect, inadvertence, or mistake.

In any case, the petitioner must proceed with due diligence and may be barred by laches or the court may deny relief where it appears that the granting thereof would be inequitable in view of all the facts and circumstances appearing.

524.3-1201 Collection of Personal Property by Affidavit.

(a) Thirty days after the death of a decedent, (i) any person indebted to the decedent, (ii) any person having possession of tangible personal property or an instrument evidencing a debt, obligation, stock, or chose in action belonging to the decedent, or (iii) any safe deposit company, as defined in section 55.01, controlling the right of access to decedent's safe deposit box shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock, or chose in action or deliver the entire contents of the safe deposit box to a person claiming to be the successor of the decedent, or a state or county agency with a claim authorized by section 256B.15, upon being presented a certified death record of the decedent and an affidavit made by or on behalf of the successor stating that:

(1) the value of the entire probate estate, determined as of the date of death, wherever located, including specifically any contents of a safe deposit box, less liens and encumbrances, does not exceed \$50,000;

(2) 30 days have elapsed since the death of the decedent or, in the event the property to be delivered is the contents of a safe deposit box, 30 days have elapsed since the filing of an inventory of the contents of the box pursuant to section 55.10, paragraph (h);

(3) no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction;

(4) if presented, by a state or county agency with a claim authorized by section 256B.15, to a financial institution with a multiple-party account in which the decedent had an interest at the time of death, the amount of the affiant's claim and a good faith estimate of the extent to which the decedent was the source of funds or beneficial owner of the account; and

(5) the claiming successor is entitled to payment or delivery of the property.

(b) A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in subsection (a).

(c) The claiming successor or state or county agency shall disburse the proceeds collected under this section to any person with a superior claim under section 524.2-403 or 524.3-805.

(d) A motor vehicle registrar shall issue a new certificate of title in the name of the successor upon the presentation of an affidavit as provided in subsection (a).

(e) The person controlling access to decedent's safe deposit box need not open the box or deliver the contents of the box if:

(1) the person has received notice of a written or oral objection from any person or has reason to believe that there would be an objection; or

(2) the lessee's key or combination is not available.

Minn. Stat. § 149A.80, subd. 2 Determination of right to control and duty of disposition. The right to control the disposition of the remains of a deceased person, including the location and conditions of final disposition, unless other directions have been given by the decedent pursuant to subdivision 1, vests in, and the duty of final disposition of the body devolves upon, the following in the order of priority listed:

(1) the person or persons appointed in a dated written instrument signed by the decedent. Written instrument includes, but is not limited to, a health care directive executed under chapter 145C. If there is a dispute involving more than one written

instrument, a written instrument that is witnessed or notarized prevails over a written instrument that is not witnessed or notarized. Written instrument does not include a durable or nondurable power of attorney which terminates on the death of the principal pursuant to sections 523.08 and 523.09;

(2) the spouse of the decedent;

(3) the adult child or the majority of the adult children of the decedent, provided that, in the absence of actual knowledge to the contrary, a funeral director or mortician may rely on instructions given by the child or children who represent that they are the sole surviving child, or that they constitute a majority of the surviving children;

(4) the surviving parent or parents of the decedent, each having equal authority;

(5) the adult sibling or the majority of the adult siblings of the decedent, provided that, in the absence of actual knowledge to the contrary, a funeral director or mortician may rely on instructions given by the sibling or siblings who represent that they are the sole surviving sibling, or that they constitute a majority of the surviving siblings;

(6) the adult grandchild or the majority of the adult grandchildren of the decedent, provided that, in the absence of actual knowledge to the contrary, a funeral director or mortician may rely on instructions given by a grandchild or grandchildren who represent that they are the only grandchild or grandchildren reasonably available to control final disposition of the decedent's remains or represent a majority of grandchildren reasonably available to control final disposition of the decedent's remains;

(7) the grandparent or the grandparents of the decedent, each having equal authority;

(8) the adult nieces and nephews of the decedent, or a majority of them, provided that, in the absence of actual knowledge to the contrary, a funeral director or mortician may rely on instructions given by a niece, nephew, or nieces or nephews who represent that they are the only niece, nephew, or nieces or nephews reasonably available to control final disposition of the decedent's remains or represent a majority of nieces and nephews reasonably available to control final disposition of the decedent's remains;

(9) the person or persons who were acting as the guardians of the person of the decedent with authority to make health care decisions for the decedent at the time of death;

(10) an adult who exhibited special care and concern for the decedent;

(11) the person or persons respectively in the next degree of kinship in the order named by law to inherit the estate of the decedent; and

(12) the appropriate public or court authority, as required by law.

For purposes of this subdivision, the appropriate public or court authority includes the county board of the county in which the death occurred if the person dies without apparent financial means to provide for final disposition or the district court in the county in which the death occurred.

II. UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT

524.2-1101 Short Title. Sections 524.2-1101 to 524.2-1116 may be cited as the "Uniform Disclaimer of Property Interests Act."

524.2-1102 Definitions. As used in sections 524.2-1101 to 524.2-1116:

(1) "benefactor" means the creator of the interest that is subject to a disclaimer;

(2) "beneficiary designation" means an instrument, other than an instrument creating or amending a trust, naming the beneficiary of:

(i) an annuity or insurance policy;

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

(iii) a security registered in beneficiary form;

(iv) a pension, profit-sharing, retirement, or other employment-related benefit plan; or

(v) any other nonprobate transfer at death;

(3) "disclaimant" means the person to whom a disclaimed interest or power would have passed had the disclaimer not been made;

(4) "disclaimed interest" or "power" means the portion of the interest that would have passed to the disclaimant had the disclaimer not been made;

(5) "disclaimer" means the refusal to accept an interest in or power over property;

(6) "fiduciary" means a personal representative, trustee of a trust, agent acting under a power of attorney, conservator, or other person authorized to act as a fiduciary with respect to the property of another person;

(7) "future interest" means an interest that takes effect in possession or enjoyment, if at all, later than the time of its creation;

(8) "holder" means a person who has an interest in or power over property;

(9) "insolvent" means that the sum of a person's debts is greater than all of the person's assets at fair valuation. A person is presumed to be "insolvent" if the person is generally not paying debts as they become due. Assets do not include property that has been transferred, concealed, or removed, with intent to hinder, delay, or defraud creditors, or has been transferred in a manner making the transfer voidable. Debts do not include an obligation to the extent it is secured by a valid lien or property of the debtor not included as an asset;

(10) "jointly held property" means property held in the names of two or more persons under an arrangement in which all holders have concurrent interests and under which the last surviving holder is entitled to the whole of the property;

(11) "person" means an individual, living, deceased, or unborn, ascertained or unascertained, whether entitled to an interest by right of intestacy or otherwise, corporation, business trust, partnership, limited liability company, association, joint venture, government, government subdivision, agency or instrumentality, public corporation, or other commercial entity;

(12) "time of distribution" means the time when a disclaimed interest would have taken effect in possession or enjoyment;

(13) "state" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, or any territory of insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, recognized by federal law or formally acknowledged by a state; and

(14) "trust" means:

(i) an express trust charitable or noncharitable, with additions thereto, whenever and however created; and

(ii) a trust created pursuant to a statute, judgment, or decree which requires the trust be administered in the manner of an express trust.

524.2-1103 Scope. Sections 524.2-1101 to 524.2-1116 apply to disclaimers of any interest in or power over property, whenever created. Except as provided in section 524.2-1116, sections 524.2-1101 to 524.2-1116 are the exclusive means by which a disclaimer may be made under Minnesota law regardless of whether it is qualified under section 2518 of the Internal Revenue Code of 1986 in effect on January 1, 2010.

524.2-1104 Tax-Qualified Disclaimer. Notwithstanding any other provision of this chapter, other than section 524.2-1106, if, as a result of a disclaimer or transfer, the disclaimed or transferred interest is treated pursuant to the provisions of section 2518 of the Internal Revenue Code of 1986, as in effect on January 1, 2010, as never having been transferred to the disclaimant, then the disclaimer or transfer is effective as a disclaimer under sections 524.2-1101 to 524.2-1116.

524.2-1105 When Disclaimer Is Permitted. A disclaimer may be made at any time unless it is barred under section 524.2-1106.

524.2-1106 When Disclaimer Is Barred or Limited.

(a) A disclaimer is barred by a written waiver of the right to disclaim.

(b) A disclaimer of an interest in property is barred if any of the following events occur before the disclaimer becomes effective:

(1) the disclaimant accepts the portion of the interest sought to be disclaimed;

(2) the disclaimant voluntarily assigns, conveys, encumbers, pledges, or transfers the portion of the interest sought to be disclaimed or contracts to do so;

(3) the portion of the interest sought to be disclaimed is sold pursuant to a judicial sale; or

(4) the disclaimant is insolvent when the disclaimer becomes irrevocable.

(c) A disclaimer, in whole or in part, of the future exercise of a power held in a fiduciary capacity is not barred by its previous exercise.

(d) A disclaimer, in whole or in part, of the future exercise of a power not held in a fiduciary capacity is not barred by its previous exercise unless the power is exercisable in favor of the disclaimant.

(e) A disclaimer of an interest in, or a power over, property which is barred by this section is ineffective.

524.2-1107 Power to Disclaim; General Requirements; When Irrevocable.

(a) A person may disclaim, in whole or in part, any interest in or power over property, including a power of appointment. A person may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim.

(b) With court approval, a fiduciary may disclaim, in whole or in part, any interest in or power over property, including a power of appointment when acting in a representative capacity. Without court approval, a fiduciary may disclaim, in whole or in part, any interest in or power over property, including a power of appointment, if and to the extent that the instrument creating the fiduciary relationship explicitly grants the fiduciary the right to disclaim. With court approval, a custodial parent may disclaim on behalf of a minor child for whom no conservator has been appointed, in whole or in part, any interest in or power over property, including a power of appointment, which the minor child is to receive.

(c) To be effective, a disclaimer must be in writing, declare the writing as a disclaimer, describe the interest or power disclaimed, and be signed by the person or fiduciary making the disclaimer and acknowledged in the manner provided for deeds of real estate to be recorded in this state. In addition, for a disclaimer to be effective, an original of the disclaimer must be delivered or filed in the manner provided in section 524.2-1114.

(d) A partial disclaimer may be expressed as a fraction, percentage, monetary amount, term of years, limitation of a power, or any other interest or estate in the property.

(e) A disclaimer becomes irrevocable when the disclaimer is delivered or filed pursuant to section 524.2-1114 or it becomes effective as provided in sections 524.2-1108 to 524.2-1113, whichever occurs later.

(f) A disclaimer made under sections 524.2-1101 to 524.2-1116 is not a transfer, assignment, or release.

524.2-1108 Disclaimer of Interest in Property.

(a) Except for a disclaimer governed by section 524.2-1109 or 524.2-1110, the rules in paragraphs (b) to (d) apply to a disclaimer of an interest in property.

(b) The disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable, or, if the interest arose under the law of intestate succession, as of the time of the intestate's death.

(c) The disclaimed interest passes according to any provision in the instrument creating the interest providing for the disposition of the interest, should it be disclaimed, or as disclaimed interests in general.

(d) If the instrument does not contain a provision described in paragraph (c), the following rules apply:

(1) if the disclaimant is an individual, the disclaimed interest passes as if

the disclaimant had died immediately before the interest was created, unless under the governing instrument or other applicable law, the disclaimed interest is contingent on surviving to the time of distribution, in which case the disclaimed interest passes as if the disclaimant had died immediately before the time for distribution. However, if, by law or under the governing instrument, the descendants of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time of distribution, the disclaimed interest passes only to the descendants of the disclaimant who survive the time of distribution. For purposes of this paragraph, a disclaimed interest is created at the death of the benefactor or such earlier time, if any, that the benefactor's transfer of the interest is a completed gift for federal gift tax purposes. Also for purposes of this paragraph, a disclaimed interest in an inter vivos trust and other will substitutes that do not lapse with certainty under state law shall pass as if the interest had been created under a will;

(2) if the disclaimant is not an individual, the disclaimed interest passes as if the disclaimant did not exist; and

(3) upon the disclaimer of a preceding interest, a future interest held by a person other than the disclaimant takes effect as if the disclaimant had died or ceased to exist immediately before the time of distribution, but a future interest held by the disclaimant is not accelerated in possession or enjoyment as a result of the disclaimer.

524.2-1109 Disclaimer of Rights of Survivorship in Jointly Held Property.

(a) Upon the death of a holder of jointly held property:

(1) if, during the deceased holder's lifetime, the deceased holder could have unilaterally regained a portion of the property attributable to the deceased holder's contributions without the consent of any other holder, another holder may disclaim, in whole or in part, a fractional share of that portion of the property attributable to the deceased holder's contributions determined by dividing the number one by the number of joint holders alive immediately after the death of the holder to whose death the disclaimer relates; and

(2) for all other jointly held property, another holder may disclaim, in whole or in part, a fraction of the whole of the property the numerator of which is one and the denominator of which is the product of the number of joint holders alive immediately before the death of the holder to whose death the disclaimer relates multiplied by the number of joint holders alive immediately after the death of the holder to whose death the disclaimer relates.

(b) A disclaimer under paragraph (a) takes effect as of the death of the holder of jointly held property to whose death the disclaimer relates.

(c) An interest in jointly held property disclaimed by a surviving holder of the property passes as if the disclaimant predeceased the holder to whose death the disclaimer relates.

524.2-1110 Disclaimer of Interest by Trustee. If a trustee having the power to disclaim under the instrument creating the fiduciary relationship or pursuant to court order disclaims an interest in property that otherwise would have become trust property, the interest does not become trust property.

524.2-1111 Disclaimer of Power of Appointment or Other Power Not Held in a Fiduciary Capacity. If a holder disclaims a power of appointment or other power not held in a fiduciary capacity, the following rules apply:

(1) if the holder has not exercised the power, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable;

(2) if the holder has exercised the power, the disclaimer takes effect immediately after the last exercise of the power; and

(3) the instrument creating the power is construed as if the power expired when the disclaimer became effective.

524.2-1112 Disclaimer by Appointee, Object, or Taker in Default of Exercise of Power of Appointment.

(a) A disclaimer of an interest in property by an appointee of a power of appointment takes effect as of the time the instrument by which the holder exercises the power becomes irrevocable.

(b) A disclaimer of an interest in property by an object, or taker in default of an exercise of a power of appointment, takes effect as of the time the instrument creating the power becomes irrevocable.

524.2-1113 Disclaimer of Power Held in Fiduciary Capacity.

(a) If a fiduciary disclaims a power held in a fiduciary capacity which has not been exercised, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

(b) If a fiduciary disclaims a power held in a fiduciary capacity which has been exercised, the disclaimer takes effect immediately after the last exercise of the power.

(c) A disclaimer under this section is effective as to another fiduciary if:

(1) the disclaimer so provides; and

(2) the fiduciary disclaiming has the authority to bind the estate, trust, or other person for whom the fiduciary is acting.

524.2-1114 Delivery or Filing.

(a) Subject to paragraphs (b) to (l), delivery of a disclaimer may be effective by personal delivery, first-class mail, or any other method that results in its receipt. A disclaimer sent by first-class mail is deemed to have been delivered on the date it is postmarked. Delivery by any other method is effective upon receipt by the person to whom the disclaimer is to be delivered under this section.

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

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

(2) if no personal representative is serving when the disclaimer is sought to be delivered, the disclaimer must be filed with the clerk of the court in any county where venue of administration would be proper.

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

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

(2) if no personal representative is serving when the disclaimer is sought to be delivered, the disclaimer must be filed with the clerk of the court in any county where venue of administration of the decedent's estate would be proper.

(d) In the case of a disclaimer of an interest in an inter vivos trust:

(1) the disclaimer must be delivered to the trustee serving when the disclaimer is delivered;

(2) if no trustee is then serving, it must be filed with the clerk of the court in any county where the filing of a notice of trust would be proper; or

(3) if the disclaimer is made before the time the instrument creating the trust becomes irrevocable, the disclaimer must be delivered to the person with the power to revoke the revocable trust or the transferor of the interest or to such person's legal representative.

(e) In the case of a disclaimer of an interest created by a beneficiary designation

made before the time the designation becomes irrevocable, the disclaimer must be delivered to the person making the beneficiary designation or to such person's legal representative.

(f) In the case of a disclaimer of an interest created by a beneficiary designation made after the time the designation becomes irrevocable, the disclaimer must be delivered to the person obligated to distribute the interest.

(g) In the case of a disclaimer by a surviving holder of jointly held property, the disclaimer must be delivered to the person to whom the disclaimed interest passes or, if such person cannot reasonably be located by the disclaimant, the disclaimer must be delivered as provided in paragraph (b).

(h) In the case of a disclaimer by an object, or taker in default of exercise, of a power of appointment at any time after the power was created, the disclaimer must be delivered to:

(1) the holder of the power; or

(2) the fiduciary acting under the instrument that created the power or, if no fiduciary is serving when the disclaimer is sought to be delivered, filed with a court having authority to appoint the fiduciary.

(i) In the case of a disclaimer by an appointee of a nonfiduciary power of appointment, the disclaimer must be delivered to:

(1) the holder of the power or the personal representative of the holder's estate; or

(2) the fiduciary under the instrument that created the power or, if no fiduciary is serving when the disclaimer is sought to be delivered, filed with a court having authority to appoint the fiduciary.

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

(k) In the case of a disclaimer of a power exercisable by an agent, other than a power exercisable by a fiduciary over a trust or estate, the disclaimer must be delivered to the principal or the principal's representative.

(l) Notwithstanding paragraph (a), delivery of a disclaimer of an interest in or relating to real estate shall be presumed upon the recording of the disclaimer in the office of the clerk of the court of the county or counties where the real estate is located.

(m) A fiduciary or other person having custody of the disclaimed interest is not liable for any otherwise proper distribution or other disposition made without actual notice of the disclaimer or, if the disclaimer is barred under section 524.2-1106, for any otherwise proper distribution or other disposition made in reliance on the disclaimer, if the distribution or disposition is made without actual knowledge of the facts constituting the bar of the right to disclaim.

524.2-1115 Recording of Disclaimer Relating to Real Estate.

(a) A disclaimer of an interest in or relating to real estate does not provide constructive notice to all persons unless the disclaimer contains a legal description of the real estate to which the disclaimer relates and unless the disclaimer is filed for recording in the office of the county recorder in the county or counties where the real estate is located.

(b) An effective disclaimer meeting the requirements of paragraph (a) constitutes constructive notice to all persons from the time of filing. Failure to record the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer.

524.2-1116 Application to Existing Relationships. Except as otherwise provided in section 524.2-1106, an interest in or power over property existing on January 1, 2010, as to which the time for delivering or filing a disclaimer under laws superseded by sections 524.2-1101 to 524.2-1116 has not expired, may be disclaimed after January 1, 2010.

524.5-107 Transfer of Jurisdiction.

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

(b) A guardian of a minor, conservator of a minor, or like fiduciary for a minor appointed in another state may petition the court for appointment as a guardian or conservator in this state if the state has jurisdiction. The appointment may be made upon proof of appointment in the other state and presentation of a certified copy of the portion of the court record in the other state specified by the court in this state. Notice of hearing on the petition, together with a copy of the petition, must be given to the ward or protected person, if the ward or protected person has attained 14 years of age, and to the persons who would be entitled to notice if the regular procedures for appointment of a guardian or conservator under this article were applicable. The court shall make the appointment in this state unless it concludes that the appointment would not be in the best interest of the ward or protected person. Upon the filing of an acceptance of office and any required bond, the court shall issue appropriate letters of guardianship or

conservatorship. Within 14 days after an appointment, the guardian or conservator shall send or deliver a copy of the order of appointment to the ward or protected person, if the ward or protected person has attained 14 years of age, and to all persons given notice of the hearing on the petition.

III. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT

524.5-601 Short Title. Sections 524.5-601 to 524.5-903 may be cited as the "Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act."

524.5-602 Definitions.

- (a) The definitions in this section apply to sections 524.5-602 to 524.5-903.
- (b) "Adult" means an individual who has attained 18 years of age.
- (c) "Conservator" means a person appointed by the court to administer the property of an adult, including a person appointed under sections 524.5-101 to 524.5-502.
- (d) "Guardian" means a person appointed by the court to make decisions regarding the person of an adult, including a person appointed under sections 524.5-101 to 524.5-502.
- (e) "Guardianship order" means an order appointing a guardian.
- (f) "Guardianship proceeding" means a judicial proceeding in which an order for the appointment of a guardian is sought or has been issued.
- (g) "Incapacitated person" means an adult for whom a guardian has been appointed.
- (h) "Party" means the respondent, petitioner, guardian, conservator, or any other person allowed by the court to participate in a guardianship or protective proceeding.
- (i) "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.
- (j) "Protected person" means an adult for whom a protective order has been issued.
- (k) "Protective order" means an order appointing a conservator or any other order related to management of an adult's property.

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

(m) "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.

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

(o) "State" means a state of the United States, the District of Columbia, the commonwealth of 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.

524.5-603 International Application. A court of this state may treat a foreign country as if it were a state for the purpose of applying sections 524.5-601 to 524.5-903.

524.5-604 Communication Between Courts.

(a) A court of this state may communicate with a court in another state concerning a proceeding arising under sections 524.5-601 to 524.5-903. The court may allow the parties to participate in the communication. Except as otherwise provided in paragraph (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.

524.5-605 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 one or more 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 clause (1) or any other proceeding, any evidence

otherwise produced under clause (2), and any evaluation or assessment prepared in compliance with an order under clause (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; and

(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 Code of Federal Regulations, title 45, section 164.504.

(b) If a court of another state in which a guardianship or protective proceeding is pending requests assistance of the kind provided in paragraph (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.

524.5-606 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.

524.5-701 Definitions; Significant Connection Factors.

(a) In sections 524.5-701 to 524.5-709:

(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; and

(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 534.5-703 and 524.5-801, paragraph (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.

524.5-702 Exclusive Basis. Sections 524.5-701 to 524.5-709 provide the exclusive jurisdictional basis for a court of this state to appoint a guardian or issue a protective order for an adult.

524.5-703 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:

(i) 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

(ii) 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:

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

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

(C) the court in this state concludes that it is an appropriate forum under the factors set forth in section 524.5-706;

(3) this state does not have jurisdiction under either clause (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 524.5-704 are met.

524.5-704 Special Jurisdiction.

(a) A court of this state lacking jurisdiction under section 524.5-703 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; and

(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 524.5-801.

(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.

524.5-705 Exclusive and Continuing Jurisdiction. Except as otherwise provided in section 524.5-704, a court that has appointed a guardian or issued a protective order consistent with sections 524.5-601 to 524.5-903 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.

524.5-706 Appropriate Forum.

(a) A court of this state having jurisdiction under section 524.5-703 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 paragraph (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.

524.5-707 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:

(i) 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;

(ii) whether it is a more appropriate forum than the court of any other state under the factors set forth in section 524.5-706, paragraph (c); and

(iii) whether the court of any other state would have jurisdiction under factual circumstances in substantial conformity with the jurisdictional standards of section 524.5-703.

(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 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 sections 524.5-601 to 524.5-903.

524.5-708 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.

524.5-709 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 524.5-704, paragraph (a), clause (1) or (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 524.5-703, it may proceed with the case unless a court in another state acquires jurisdiction under provisions similar to section 524.5-703 before the appointment or issuance of the order.

(2) If the court in this state does not have jurisdiction under section 524.5-703, 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.

524.5-801 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 paragraph (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 paragraph (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 524.5-701, paragraph (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 524.5-802; and

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

524.5-802 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 524.5-801, 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 paragraph (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 paragraph (a).

(d) The court shall issue an order provisionally granting a petition filed under paragraph (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 524.5-801 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 sections 524.5-101 to 524.5-502 if the court has jurisdiction to make an appointment other than by reason of the provisional order of transfer.

524.5-901 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.

524.5-902 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.

524.5-903 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 relief available under sections 524.5-601 to 524.5-903 and other law of this state to enforce a registered order.

IV. OMBUDSMAN'S GUARDIANSHIP/CONSERVATORSHIP AMENDMENTS

This bill modifies the law governing guardians and conservators and the rights of wards

and protected persons.

Section 1 modifies the definition of “interested person” for purposes of guardianship and conservatorship proceedings to include a representative of a state ombudsman’s office or a federal protection advocacy program that has notified the court that it has a matter regarding a ward, protected person, or respondent.

Section 2 defines “professional guardian” or “professional conservator” as a person acting as a guardian or conservator for three or more individuals not related by blood, adoption, or marriage.

Section 3 establishes a central registration system for guardians and conservators. By July 1, 2013, all guardians and conservators would be required to register with the Supreme Court and registration data that the court determines are accessible to the public must be available online or through other means implemented by the court. The state court administrator must establish fees to support the costs of the system. Professional guardians or conservators must be required to pay a fee and nonprofessionals may be required to do so. The state court administrator must begin collecting fees on July 1, 2012. Fees collected under this section are appropriated to the Supreme Court. Registration fees must be established to support the costs of the registration system.

Section 4 establishes a bill of rights for wards and protected persons.

Section 5 establishes certification requirements for professional guardians (parallel amendments would apply to certain professional conservators under **Section 14**). Effective July 1, 2010, professional guardians must be certified in the manner required by the Supreme Court. An exception is included for certain nonprofit organizations and their employees.

Section 6 modifies provisions governing appointment of the counsel for a ward to require disclosures regarding potential conflicts of interest and a court determination as to whether an appointment or continued representation should be allowed based on a potential conflict of interest. In addition, before an initial appointment and annually after that time, a guardian would be required to file an informational statement with the court, which would include specified information.

Section 7 amends the priority statute governing appointment of guardians. A new priority provision is included for family members not already included under the current law (which is limited to a spouse, child, or parent) and last in the priority would be other adults or a professional guardian.

Section 8 requires the annual notice of the right to request termination or modification of a guardianship to be made to interested persons of record and to also include notice of the right to request an order that is in the best interests of the ward or other appropriate relief.

Section 9 modifies provisions governing the power of a guardian to revoke the

appointment of a health care agent or revoke a health care directive.

Section 10 amends the annual “well-being” report on the ward to require that a copy be provided to the ward and interested persons. A report must include any restrictions placed on the ward’s right to communication or visitation. In addition, a ward or interested person may submit a written statement disputing statements or conclusions in the report. If an annual report is not filed within 60 days of the required date, the court must issue an order to show cause.

Section 11 amends the statute dealing with termination or modification of a guardianship to add language specifying that a court may make any other order that is in the best interests of the ward or may grant other appropriate relief.

Section 12 amends the conservatorship statute to include the legal counsel conflict of interest language applicable to guardians under **Section 6** and to require an informational statement from the conservator.

Section 13 requires the annual notice of the right to request termination or modification of a conservatorship to be made to interested persons of record and to include notice of the right to request an order that is in the best interests of the protected person or other appropriate relief.

Section 14 amends the priorities for persons who may be appointed as a conservator, consistent with the changes made for guardians in **Section 7**. In addition, in a proceeding where the value of the personal property of the estate of the proposed protected person in the initial inventory is expected to be at least \$10,000, the court must require the conservator to post a bond and a professional conservator must be certified.

Section 15 adds a reference in the conservatorship statute dealing with petitions for orders subsequent to appointment to include orders in the protected person’s best interests.

Section 16 amends the annual estate reporting requirements to allow a protected person or interested persons of record to submit a written statement disputing account statements. If the annual report is not filed within 60 days of the required date, the court must issue an order to show cause.

V. STRANGER-OWNED LIFE INSURANCE

60A.078 Short Title. Sections 60A.078 to 60A.0789 may be cited as the "Insurable Interest Act."

60A.0782 Definitions.

Subdivision 1. **Terms.** For the purpose of sections 60A.078 to 60A.0789, unless the context clearly indicates otherwise, the terms in this section have the meanings given them.

Subd. 2. **Act.** “Act” means sections 60A.078 to 60A.0789.

Subd. 3. **Business entity.** "Business entity" includes, but is not limited to, a joint venture, partnership, corporation, limited liability company, and business trust.

Subd. 4. **Commissioner.** "Commissioner" means the commissioner of commerce.

Subd. 5. **Legitimate settlement contracts.** "Legitimate settlement contracts" mean settlement contracts that comply with Minnesota law governing viatical settlement contracts and that are not prohibited by section 60A.0785 or otherwise part of or in furtherance of an act, practice, or arrangement that is prohibited by sections 60A.078 to 60A.0789.

Subd. 6. **Life expectancy evaluation.** "Life expectancy evaluation" means an evaluation conducted by any person other than the insurer or its authorized representatives for the purpose of projecting or estimating how long a particular individual is expected to live.

Subd. 7. **Person.** "Person" means any natural person or legal entity, including, but not limited to, a partnership, limited liability company, association, trust, or corporation.

Subd. 8. **Policy.** "Policy" means an individual or group policy, group certificate, contract, or arrangement of life insurance affecting the rights of a resident of this state or bearing a reasonable relation to this state, regardless of whether delivered or issued for delivery in this state.

Subd. 9. **Policyowner.** "Policyowner" means the owner of a policy.

Subd. 10. **Prospective purchaser.** "Prospective purchaser" means any person that may purchase or acquire the policy or a beneficial interest in the policy, but excluding individuals closely related to the insured by blood or law or who have a lawful and substantial interest in the continued life of the insured, or trusts established for the benefit of those individuals, provided those trusts meet the requirements of section 60A.0783, subdivision 2, paragraph (d).

Subd. 11. **Settlement contract.**

(a) "Settlement contract" means an agreement between a policyowner and another person establishing the terms under which compensation or anything of value will be paid or which compensation or value is less than the expected death benefit of the insurance policy, in return for the owner's assignment, transfer, sale, devise, or bequest of the death benefit or ownership of any portion of the policy. Settlement contract also includes:

(1) the transfer for compensation or value of ownership or beneficial interest in a trust or other entity that owns such a policy if the trust or other entity was formed or availed of for the principal purpose of acquiring one or more policies, which policy insures the life of an individual who is a resident of this state; and

(2) a premium finance loan made for a policy by a lender to a policyowner

on, before, or after the date of issuance of the policy where:

(i) the policyowner or the insured receives a guarantee of a future settlement value of the policy; or

(ii) the policyowner or the insured agrees to sell the policy or any portion of its death benefit on any date following the issuance of the policy.

(b) Settlement contract does not include:

(1) a policy loan or accelerated death benefit made by the insurer under the policy's terms;

(2) loan proceeds that are used solely to pay premiums for the policy and loan-related costs, including, without limitation, interest, arrangement fees, utilization fees and similar fees, closing costs, legal fees and expenses, trustee fees and expenses, and third-party collateral provider fees and expenses, including fees payable to letter of credit issuers;

(3) a loan made by a bank or other licensed financial institution in which the lender takes an interest in a policy solely to secure repayment of a loan or, if there is a default on the loan and the policy is transferred, the transfer of such a policy by the lender, as long as the default itself is not pursuant to an agreement or understanding with any other person for the purpose of evading regulation under sections 60A.078 to 60A.0789;

(4) an agreement in which all the parties are closely related to the insured by blood or law or have a lawful substantial economic interest in the continued life, health, and bodily safety of the person insured or are trusts established for the benefit of such parties;

(5) any designation, consent, or agreement by an insured who is an employee or an employer in connection with the purchase by the employer, or by a trust established by the employer, of life insurance on the life of the employee;

(6) a bona fide business succession planning arrangement:

(i) between shareholders in a corporation or between a corporation and one or more of its shareholders or one or more trusts established by its shareholders;

(ii) between partners in a partnership or between a partnership and one or more of its partners or one or more trusts established by its partner;
or

(iii) between members in a limited liability company or between a limited liability company and one or more of its members or one or more trusts established by its members; or

(7) an agreement entered into by a service recipient, or a trust established by the service recipient, and a service provider, or a trust established by the service provider, who performs significant services for the service recipient's trade or business.

Subd. 12. **Stranger-originated life insurance practices.** "Stranger-originated life insurance practices" or "STOLI practices" means an act, practice, or arrangement to initiate a life insurance policy for the benefit of a third-party investor who, at the time of policy origination, has no insurable interest in the insured. STOLI practices include, but are not limited to, cases in which life insurance is purchased with resources or guarantees from or through a person or entity, who, at the time of policy inception, could not lawfully initiate the policy themselves, and where, at the time of inception, there is an arrangement or agreement, whether spoken or written, to directly or indirectly transfer the ownership of the policy and/or the policy benefits to a third party. Trusts that are created to give the appearance of insurable interest and are used to initiate policies for investors violate the insurable interest requirements and the prohibition against STOLI practices.

60A.0783 Insurable Interest Required.

Subdivision 1. **Insurance on life of another.** A person may not procure or cause to be procured or effected a policy upon the life of another individual unless the benefits under the policy are payable to the insured, the personal representatives of the insured's estate, or to a person having, at the time the policy is issued, an insurable interest in the individual insured.

Subd. 2. **What constitutes an insurable interest.** Insurable interest, with reference to insurance on the life of another, includes only the following interests.

(a) An individual has an insurable interest in the life of another person to whom the individual is closely related by blood or by law and in whom the individual has a substantial interest engendered by love and affection.

(b) An individual has an insurable interest in the life of another person if such individual has a lawful and substantial interest in the continued life of the individual insured, as distinguished from an interest that would arise only by or would be enhanced in value by the death of the individual insured.

(c) An individual party to a contract for the purchase or sale of an interest in any business entity and, if applicable, a trust or the trustee of a trust of which the individual is a settlor, has an insurable interest in the life of each other individual party to the contract, but only for the purpose of carrying out the intent and purpose of the contract.

(d) A trust, or the trustee of a trust, has an insurable interest in the life of an individual insured under a life insurance policy owned by the trust, or the trustee of the trust acting in a fiduciary capacity, if the insured is the settlor of the trust; an individual closely related by blood or law to the settlor; or an individual in whom the settlor otherwise has an insurable interest if, in each of the situations described in this paragraph, the life insurance proceeds are primarily for the benefit of trust beneficiaries having an insurable interest in the life of the insured and the trust is not used, directly or indirectly, as part of or in furtherance of an act, practice, or arrangement that is otherwise prohibited by sections 60A.078 to 60A.0789.

(e) A guardian, trustee, or other fiduciary, acting in a fiduciary capacity, has an insurable interest in the life of any person for whose benefit the fiduciary holds property, and in the life of any other individual in whose life the person has an insurable interest so long as the life insurance proceeds are used primarily for the benefit of persons having an insurable interest in the life of the insured and the guardianship or fiduciary relationship is not used, directly or indirectly, as part of or in furtherance of an act, practice, or arrangement that is otherwise prohibited by sections 60A.078 to 60A.0789.

(f) An organization in section 170(c) of the United States Internal Revenue Code of 1986, as amended through December 31, 2008, has an insurable interest in the life of any person who consents in writing to the organization's ownership or purchase of that insurance.

(g) A trustee, sponsor, or custodian of assets held in any plan governed by the Employee Retirement Income Security Act of 1974, United States Code, title 29, section 1001, et seq., or in any other retirement or employee benefit plan, has an insurable interest in the life of any participant in the plan provided consent is obtained in writing from the participant before the insurance is purchased. An employer, trustee, sponsor, or custodian may not retaliate or take adverse action against any participant who does not consent to the issuance of insurance on the participant's life.

(h) A business entity has an insurable interest in the life of any of the owners, directors, officers, partners, and managers of the business entity or any affiliate or subsidiary of the business entity, or key employees or key persons of the business entity or affiliate or subsidiary, provided consent is obtained in writing from key employees or persons before the insurance is purchased. The business entity or affiliate or subsidiary may not retaliate or take adverse action against any key employee or person who does not consent to the issuance of insurance on the key employee or key person's life. For purposes of this subdivision, a "key employee" or "key person" means an individual whose position or compensation is described in section 101(j)(2)(A)(ii) of the Internal Revenue Code of 1986, as amended through December 31, 2008.

(i) A financial institution or other person to whom a debt is owed, whether for the purposes of premium financing or otherwise, has an insurable interest in the life of the borrower limited to the amount of debt owed plus reasonable interest and service charges.

Subd. 3. **Insured's own life.** An individual has an insurable interest in the individual's own life and an individual of competent legal capacity that procures or effects a policy on the individual's own life may designate any person as the beneficiary, provided the policy is not part of or in furtherance of an act, practice, or arrangement that is otherwise prohibited by sections 60A.078 to 60A.0789.

Subd. 4. **Reliance on statements.** An insurer is entitled to rely upon all reasonable statements, declarations, and representations made by an applicant for life insurance relative to the existence of an insurable interest; and no insurer shall incur legal liability, except as set forth in the policy, by virtue of untrue statements, declarations, or representations so relied upon in good faith by the insurer.

Subd. 5. **Consent of insured.** A policy upon the life of an individual, other than a policy of noncontributory group life insurance, may not be effectuated unless, on or before the time the policy is effectuated, the individual insured, having legal capacity to contract, applies for or consents in writing to the policy and its terms. Consent may be given by another in the following cases:

(1) a parent or a person having legal custody of a minor may consent to the issuance of a policy on a dependent child;

(2) a court-appointed guardian of a person may consent to the issuance of a policy on the person under guardianship;

(3) a court-appointed conservator of a person's estate may consent to the issuance of a policy on the person whose estate is under conservatorship;

(4) an attorney-in-fact may consent to the issuance of a policy on the person that appointed the attorney-in-fact for the limited purpose of replacing one or more policies with one or more new policies, provided the aggregate amount of life insurance on the person as the result of the replacement remains the same or decreases;

(5) a trustee of a revocable trust may consent to the issuance of a policy on the life of a settlor of the trust; and

(6) a court of general jurisdiction may give consent to the issuance of a policy upon a showing of facts the court considers sufficient to justify the issuance of the policy.

60A.0784 Prohibited Practices. It is unlawful for any person to:

(1) procure or cause to be procured or effected a policy in violation of section 60A.0783;

(2) engage in STOLI practices or otherwise wager on life;

(3) solicit, market, or otherwise promote the purchase of a policy for the purpose of or with an emphasis on the subsequent sale of the policy in the secondary market;

(4) enter into a premium finance agreement with any person or agency, or any person affiliated with such person or agency, pursuant to which the lender or any person affiliated with the lender shall receive any proceeds, fees, or other consideration, directly or indirectly, from the policy or policyowner or any other person with respect to the premium finance agreement or any settlement contract or other transaction related to such policy that are in addition to the amounts required to pay the principal, interest, and service charges related to policy premiums pursuant to the premium finance agreement or subsequent sale of such agreement; provided, further, that any payments, charges, fees, or other amounts in addition to the amounts required to pay the principal, interest, and service charges related to policy premiums paid under the premium finance agreement shall be remitted to the insured or to the insured's estate if the insured is not living at the time of the determination of the overpayment; or

(5) enter into or to offer to enter into a settlement contract prior to the issuance of a policy that is the subject of the settlement contract or proposed settlement contract.

60A.0785 Prohibition; Entry into Settlement Contracts.

Subdivision 1. **Prohibition.** No prospective purchaser of the policy or beneficial interest in the policy shall, at any time prior to issuance of a policy, or during a four-year period commencing with the date of issuance of the policy, enter into a settlement contract or any other agreement the effect of which is to acquire the policy or a beneficial interest in the policy regardless of the date the compensation is to be provided and regardless of the date the assignment, transfer, sale, devise, bequest, or surrender of the policy or beneficial interest in the policy is to occur, unless and until the prospective purchaser has determined, based on reasonable inquiry, which includes but is not limited to questioning the insured and reviewing the broker's files, that none of the following circumstances are present:

(1) there was an agreement or understanding, before issuance of the policy, between the insured, policyowner, or owner of a beneficial interest in the policy, and another person to guarantee any liability or to purchase, or stand ready to purchase, the policy or an interest therein, including through an assumption or forgiveness of a loan; or

(2) both of the following are present:

(i) all or a portion of the policy premiums were funded by means

other than by the insured's personal assets or assets provided by a person who is closely related to the insured by blood or law or who has a lawful and substantial economic interest in the continued life of the insured. For purposes of this provision, funds from a premium finance loan are considered assets of the insured or such person only if the insured or such person is contractually obligated to repay the full amount of the loan and to pledge personal assets, other than the policy itself, for loan amounts exceeding the policy's cash value; and

(ii) the insured underwent a life expectancy evaluation within the 18-month time period immediately prior to the issuance of the policy and, during the same time period, the results of the life expectancy evaluation were shared with or used by any person for the purpose of determining the actual or potential value of the policy in the secondary market. Nothing in this paragraph shall prevent such a life expectancy evaluation from being shared with or used by the insured or the insured's accountant, attorney, or insurance producer for estate planning purposes so long as the life expectancy evaluation is not used by such persons to determine the actual or potential value of the policy in the secondary market.

Subd. 2. Certification. As part of the prospective purchaser's responsibility to make reasonable inquiry, the prospective purchaser shall request, and the settlement broker shall provide, a certification in which the broker certifies that, to the best of the broker's knowledge, any life expectancy evaluation performed on the insured prior to the issuance of the policy was not used by or shared with any other person prior to the issuance of the policy for the purpose of determining the actual or potential value of the policy in the secondary market.

Subd. 3. Legitimate insurance transactions. Nothing in sections 60A.078 to 60A.0789 prevents:

- (1) any policyowner, whether or not the policyowner is also the subject of the insurance, from entering into a legitimate settlement contract;
- (2) any person from soliciting a person to enter into a legitimate settlement contract;
- (3) a person from enforcing the payment of proceeds from the interest obtained under a legitimate settlement contract; or
- (4) the assignment, sale, transfer, devise, or bequest with respect to the death benefit or ownership of any portion of a policy, provided the assignment, sale, transfer, devise, or bequest is connected to a legitimate settlement contract and not part of or in furtherance of STOLI practices.

60A.0786 Presumption of Stoli Practices.

Subdivision 1. **Presumption of STOLI practices.** A settlement contract, or any agreement the effect of which is to sell or acquire the policy or a beneficial interest in the policy, entered into within the four-year period commencing with the date the policy is issued creates a rebuttable presumption of STOLI practices if either of the following circumstances are present:

(1) there was an agreement or understanding, before issuance of the policy, between the insured, policyowner, or owner of a beneficial interest in the policy, and another person to guarantee any liability or to purchase, or stand ready to purchase, the policy or an interest in the policy, including through an assumption or forgiveness of a loan; or

(2) both of the following are present:

(i) all or a portion of the policy premiums were funded by means other than by the insured's personal assets or assets provided by a person who is closely related to the insured by blood or law or who has a lawful and substantial economic interest in the continued life of the insured. For purposes of this provision, funds from a premium finance loan are considered assets of the insured or that person only if the insured or that person is contractually obligated to repay the full amount of the loan and to pledge personal assets, other than the policy itself, for loan amounts exceeding the policy's cash value; and

(ii) the insured underwent a life expectancy evaluation within the 18-month time period immediately prior to the issuance of the policy and, during the same time period, the results of the life expectancy evaluation were shared with or used by any person for the purpose of determining the actual or potential value of the policy in the secondary market.

Subd. 2. **Not applicable in criminal proceedings.** The rebuttable presumption created in this section does not apply in any criminal proceeding.

60A.0787 Processing Change of Ownership or Beneficiary Requests.

Subdivision 1. **Obligation to process change of ownership or beneficiary requests.** Upon receipt of a properly completed request for change of ownership or beneficiary of a policy and, if applicable, the completed questionnaire described in this section, the insurer shall respond in writing within 30 calendar days with written acknowledgment confirming that the change has been effected or specifying the reasons why the requested change cannot be processed. The insurer shall not unreasonably delay effecting change of ownership or beneficiary and shall not otherwise interfere with any permitted settlement contract entered into in this state.

Subd. 2. **Written questionnaire.** If the insurer receives a request for change of ownership or beneficiary within the four-year period commencing with the date the policy is

issued, the insurer may require, as a condition of effecting the requested change, that the policyowner complete and return a written questionnaire designed to determine whether the change request relates to or is made in accordance with a settlement contract and if so, whether the circumstances described in section 60A.0785 are present. The questionnaire shall be in a form approved by the commissioner and shall include, but not be limited to, the following:

(1) the definition of settlement contract;

(2) an inquiry regarding whether the request for change of ownership or beneficiary relates to or is made in accordance with a settlement contract;

(3) if the answer to clause (2) is "yes," then an inquiry regarding whether the circumstances described in section 60A.0785 are present;

(4) a disclosure that presenting false material information, or concealing material information, in connection with the questionnaire is defined under the laws of this state as a fraudulent act; and

(5) a signed certification by the policyowner that the answers and information provided in and pursuant to the questionnaire are true and complete to the best of the policyowner's knowledge and belief.

Subd. 3. **Other inquiries.** Nothing in this section should be interpreted to limit an insurer's ability to make other inquiries to detect STOLI practices.

Subd. 4. **Fraternal benefit societies.** Nothing in sections 60A.078 to 60A.0789 shall prohibit a fraternal benefit society regulated under chapter 64B from enforcing the terms of its bylaws or rules regarding permitted beneficiaries and owners.

60A.0788 Fraudulent Acts.

Subdivision 1. **Fraudulent acts.** A person who commits a fraudulent act as defined in this section commits insurance fraud and may be sentenced under section 609.611, subdivision 3.

Subd. 2. **List of fraudulent acts.** All of the following acts are fraudulent when committed by a person who, with intent to defraud and for the purpose of depriving another of property or for pecuniary gain, commits, or permits any of its employees or its agents to commit them:

(1) failing to disclose to the insurer where the insurer has requested such disclosure that the prospective insured has undergone a life expectancy evaluation;

(2) misrepresenting a person's state of residence or facilitating the change of the state in which a person resides for the express purpose of evading or

avoiding the provisions of sections 60A.078 to 60A.0789;

(3) presenting, causing to be presented, or preparing with knowledge or belief that it will be presented to an insurer any false material information, or concealing any material information, as part of, in support of, or concerning a fact material to one or more of the following:

(i) a questionnaire as provided for under section 60A.0787; or

(ii) any other documents or communications, whether written or verbal, which are intended to detect STOLI practices or demonstrate compliance with sections 60A.078 to 60A.0789;

(4) encouraging the insured, policyowner, or owner of a beneficial interest in the policy to falsely state that the circumstances described in section 60A.0785 are not present or aiding in the preparation or execution of documents designed to create the false impression that those circumstances are not present; and

(5) failing to request or to provide the broker certification required by section 60A.0785, subdivision 2, or falsely certifying that the life expectancy evaluation in section 60A.0785, subdivision 2, was not shared with any other person prior to the issuance of the policy for the purpose of determining the actual or potential value of the policy in the secondary market.

60A.0789 Remedies.

Subdivision 1. Actions to recover death benefits.

(a) If the beneficiary, assignee, or other payee receives the death benefits under a life insurance policy initiated by STOLI practices or a policy procured or effected in violation of section 60A.0783 or section 60A.0785, the personal representative of the insured's estate or other lawfully acting agent may maintain an action to recover such benefits from the person receiving them.

(b) Where a person receives the death benefit as a result of a nonwillful violation of sections 60A.078 to 60A.0789, the court may limit the recovery to unjust enrichment, calculated as the benefits received plus interest from the date of receipt, less premiums paid under the policy by the recipient and any consideration paid by the recipient to the insured in connection with the policy.

(c) Where a person receives the death benefits as the result of a willful violation of sections 60A.078 to 60A.0789, the court may, in addition to actual damages, order the defendant or defendants to pay exemplary damages in an amount up to two times the death benefits. A pattern of violations of sections 60A.078 to 60A.0789 and conduct involving one or more fraudulent acts are evidence of willfulness. The exemplary

damages shall be paid to one or more governmental agencies charged with combating consumer fraud, including the Department of Commerce.

(d) The court may award reasonable attorney fees, together with costs and disbursements, to any party that recovers damages in any action brought under this subdivision.

(e) An action under this subdivision must be brought within two years after the death of the insured.

Subd. 2. **Enforceability of contracts.** Any contract, agreement, arrangement, or transaction prohibited under sections 60A.078 to 60A.0789 is voidable.

Subd. 3. **Declaratory judgment action.** If, prior to payment of death benefits, the insurer believes the policy was initiated by STOLI practices, the insurer may bring a declaratory judgment action seeking a court order declaring the policy void.

Subd. 4. **Effect on other law.** Sections 60A.078 to 60A.0789 shall not:

(1) preempt or limit other civil remedies, including, but not limited to, declaratory judgments, injunctive relief, and interpleaders;

(2) preempt the authority or relieve the duty of other law enforcement or regulatory agencies to investigate, examine, and prosecute suspected violations of law;

(3) limit the powers granted elsewhere by the laws of this state to the commissioner or an insurance fraud unit or the attorney general to investigate and examine possible violations of law and to take appropriate actions against wrongdoers; or

(4) limit the power of this state to punish a person for conduct that constitutes a crime under other laws of this state.

VI. MINNESOTA TAX LAW

Article 1: Federal Conformity

Federal update; estate tax. Changes the date through which Minnesota incorporates the federal estate tax from February 13, 2008, to December 31, 2008. Since there have not been any federal changes to the estate tax since the last update, this change does not have any substantive effect.

Article 2: Green Acres

Overview

This article makes the following changes to the Minnesota Agricultural Property Tax Law (better known as the “Green Acres” program):

2. Allows most land in government-sponsored conservation programs (i.e. RIM, CRP, etc) to be eligible.

4. Allows property owners to withdraw a portion of their rural vacant land from the program without withdrawing all of it.

6. Provides that rural vacant land grandfathered into the Green Acres program is terminated from the program effective January 1, 2013; much of the terminated land will be able to transition to a new “rural preserve” program with somewhat similar tax benefits; no additional taxes will be collected from properties that transition to the new program.

8. Allows rural vacant land to remain in the program until 2013 if sold or otherwise transferred to the owner’s son or daughter, as long as it continues to qualify under the pre-2008 law.

10. Provides that property that was enrolled prior to 2008, but that no longer qualifies due to the 2008 changes (class 2b rural vacant land), may be withdrawn from the program prior to May 1, 2010, with no additional back-taxes due.

12. Provides a list of various types of transfers that do not constitute a change in ownership and therefore, do not trigger a pay back of additional taxes (i.e. marriages, divorces, etc.).

14. Establishes a new Rural Preserve Property Tax program. Requires the owner to have an approved conservation management plan for the property and it must be at least ten acres. Requires a covenant that is binding on the land. Requires land to be enrolled for at least ten years and for the property owner to notify the assessor five years in advance before terminating the covenant. Upon termination, it imposes additional taxes for the last three years the property was enrolled in the program. Effective for taxes payable in 2012 and thereafter.

16. Modifies the definition of class 2a property to include interspersed non-productive land.

18. Requires the commissioner of revenue to annually report to the house and senate tax committees on agricultural valuation and classification.

1 Requirements. Allows land enrolled in state and federal sponsored conservation programs such as RIM and CRP to be enrolled in Green Acres (other than RIM land subject to a perpetual easement) provided that the land was in agricultural use before enrollment. Also extends the green acres eligibility to certain farm entities that are not

regulated under section 500.24. This primarily includes poultry farming in which the majority of the owners are related and at least one of them either resides on the land or actively operates the land. Effective for assessment year 2009 and thereafter.

- 2 Property no longer eligible for deferment.** Allows property owners to withdraw a portion of their rural vacant land from the program without withdrawing all of it. Allows property that was in the program prior to the 2008 changes but no longer qualifies due to those changes (i.e. rural vacant land) to continue to qualify until the 2013 assessment. This date ties in with the rural preserve program established in section 5. If it is not enrolled in that new rural preserve program within that time period, it must be removed from Green Acres. Also allows rural vacant land to remain in the program until the 2013 assessment, if sold or otherwise transferred to the owner's son or daughter as long as it continues to qualify under the pre-2008 law. Lastly, this section provides that if property enrolled in the Green Acres program is removed from that program and enrolls in the new rural preserve program established in section 5, it is not subject to any additional taxes.
- 3 Additional taxes.** Provides that property that was in the program prior to the 2008 law changes, but that no longer qualifies due to those 2008 changes (i.e. rural vacant land), may be withdrawn from the program prior to May 1, 2010, with no back-taxes due.
- 4 Continuation of tax treatment upon sale or other events.** Clarifies that certain types of property transactions are not to be considered changes of ownership in the Green Acres program, specifically:
 20. transfer to surviving spouse upon death,
 22. divorce of a married couple when one spouse retains ownership,
 24. marriage of a property owner when the owner retains full or partial ownership,
 26. organization or reorganization of a farm entity if all owners retain the same interest,
 28. placement of the property into trust provided the owners are the grantors of the trust and they maintain the same beneficial interest.
- 5 Rural Preserve Property Tax Program.** Establishes a new tax preference program for rural land that meets certain criteria.

VII. TRANSFER ON DEATH DEED AMENDMENTS

Article 1: Transfer on death deeds

Overview

This article tidies up some technical loose ends from the 2008 legislation that authorized transfer on death deeds. A transfer on death deed permits an owner of real estate to record a new type of deed that provides for an automatic transfer of title to the real estate to one or more specified persons upon the owner's future death without having the property go through probate.

Section

- 1 Proof of survivorship and clearance from public assistance liens.** This section affects an affidavit of identity and survivorship recorded in the real estate records together with a lien clearance certificate to prove the absence of a Medical Assistance lien on a parcel of real estate in connection with a transfer on death deed. Requires that the affidavit include the name of the person and mailing address to which the county should send future property tax statements.
- 2 Jurisdiction.** Provides that jurisdiction in an action to enforce a medical assistance lien against property conveyed by a transfer on death deed is in the probate division of the district court in counties in which the district court has a probate division, and in the district court in all other counties.
- 3 To get tax statements.** Takes into account that a person to whom future property tax statements should be sent may not be the grantee of a deed or contract for deed.
- 4 Exceptions.** Provides that the statute amended in section 3 of this article does not apply to a transfer on death deed or a Medical Assistance clearance certificate obtained under section 2 of this article.
- 5 Instruments to have name and address.** Same as section 4 above, but applies to Torrens real estate.
- 6 Instruments to have name and address.** Same as sections 4 and 5, but applies to real estate registered under a streamlined Torrens procedure in chapter 508A.
- 7 Effective dates.** Provides effective dates retroactive to August 1, 2008, which was the effective date of the 2008 transfer on death deeds legislation.

93.1 demonstration project been provided, as applicable for the enrollee, under fee-for-service
93.2 or through managed care or county-based purchasing plans.

93.3 Sec. 27. Minnesota Statutes 2008, section 256B.15, subdivision 1a, is amended to read:

93.4 Subd. 1a. **Estates subject to claims.** (a) If a person receives any medical assistance
93.5 hereunder, on the person's death, if single, or on the death of the survivor of a married
93.6 couple, either or both of whom received medical assistance, or as otherwise provided
93.7 for in this section, the total amount paid for medical assistance rendered for the person
93.8 and spouse shall be filed as a claim against the estate of the person or the estate of the
93.9 surviving spouse in the court having jurisdiction to probate the estate or to issue a decree
93.10 of descent according to sections 525.31 to 525.313.

93.11 (b) For the purposes of this section, the person's estate must consist of:

93.12 (1) the person's probate estate;

93.13 (2) all of the person's interests or proceeds of those interests in real property the
93.14 person owned as a life tenant or as a joint tenant with a right of survivorship at the time of
93.15 the person's death;

93.16 (3) all of the person's interests or proceeds of those interests in securities the person
93.17 owned in beneficiary form as provided under sections 524.6-301 to 524.6-311 at the time
93.18 of the person's death, to the extent the interests or proceeds of those interests become part
93.19 of the probate estate under section 524.6-307;

93.20 (4) all of the person's interests in joint accounts, multiple-party accounts, and
93.21 pay-on-death accounts, brokerage accounts, investment accounts, or the proceeds of
93.22 those accounts, as provided under sections 524.6-201 to 524.6-214 at the time of the
93.23 person's death to the extent the interests become part of the probate estate under section
93.24 524.6-207; and

93.25 (5) assets conveyed to a survivor, heir, or assign of the person through survivorship,
93.26 living trust, or other arrangements.

93.27 (c) For the purpose of this section and recovery in a surviving spouse's estate for
93.28 medical assistance paid for a predeceased spouse, the estate must consist of all of the legal
93.29 title and interests the deceased individual's predeceased spouse had in jointly owned or
93.30 marital property at the time of the spouse's death, as defined in subdivision 2b, and the
93.31 proceeds of those interests, that passed to the deceased individual or another individual, a
93.32 survivor, an heir, or an assign of the predeceased spouse through a joint tenancy, tenancy
93.33 in common, survivorship, life estate, living trust, or other arrangement. A deceased
93.34 recipient who, at death, owned the property jointly with the surviving spouse shall have
93.35 an interest in the entire property.

94.1 (d) For the purpose of recovery in a single person's estate or the estate of a survivor
 94.2 of a married couple, "other arrangement" includes any other means by which title to all or
 94.3 any part of the jointly owned or marital property or interest passed from the predeceased
 94.4 spouse to another including, but not limited to, transfers between spouses which are
 94.5 permitted, prohibited, or penalized for purposes of medical assistance.

94.6 (e) A claim shall be filed if medical assistance was rendered for either or both
 94.7 persons under one of the following circumstances:

94.8 ~~(a)~~ (1) the person was over 55 years of age, and received services under this chapter;

94.9 ~~(b)~~ (2) the person resided in a medical institution for six months or longer, received
 94.10 services under this chapter, and, at the time of institutionalization or application for
 94.11 medical assistance, whichever is later, the person could not have reasonably been expected
 94.12 to be discharged and returned home, as certified in writing by the person's treating
 94.13 physician. For purposes of this section only, a "medical institution" means a skilled
 94.14 nursing facility, intermediate care facility, intermediate care facility for persons with
 94.15 developmental disabilities, nursing facility, or inpatient hospital; or

94.16 ~~(c)~~ (3) the person received general assistance medical care services under chapter
 94.17 256D.

94.18 (f) The claim shall be considered an expense of the last illness of the decedent for the
 94.19 purpose of section 524.3-805. Notwithstanding any law or rule to the contrary, a state or
 94.20 county agency with a claim under this section must be a creditor under section 524.6-307.

94.21 Any statute of limitations that purports to limit any county agency or the state agency,
 94.22 or both, to recover for medical assistance granted hereunder shall not apply to any claim
 94.23 made hereunder for reimbursement for any medical assistance granted hereunder. Notice
 94.24 of the claim shall be given to all heirs and devisees of the decedent whose identity can be
 94.25 ascertained with reasonable diligence. The notice must include procedures and instructions
 94.26 for making an application for a hardship waiver under subdivision 5; time frames for
 94.27 submitting an application and determination; and information regarding appeal rights and
 94.28 procedures. Counties are entitled to one-half of the nonfederal share of medical assistance
 94.29 collections from estates that are directly attributable to county effort. Counties are entitled
 94.30 to ten percent of the collections for alternative care directly attributable to county effort.

94.31 Sec. 28. Minnesota Statutes 2008, section 256B.15, subdivision 1h, is amended to read:

94.32 Subd. 1h. Estates of specific persons receiving medical assistance. (a) For
 94.33 purposes of this section, paragraphs (b) to ~~(i)~~ (j) apply if a person received medical
 94.34 assistance for which a claim may be filed under this section and died single, or the

95.1 surviving spouse of the couple and was not survived by any of the persons described
95.2 in subdivisions 3 and 4.

95.3 ~~(b) For purposes of this section, the person's estate consists of: (1) the person's~~
95.4 ~~probate estate; (2) all of the person's interests or proceeds of those interests in real property~~
95.5 ~~the person owned as a life tenant or as a joint tenant with a right of survivorship at the~~
95.6 ~~time of the person's death; (3) all of the person's interests or proceeds of those interests in~~
95.7 ~~securities the person owned in beneficiary form as provided under sections 524.6-301 to~~
95.8 ~~524.6-311 at the time of the person's death, to the extent they become part of the probate~~
95.9 ~~estate under section 524.6-307; (4) all of the person's interests in joint accounts, multiple~~
95.10 ~~party accounts, and pay on death accounts, or the proceeds of those accounts, as provided~~
95.11 ~~under sections 524.6-201 to 524.6-214 at the time of the person's death to the extent~~
95.12 ~~they become part of the probate estate under section 524.6-207; and (5) the person's~~
95.13 ~~legal title or interest at the time of the person's death in real property transferred under~~
95.14 ~~a transfer on death deed under section 507.071, or in the proceeds from the subsequent~~
95.15 ~~sale of the person's interest in the real property. Notwithstanding any law or rule to the~~
95.16 ~~contrary, a state or county agency with a claim under this section shall be a creditor under~~
95.17 ~~section 524.6-307.~~

95.18 ~~(e)~~ (b) Notwithstanding any law or rule to the contrary, the person's life estate or joint
95.19 tenancy interest in real property not subject to a medical assistance lien under sections
95.20 514.980 to 514.985 on the date of the person's death shall not end upon the person's death
95.21 and shall continue as provided in this subdivision. The life estate in the person's estate
95.22 shall be that portion of the interest in the real property subject to the life estate that is equal
95.23 to the life estate percentage factor for the life estate as listed in the Life Estate Mortality
95.24 Table of the health care program's manual for a person who was the age of the medical
95.25 assistance recipient on the date of the person's death. The joint tenancy interest in real
95.26 property in the estate shall be equal to the fractional interest the person would have owned
95.27 in the jointly held interest in the property had they and the other owners held title to the
95.28 property as tenants in common on the date the person died.

95.29 ~~(f)~~ (c) The court upon its own motion, or upon motion by the personal representative
95.30 or any interested party, may enter an order directing the remaindermen or surviving joint
95.31 tenants and their spouses, if any, to sign all documents, take all actions, and otherwise
95.32 fully cooperate with the personal representative and the court to liquidate the decedent's
95.33 life estate or joint tenancy interests in the estate and deliver the cash or the proceeds of
95.34 those interests to the personal representative and provide for any legal and equitable
95.35 sanctions as the court deems appropriate to enforce and carry out the order, including an
95.36 award of reasonable attorney fees.

96.1 ~~(e)~~ (d) The personal representative may make, execute, and deliver any conveyances
96.2 or other documents necessary to convey the decedent's life estate or joint tenancy interest
96.3 in the estate that are necessary to liquidate and reduce to cash the decedent's interest or
96.4 for any other purposes.

96.5 ~~(f)~~ (e) Subject to administration, all costs, including reasonable attorney fees,
96.6 directly and immediately related to liquidating the decedent's life estate or joint tenancy
96.7 interest in the decedent's estate, shall be paid from the gross proceeds of the liquidation
96.8 allocable to the decedent's interest and the net proceeds shall be turned over to the personal
96.9 representative and applied to payment of the claim presented under this section.

96.10 ~~(g)~~ (f) The personal representative shall bring a motion in the district court in which
96.11 the estate is being probated to compel the remaindermen or surviving joint tenants to
96.12 account for and deliver to the personal representative all or any part of the proceeds of any
96.13 sale, mortgage, transfer, conveyance, or any disposition of real property allocable to the
96.14 decedent's life estate or joint tenancy interest in the decedent's estate, and do everything
96.15 necessary to liquidate and reduce to cash the decedent's interest and turn the proceeds of
96.16 the sale or other disposition over to the personal representative. The court may grant any
96.17 legal or equitable relief including, but not limited to, ordering a partition of real estate
96.18 under chapter 558 necessary to make the value of the decedent's life estate or joint tenancy
96.19 interest available to the estate for payment of a claim under this section.

96.20 ~~(h)~~ (g) Subject to administration, the personal representative shall use all of the cash
96.21 or proceeds of interests to pay an allowable claim under this section. The remaindermen
96.22 or surviving joint tenants and their spouses, if any, may enter into a written agreement
96.23 with the personal representative or the claimant to settle and satisfy obligations imposed at
96.24 any time before or after a claim is filed.

96.25 ~~(i)~~ (h) The personal representative may, at their discretion, provide any or all of the
96.26 other owners, remaindermen, or surviving joint tenants with an affidavit terminating the
96.27 decedent's estate's interest in real property the decedent owned as a life tenant or as a joint
96.28 tenant with others, if the personal representative determines in good faith that neither the
96.29 decedent nor any of the decedent's predeceased spouses received any medical assistance
96.30 for which a claim could be filed under this section, or if the personal representative has
96.31 filed an affidavit with the court that the estate has other assets sufficient to pay a claim, as
96.32 presented, or if there is a written agreement under paragraph ~~(h)~~ (g), or if the claim, as
96.33 allowed, has been paid in full or to the full extent of the assets the estate has available
96.34 to pay it. The affidavit may be recorded in the office of the county recorder or filed in
96.35 the Office of the Registrar of Titles for the county in which the real property is located.
96.36 Except as provided in section 514.981, subdivision 6, when recorded or filed, the affidavit

97.1 shall terminate the decedent's interest in real estate the decedent owned as a life tenant or a
97.2 joint tenant with others. The affidavit shall:

97.3 (1) be signed by the personal representative;

97.4 (2) identify the decedent and the interest being terminated;

97.5 (3) give recording information sufficient to identify the instrument that created the
97.6 interest in real property being terminated;

97.7 (4) legally describe the affected real property;

97.8 (5) state that the personal representative has determined that neither the decedent
97.9 nor any of the decedent's predeceased spouses received any medical assistance for which
97.10 a claim could be filed under this section;

97.11 (6) state that the decedent's estate has other assets sufficient to pay the claim, as
97.12 presented, or that there is a written agreement between the personal representative and
97.13 the claimant and the other owners or remaindermen or other joint tenants to satisfy the
97.14 obligations imposed under this subdivision; and

97.15 (7) state that the affidavit is being given to terminate the estate's interest under this
97.16 subdivision, and any other contents as may be appropriate.

97.17 The recorder or registrar of titles shall accept the affidavit for recording or filing. The
97.18 affidavit shall be effective as provided in this section and shall constitute notice even if it
97.19 does not include recording information sufficient to identify the instrument creating the
97.20 interest it terminates. The affidavit shall be conclusive evidence of the stated facts.

97.21 ~~(f)~~ (i) The holder of a lien arising under subdivision 1c shall release the lien at
97.22 the holder's expense against an interest terminated under paragraph ~~(f)~~ (g) to the extent
97.23 of the termination.

97.24 ~~(k)~~ (j) If a lien arising under subdivision 1c is not released under paragraph ~~(f)~~ (i),
97.25 prior to closing the estate, the personal representative shall deed the interest subject to the
97.26 lien to the remaindermen or surviving joint tenants as their interests may appear. Upon
97.27 recording or filing, the deed shall work a merger of the recipient's life estate or joint
97.28 tenancy interest, subject to the lien, into the remainder interest or interest the decedent and
97.29 others owned jointly. The lien shall attach to and run with the property to the extent of
97.30 the decedent's interest at the time of the decedent's death.

97.31 Sec. 29, Minnesota Statutes 2008, section 256B.15, subdivision 2, is amended to read:

97.32 Subd. 2. **Limitations on claims.** The claim shall include only the total amount
97.33 of medical assistance rendered after age 55 or during a period of institutionalization
97.34 described in subdivision 1a, ~~clause (b) paragraph (e)~~, and the total amount of general
97.35 assistance medical care rendered, and shall not include interest. Claims that have been

98.1 allowed but not paid shall bear interest according to section 524.3-806, paragraph (d). A
98.2 claim against the estate of a surviving spouse who did not receive medical assistance, for
98.3 medical assistance rendered for the predeceased spouse, shall be payable from the full
98.4 value of all of the predeceased spouse's assets and interests which are part of the surviving
98.5 spouse's estate under subdivisions 1a and 2b. Recovery of medical assistance expenses in
98.6 the nonrecipient surviving spouse's estate is limited to the value of the assets of the estate
98.7 that were marital property or jointly owned property at any time during the marriage. The
98.8 claim is not payable from the value of assets or proceeds of assets in the estate attributable
98.9 to a predeceased spouse whom the individual married after the death of the predeceased
98.10 recipient spouse for whom the claim is filed or from assets and the proceeds of assets in the
98.11 estate which the nonrecipient decedent spouse acquired with assets which were not marital
98.12 property or jointly owned property after the death of the predeceased recipient spouse.
98.13 Claims for alternative care shall be net of all premiums paid under section 256B.0913,
98.14 subdivision 12, on or after July 1, 2003, and shall be limited to services provided on or
98.15 after July 1, 2003. Claims against marital property shall be limited to claims against
98.16 recipients who died on or after July 1, 2009.

98.17 Sec. 30. Minnesota Statutes 2008, section 256B.15, is amended by adding a
98.18 subdivision to read:

98.19 Subd. 2b. **Controlling provisions.** (a) For purposes of this subdivision and
98.20 subdivisions 1a and 2, paragraphs (b) to (d) apply.

98.21 (b) At the time of death of a recipient spouse and solely for purpose of recovery of
98.22 medical assistance benefits received, a predeceased recipient spouse shall have a legal
98.23 title or interest in the undivided whole of all of the property which the recipient and the
98.24 recipient's surviving spouse owned jointly or which was marital property at any time
98.25 during their marriage regardless of the form of ownership and regardless of whether
98.26 it was owned or titled in the names of one or both the recipient and the recipient's
98.27 spouse. Title and interest in the property of a predeceased recipient spouse shall not end
98.28 or extinguish upon the person's death and shall continue for the purpose of allowing
98.29 recovery of medical assistance in the estate of the surviving spouse. Upon the death of
98.30 the predeceased recipient spouse, title and interest in the predeceased spouse's property
98.31 shall vest in the surviving spouse by operation of law and without the necessity for any
98.32 probate or decree of descent proceedings and shall continue to exist after the death of the
98.33 predeceased spouse and the surviving spouse to permit recovery of medical assistance.
98.34 The recipient spouse and the surviving spouse of a deceased recipient spouse shall not

99.1 encumber, disclaim, transfer, alienate, hypothecate, or otherwise divest themselves of
99.2 these interests before or upon death.

99.3 (c) For purposes of this section, "marital property" includes any and all real or
99.4 personal property of any kind or interests in such property the predeceased recipient
99.5 spouse and their spouse, or either of them, owned at the time of their marriage to each
99.6 other or acquired during their marriage regardless of whether it was owned or titled in
99.7 the names of one or both of them. If either or both spouses of a married couple received
99.8 medical assistance, all property owned during the marriage or which either or both spouses
99.9 acquired during their marriage shall be presumed to be marital property for purposes of
99.10 recovering medical assistance unless there is clear and convincing evidence to the contrary.

99.11 (d) The agency responsible for the claim for medical assistance for a recipient spouse
99.12 may, at its discretion, release specific real and personal property from the provisions of
99.13 this section. The release shall extinguish the interest created under paragraph (b) in the
99.14 land it describes upon filing or recording. The release need not be attested, certified, or
99.15 acknowledged as a condition of filing or recording and shall be filed or recorded in the
99.16 office of the county recorder or registrar of titles, as appropriate, in the county where the
99.17 real property is located. The party to whom the release is given shall be responsible for
99.18 paying all fees and costs necessary to record and file the release. If the property described
99.19 in the release is registered property, the registrar of titles shall accept it for recording and
99.20 shall record it on the certificate of title for each parcel of property described in the release.
99.21 If the property described in the release is abstract property, the recorder shall accept it
99.22 for filing and file it in the county's grantor-grantee indexes and any tract index the county
99.23 maintains for each parcel of property described in the release.

99.24 Sec. 31. Minnesota Statutes 2008, section 256B.15, is amended by adding a
99.25 subdivision to read:

99.26 Subd. 9. **Commissioner's intervention.** The commissioner shall be permitted to
99.27 intervene as a party in any proceeding involving recovery of medical assistance upon
99.28 filing a notice of intervention and serving such notice on the other parties.

99.29 Sec. 32. Minnesota Statutes 2008, section 256B.69, subdivision 5a, is amended to read:

99.30 Subd. 5a. **Managed care contracts.** (a) Managed care contracts under this section
99.31 and sections 256L.12 and 256D.03, shall be entered into or renewed on a calendar year
99.32 basis beginning January 1, 1996. Managed care contracts which were in effect on June
99.33 30, 1995, and set to renew on July 1, 1995, shall be renewed for the period July 1, 1995
99.34 through December 31, 1995 at the same terms that were in effect on June 30, 1995. The

2010 LEGISLATION

UNIFORM PROBATE CODE 2008 AMENDMENTS

The Uniform Probate Code (UPC), which is fully adopted in 19 states (and partially adopted as various stand-alone acts in many others) provides an integrated statutory system for all sorts of probate and estate law matters. The UPC, along with its constituent stand-alone acts, has been frequently updated since its inception in 1969.

The principal features of the 2008 revisions are summarized as follows:

Inflation Adjustments. Between 1990 and 2008, the Consumer Price Index rose by somewhat more than 50 percent. The 2008 revisions raise the dollar amounts by 50 percent in Article II Sections 2-102, 2-102A, 2-201, 2-402, 2-403, and 2-405, and added a new cost of living adjustment section - Section 1-109.

Intestacy. Article II of the UPC dealing with intestate succession has been reorganized and expanded to extend intestate inheritance rights to a broader group of potential heirs based on the existence of a “parent-child relationship” as defined therein. Specifically, Part 1 on intestacy was divided into two subparts: Subpart 1 on general rules of intestacy and subpart 2 on parent-child relationships. This last change significantly modernizes the UPC’s treatment of non-marital children, adoptive children, and children of assisted reproduction.

Execution of Wills. Section 2-502 was amended to allow notarized wills as an alternative to wills that are attested by two witnesses. That amendment necessitated minor revisions to Section 2-504 on self-proved wills and to Section 3-406 on the effect of notarized wills in contested cases.

Reformation and Modification. The process and standards under which a will can be reformed or corrected are clarified to be consistent with the Restatement (Third) of Property: Wills and other Transfers, and the Uniform Trust Code. New Sections 2-805 and 2-806 brought the reformation and modification sections now contained in the Uniform Trust Code into the Uniform Probate Code.

Class Gifts. Section 2-705 on class gifts was revised in a variety of ways, as explained in the revised Comment to that section.

**UNIFORM DISPOSITION OF COMMUNITY
PROPERTY RIGHTS AT DEATH ACT**

PURPOSE:

The purpose of this act is to preserve the rights of each spouse in property which was community property prior to change of domicile, as well as in property substituted therefor where the spouses have not indicated an intention to sever or alter their community rights.

ORIGIN:

Completed by the Uniform Law Commissioners in 1971.

ENDORSED BY:

American Bar Association

STATE ADOPTIONS:

Alaska	Hawaii	North Carolina
Arkansas	Kentucky	Oregon
Colorado	Michigan	Virginia
Connecticut	Montana	Wyoming
Florida	New York	

2011 LEGISLATION

**2008 AMENDMENTS TO THE REVISED
UNIFORM PRINCIPAL AND INCOME ACT**

PURPOSE:

The Uniform Principal and Income Act provides procedures for trustees administering an estate in separating principal from income, and to ensure that the intention of the trust creator is the guiding principle for trustees. The Act was amended in 2008 to update the Act to reflect current policy of the Internal Revenue Service (IRS) and to clarify technical language regarding withholdings.

ORIGIN:

Completed by the Uniform Law Commission in 2008.

STATE ADOPTIONS:

Arizona
California
Colorado
Delaware
Idaho
Indiana
Iowa
Nebraska
Nevada
North Dakota
Oklahoma
South Dakota
Virginia
Utah
Washington
West Virginia

2008 INTRODUCTIONS:

Connecticut
New Mexico

UNIFORM ESTATE TAX APPORTIONMENT ACT

PURPOSE:

This is a revision of earlier acts (from 1958, 1964, and 1982), and part of the Uniform Probate Code, that provides for apportioning the burden of federal or state estate taxes between the respective interests of heirs or legatees of an estate, or beneficiaries of a revocable trust, when the fiduciary for an estate or trust is required to pay such taxes. Generally, the tax burden is allocated to the interests of estate or trust beneficiaries in proportion to their interests in the whole of the taxable estate. This update takes into account all changes in tax rules arising since the last time this act was amended.

ORIGIN:

Completed by the Uniform Law Commissioners in 2003.

STATE ADOPTIONS:

Alabama
Arkansas
Idaho
Massachusetts
New Mexico
Washington

2009 INTRODUCTIONS:

Minnesota

MULTIPLE-PERSON ACCOUNTS ACT

PURPOSE:

To update the law on multiple party accounts and make them easier to use.

ORIGIN:

Completed by the Uniform Law Commissioners in 1989. First appeared in Uniform Probate Code in 1969: UPC Article VI, Part 1.

STATE ADOPTIONS OF 1989 ACT:

Alaska	Montana	North Dakota
Arizona	Nebraska	South Dakota
Colorado	New Mexico	
District of Columbia		

STATE ADOPTIONS OF 1969 VERSION:

California	Kentucky	South Carolina
Florida	Maine	Texas
Georgia	Maryland	Utah
Hawaii	Massachusetts	Virginia
Idaho	Minnesota	Washington
Indiana	New Jersey	Wisconsin
	Oregon	

2009 INTRODUCTIONS OF 1989 ACT:

Minnesota

501B TRUST AMENDMENTS

- Successor Trustee Liability
- Discharge vs. Release
- Incorporation by Reference
- Protection for ILIT Trustees
- In-Law Rights to Parents-in-Law Estate Plan
- Decanting
- Certificates of Trust for Personal Property
- Deposit of Trust Funds (Minn. Stat. § 48.64)
- Virtual Representation

UNIFORM POWER OF ATTORNEY ACT (2006)

A “power of attorney” is an authorization for one person to act on someone else’s behalf in a legal or business matter. The person authorized to act is the “agent” and the person granting the authorization is the “principal.” A durable power of attorney is a power that continues or initiates the agency after the principal becomes incapacitated. The concept of a durable power of attorney was first incorporated into the Uniform Probate Code in 1969 to offer an inexpensive method of surrogate decision making to those whose modest assets did not justify pre-incapacity planning with a trust or post-incapacity property management with a guardianship. After more than three decades, the durable power of attorney is now used by both the wealthy and the non-wealthy for incapacity planning as well as convenience. The Uniform Power of Attorney Act (2006) (UPOAA) is necessary because many states had incorporated numerous non-uniform provisions that, while helpful, caused great divergence and confusion in the states. The UPOAA enhances the usefulness of durable powers of attorney while protecting the principal, the agent and those who deal with the agent.

A national study of durable powers of attorney, conducted in 2002, revealed the need to address numerous issues not contemplated in the original Uniform Durable Power of Attorney Act such as multiple agents, the authority of later-appointed guardians, and the impact of dissolution or annulment of the principal’s marriage to the agent. The study also found that other topics about which the states had legislated, although not necessarily in a convergent manner, included: successor agents, execution requirements, portability, sanctions for dishonor of a power of attorney, and restrictions on powers that alter a principal’s estate plan. In a national survey, trust and estate lawyers’ responses demonstrated a high degree of consensus about the need to improve portability and acceptance of powers of attorney as well as the need to better protect incapacitated principals.

The UPOAA, which supersedes the Uniform Durable Power of Attorney Act, the Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code, consists of four articles. The first contains all of the general provisions that pertain to creation and use of a power of attorney. While most of these provisions are default rules that can be altered by the power of attorney, certain mandatory provisions in Article 1 serve as safeguards for the protections of the principal, the agent, and persons who are asked to rely on the agent’s authority. Article 2 provides default definitions for the various areas of authority that can be granted to an agent. The genesis for most of these definitions is the Uniform Statutory Form Power of Attorney Act (1988); however, the language is updated where necessary to reflect modern day transactions. Article 2 also identifies certain areas of authority that must be granted with express language because of the propensity of such authority to dissipate the principal’s property or alter the principal’s estate plan. Article 3 contains an optional statutory form that is designed for use by lawyers as well as lay persons. Step-by-step prompts are given for designation of the agent, successor agents, and the grant of authority. Article 3 also contains a sample agent certification form. Article 4 contains miscellaneous provisions concerning the relationship of the Act to other law and pre-existing powers of attorney.

The UPOAA seeks to preserve the durable powers of attorney as a low-cost, flexible, and private

form of surrogate decision making while trying to prevent financial abuse of incapacitated individuals. It also encourages the use of powers of attorney by trustworthy agents who are reluctant to serve for fear of liability in contentious family situations. The UPOAA provides provisions that encourage acceptance of powers of attorney by third persons, safeguard incapacitated principals, and provide clearer guidelines for agents.

The UPOAA provides broad protection for good faith acceptance or refusal of an acknowledged power of attorney, consequences for unreasonable refusal of an acknowledged power of attorney and recognition of the portability of powers of attorney validly created under other law. The Act seeks to address the problem of arbitrary refusals of powers of attorney by entities such as banks, brokerage houses, and insurance companies. With respect to sanctioned refusals of a power of attorney, the Act provides adopting states with two choices. Section 120, Alternate A, sets out liability parameters for refusal of any acknowledged power of attorney not excluded by the statutory safe harbors. Section 120, Alternate B, applies only to refusals of acknowledged statutory form powers of attorney. As an additional protective measure for the principal, both alternative Sections 120 allow refusal to an otherwise valid power of attorney if the person believes that “the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent” and makes or knows that another person has made a report to Adult Protective Services (or the equivalent governmental agency).

Protecting the principal from potential abuse under the UPOAA is multi-faceted and provides the following: mandatory as well as default fiduciary duties for the agent; liability for agent misconduct; broad standing provisions for judicial review of the agent’s conduct; and, the requirement of express language to grant certain authority that could dissipate the principal’s property or alter the principal’s estate plan. Mandatory duties include acting in good faith, within the scope of the authority granted and according to the principal’s reasonable expectations (or, if unknown, the principal’s best interest). The UPOAA also contains a number of default duties that can be varied in the power of attorney such as preservation of the principal’s estate plan (subject to certain qualifications) and the duty to cooperate with the person who has the principal’s health-care decision making authority.

The UPOAA recognizes that many agents are family members who have inherent conflict of interest, but that these conflicts do not, in and of themselves, prevent an agent from acting competently for the principal’s benefit. While it is well-accepted that an agent under a power of attorney is a fiduciary, most state statutes and the previous Uniform Durable Power of Attorney Act specifies what it means. The UPOAA addresses this dilemma in a default provision which recognizes that an agent who acts with care, competence and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has conflicting interests. Furthermore, the Act permits the principal to include in the power of attorney an exoneration clause for the benefit of the agent. Another provision that operates to the benefit of both the principal and the agent is one requiring notice of an agent’s resignation. If the agent cannot effectively notify the principal because the principal is incapacitated, the provision gives a hierarchy of persons to whom the agent may give notice.

Incapacitated individuals are, unfortunately, uniquely vulnerable to financial abuse, but the surrogate decision making needs of our aging society are greatly aided by the use of powers of attorney by trustworthy agents. Naturally, third parties such as banks and insurance companies are concerned about potential fraud. The UPOAA balances the competing interests at stake with reforms that enhance the usefulness of durable powers while at the same time protecting the principal, the agent, and those who deal with the agent. It should be enacted in every state as soon as possible.

#558807