

LEGISLATIVE BILL 292

Approved by the Governor March 25, 1985

Introduced by Abboud, 12

AN ACT relating to powers of attorney; to amend sections 30-2201, 30-2639, and 30-2640, Reissue Revised Statutes of Nebraska, 1943, and section 30-2627, Revised Statutes Supplement, 1984; to adopt the Uniform Durable Power of Attorney Act; to change provisions relating to the appointment of guardians and conservators; to harmonize provisions; to provide duties for the Revisor of Statutes; to eliminate certain provisions relating to powers of attorney; and to repeal the original sections, and also sections 30-2662 and 30-2663, Reissue Revised Statutes of Nebraska, 1943.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 30-2201, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

30-2201. ~~This act~~ Sections 30-2201 to 30-2902 and sections 5 to 13 of this act shall be known and may be cited as the Nebraska Probate Code.

Sec. 2. That section 30-2627, Revised Statutes Supplement, 1984, be amended to read as follows:

30-2627. (a) Any competent person or a suitable institution may be appointed guardian of an incapacitated person, except that it shall be unlawful for any agency providing residential care in an institution or community based program, or any owner, part owner, manager, administrator, or employee, or any spouse of an owner, part owner, manager, administrator, or employee of any nursing home, room and board home, convalescent home, or institution engaged in the care, treatment, or housing of any person physically or mentally handicapped, infirm, or aged to be appointed guardian or conservator of any such person residing, being under care, receiving treatment, or being housed in any such home or institution within the State of Nebraska. Nothing in this subsection shall prevent the allegedly incapacitated person's spouse, adult child, parent, or relative from being appointed guardian.

(b) Persons who are not disqualified and who exhibit the ability to exercise the powers to be assigned by the court have priority for appointment as guardian in the following order:

(1) a person nominated most recently by either of the following methods:

(i) a person nominated by the incapacitated person in a power of attorney or a durable power of attorney; or

(ii) a person nominated by an attorney in fact who is given power to nominate in a power of attorney or a durable power of attorney executed by the incapacitated person;

~~(2)~~ ~~(1)~~ the spouse of the incapacitated person;

~~(2)~~ ~~(3)~~ an adult child of the incapacitated person;

~~(3)~~ ~~(4)~~ a parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;

~~(4)~~ ~~(5)~~ any relative of the incapacitated person with whom he or she has resided for more than six months prior to the filing of the petition;

~~(5)~~ ~~(6)~~ a person nominated by the person who is caring for him or her or paying benefits to him or her.

(c) The court may require a guardian to furnish a bond in an amount and conditioned in accordance with the provisions of section 30-2640.

Sec. 3. That section 30-2639, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

30-2639. (a) The court may appoint an individual, or a corporation with general power to serve as trustee, as conservator of the estate of a protected person. The following are entitled to consideration for appointment in the order listed:

(1) a person nominated most recently by either of the following methods:

(i) a person nominated by the protected person in a power of attorney or durable power of attorney; or

(ii) a person nominated by an attorney in fact who is given power to nominate in a power of attorney or a durable power of attorney executed by the protected person;

~~(2)~~ ~~(1)~~ a conservator, guardian of property or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides;

~~(2)~~ ~~(3)~~ an individual or corporation nominated by the protected person if he or she is fourteen or more years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice;

~~(3)~~ ~~(4)~~ the spouse of the protected person;

~~(4)~~ ~~(5)~~ an adult child of the protected person;

~~(5)~~ ~~(6)~~ a parent of the protected person, or a person nominated by the will of a deceased parent;

~~(6)~~ ~~(7)~~ any relative of the protected person with whom he or she has resided for more than six months prior to the filing of the petition;

~~(7)~~ ~~(8)~~ a person nominated by the person who is caring for him or her or paying benefits to him or her.

(b) A person in priority (2), ~~(3)~~ (4), (5), ~~or~~ (6), or (7) may nominate in writing a person to serve in his or her stead. With respect to persons having equal priority, the court is to select the one who is best qualified of those willing to serve. The court, for good cause, may pass over a person having priority and appoint a person having less priority or no priority.

Sec. 4. That section 30-2640, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

30-2640. The court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the trust according to law, with sureties as it shall specify and may eliminate the requirement or decrease or increase the required amount of any such bond previously furnished. The amount of the bond may be fixed at the discretion of the court, but if not otherwise fixed by the court, the amount of the bond shall be in the amount of the aggregate capital value of the personal property of the estate in his or her control plus one year's estimated income from all sources minus the value of securities deposited under arrangements requiring an order of the court for their removal. The court, in lieu of sureties on a bond, may accept other security for the performance of the bond, including a pledge of securities or a mortgage of land. The court may consider the desires of the protected person as expressed in any written power of attorney in determining whether a bond shall be required and the amount thereof.

Sec. 5. Sections 5 to 13 of this act shall be known and may be cited as the Uniform Durable Power of Attorney Act.

Sec. 6. As used in the Uniform Durable Power of Attorney Act, unless the context otherwise requires, durable power of attorney shall mean a power of attorney by which a principal designates another his or her attorney in fact in writing and the writing contains the words This power of attorney shall not be affected by subsequent disability or incapacity of the principal or This power of attorney shall become effective upon the disability or incapacity of the principal or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity.

Sec. 7. All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his or her successors in interest as if the principal were competent and not disabled.

Sec. 8. (1) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the estate, or other fiduciary charged with the management of all of the

principal's property or all of his or her property except specified exclusions, the attorney in fact shall be accountable to the fiduciary as well as to the principal. The fiduciary shall have the same power to revoke or amend the power of attorney that the principal would have had if he or she were not disabled or incapacitated.

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

Sec. 9. (1) The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.

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

Sec. 10. As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney in fact under a power of attorney, durable or otherwise, stating that he or she did not have at the time of exercise of the power actual knowledge of the termination of the power by revocation or of the principal's death, disability, or incapacity is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable. This section shall not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

Sec. 11. The validity and enforceability of a power of attorney executed prior to the effective date of this act shall be governed by the law in effect on the date of execution of such power of attorney.

Sec. 12. The county court and the district court of the principal's domicile shall have concurrent jurisdiction to determine the validity and enforceability of a durable power of attorney.

Sec. 13. The Uniform Durable Power of Attorney Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of such act among states enacting it.

Sec. 14. The Revisor of Statutes shall assign sections 5 to 13 of this act to Part 5 of Chapter 30, article 26.

Sec. 15. That original sections 30-2201, 30-2639, and 30-2640, Reissue Revised Statutes of Nebraska, 1943, and section 30-2627, Revised Statutes Supplement, 1984, and also sections 30-2662 and 30-2663, Reissue Revised Statutes of Nebraska, 1943, are repealed.