PROPOSED REVISIONS TO ARTICLE 5—PROBATE CODE

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1. All South Carolina citizens have a right to decide how they will be cared for during incapacity.
2. All South Carolina citizens have a right to decide how their assets will be used during their incapacity.
3. No probate judge, conservator, guardian, nor attorney-in-fact has a right to change the designated directions of an incapacitated person made prior to the incapacity.
4. The probate court, conservator, guardian, and attorney-in-fact have a duty to protect the incapacitated person and their assets during their incapacity.
5. No fees should be paid to a guardian ad litem, guardian, conservator, or attorney-in-fact that are needed for the welfare, care, support, and maintenance of the primary respondent/principal.
6. All fees for a guardian ad litem, conservator, guardian, or attorney-in-fact should not exceed five (5) percent of the yearly gross income of the primary respondent/principal.
7. All interested parties have a right to notice and an opportunity to be heard.
8. All parties with any actual or potential property interest in the primary respondent's estate shall have a right to notice and an opportunity to be heard on any issue affecting their property interest.
9. The court should seek pro bono services for guardian ad litems, guardians, conservators, attorneys-in-fact, and attorneys when funds are needed for the welfare, care, maintenance, and support of the primary respondent or his dependents. Under no circumstances should the total of all fees exceed five (5) percent of the yearly gross income of the primary respondent for all services.

62-5-101: (13) The definition is ambiguous. It should read, "'Incapacity' means the inability to receive and evaluate information or make or communicate decisions to the extent that a person, even with appropriate technological assistance, (a) is unable to provide for his physical health, safety, or self-care, or (b) is unable to manage his property."

62-5-101: (23) A visitor should be screened, bonded, trained, and approved by the court before being allowed to serve—much as a mediator is required to do. All approved visitors should be on a probate list that should be used by the probate judge, again much as mediators are appointed with the probate judge required to use only those individuals on the list. It should read, "'Visitor' is a person who has the requisite knowledge, training, and expertise to perform the duties required by the court. The 'Visitor' must be listed on the probate court's approved 'Visitor' list. The 'Visitor' must have no personal interest in the proceedings."

62-5-303: (2)(h) should read, “a general statement of the primary respondent’s gross personal assets, with an estimate of its fair market value, and the source and amount of any earned or unearned income of the primary respondent.” This should correspond with IRS regulations and code.

62-5-303: (4)(b) should read, “upon the request of the primary respondent, guardian ad litem, any party or upon the court’s own motion, the court may appoint counsel for the primary respondent. During the pendency of any guardianship proceeding, any attorney purporting to represent the primary respondent shall file a notice of appearance with the court. Fees for counsel retained by a primary respondent who is determined to be incapacitated shall be limited to five (5) percent of the primary respondent’s yearly gross income. No fees shall be paid unless the primary respondent’s estate is sufficient to provide for the health, welfare, and care of the primary respondent’s needs and obligations. No compensation shall be allowed from the corpus of the protected person’s estate. The court shall make specific findings of fact that the fees incurred by the attorney are reasonable, necessary, in good faith, and in the best interest of the primary respondent.”

62-5-303: (5) should read, “Upon the filing of the summons and petition with the court and proof of service of the summons and petition upon the primary respondent, the court shall appoint two examiners, who shall be physicians, to examine the primary respondent and report to the court the physical and mental condition of the primary respondent. Upon the motion or written request of the guardian ad litem, the primary respondent, any party or on its own motion, the court shall appoint one or more additional examiners, who may be a physician or any other person the court determines qualified to evaluate the primary respondent’s alleged impairment. When the court appoints an additional examiner, the court shall set out in the order appointing the examiner why an additional examiner is necessary and why the appointed examiner is appropriate to serve in that capacity. Each examiner shall complete a verified report evaluating the condition of the primary respondent and file his original report with the court or deliver the original report to the guardian ad litem, who without undue delay shall file the report with the court by the deadline set by the court, but not less than forty-eight hours prior to any hearing in which the report will be introduced as evidence. All parties to the proceeding are entitled to copies of examiners’ reports. An examiner’s report shall evaluate the condition of the primary respondent and shall contain, to the best information and belief of the examiner:”

62-5-303: (6) should read, “Within thirty (30) days after the time for filing a response to the petition has elapsed as to all parties served, the court must hold a hearing on the merits of the petition. The primary respondent, all parties, and any persons who have filed a demand for notice pursuant to subsection (7), must be given notice of the hearing as provided in Section 62-1-401. The primary respondent shall attend the hearing unless excused by the court upon written documentation from a physician that attending the hearing would result in harm to the primary respondent.”

62-5-303: (8) should read, “Within 30 days of hearing, or with the consent of all parties, upon the finding that a basis for the appointment of a guardian has been established as set forth in this section,

the court shall make and file an order of appointment. A primary respondent represented by counsel may consent through counsel."

62-5-305: The ending paragraph should read, "With respect to persons having equal priority, the court shall select the person it considers best qualified to serve as guardian for the primary respondent. The court, acting in the best interest of the primary respondent and upon the primary respondent's prior stated wishes, may decline to appoint a person having priority and appoint a person having a lower priority. In making its determination, the court must make findings of fact and specify the reasons that it is in the best interest of the primary respondent and pursuant to the primary respondent's stated wishes to make the specific appointment."

62-5-309 should read, "Any guardian ad litem, attorney, examiner, visitor or guardian appointed in a guardianship proceeding is entitled to reasonable compensation from the ward's estate not to exceed a total of five (5) percent of the ward's income for all compensation and only if the ward's funds are not needed to meet the needs for the health, welfare, care, and maintenance of the ward or the ward's dependents. The court must make specific findings of fact that the compensation sought was reasonable, necessary, in good faith, and in the best interest of the ward. No compensation shall be allowed from the corpus of the protected person's estate."

62-5-310 should read, "The authority and responsibility of a guardian for a ward terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation of the guardian as provided in Section 62-5-311. The court shall accept the resignation of a guardian when made. Termination does not affect the guardian's liability for prior actions or his obligation to account for funds and assets of his ward. Upon the death of the ward, the guardian shall file a certified copy of the ward's death certificate with the court having continuing jurisdiction over the ward within thirty (30) days of the ward's death, and upon receipt, the court must issue a termination of appointment within thirty (30) days of receipt. Before the termination of the guardian's appointment, the court shall require from the guardian an accounting of any assets held by the guardian on behalf of the ward and an accounting of all funds expended on behalf of the ward by the guardian."

62-5-311(2)(B) should read, "If no co-guardian is then serving, a guardian seeking to resign must file a summons and petition for discharge and appointment of a successor guardian. Upon the filing of a summons and petition by the guardian and service upon the primary respondent and other parties set forth in Section 62-5-303(2)(d), the court shall accept the resignation of the guardian and make any other order which may be appropriate including the appointment of a temporary guardian."

62-5-312(C) should read, "Within forty eight (48) hours after the filing of a motion for appointment of temporary guardian, the court shall conduct a hearing on the motion."

62-5-312(E) should read, "At or following the hearing convened for the purpose of considering the appointment of a temporary guardian, the court shall appoint a temporary guardian for a ward or primary respondent, if the court makes findings that:"

62-5-312(G) should read, “on two days’ notice to the party who obtained the emergency order appointing a temporary guardian, or upon shorter notice to that party as the court may prescribe, the primary respondent, ward, or any party opposed to the order may appear and move its dissolution or modification, and in that event, the court shall proceed to hearing and determine the motion within forty eight (48) hours of filing.”

62-5-402(2) should read, “Upon the filing of a summons and petition for appointment of a conservator or other protective order based upon minority, the summons and the petition shall be served upon the minor, the minor’s living parents whose identity and whereabouts are known or reasonably ascertainable, and the person or persons having custody of the minor. After the time has elapsed for the filing of a response to the petition as to all parties served, the court shall within thirty (30) days conduct a hearing on the matters alleged in the petition.”

62-5-403(A)(1) should read, “the court determines, by clear and convincing evidence, the person is incapacitated or is unable to manage his property or affairs effectively for reasons of confinement, detention by a foreign power, or disappearance; and”

62-5-403(C)(5) should read, “a general statement of the primary respondent’s personal assets with an estimate of its fair market value and the source and amount of any income, insurance, pension, or allowance to which the primary respondent is entitled.”

62-5-403(E)(2) should read, “This subsection shall not be construed to require an attorney to accept an uncompensated appointment. During the pendency of any protective proceeding, any attorney purporting to represent the primary respondent shall file a notice of appearance with the court. Attorney’s fees for counsel appointed under this section shall be subject to approval by the court after notice and hearing to all persons interested in the primary respondent or who has any interest in any of the primary respondent’s assets. All fees for conservatorship proceedings shall be limited to five (5) percent of the primary respondent’s yearly income. No fees shall be paid if the funds are needed for the care, welfare, maintenance, and support of the primary respondent or his dependents. No compensation shall be allowed from the corpus of the protected person’s estate. The court shall make specific findings of fact that the fees incurred by the attorney are reasonable, necessary, in good faith, and in the best interest of the primary respondent.”

62-5-403(F) should read, “Except in cases governed by Section 62-5-431, relating to veterans’ benefits, upon the filing of the summons and petition with the court in which the petition alleges the primary respondent is incapacitated and proof of service of the summons and petition upon the primary respondent, the court shall appoint two examiners, who shall be physicians, to examine the primary respondent and report to the court the physical and mental condition of the primary respondent. Upon the motion or written request of the guardian ad litem, the primary respondent, any party or on its own motion, the court shall appoint one or more additional examiners, who may be a physician or any other person the court determines qualified to evaluate the primary respondent’s alleged impairment. When the court appoints an additional examiner, the court shall set out in the order appointing the examiner

why an additional examiner is necessary and why the appointed examiner is appropriate to serve in that capacity. Each examiner shall complete a verified report evaluating the condition of the primary respondent and file his original report with the court or deliver the original report to the guardian ad litem, who without undue delay shall file the report with the court by the deadline set by the court, but not less than forty-eight hours prior to any hearing in which the report will be introduced as evidence. All parties to the proceeding are entitled to copies of examiners' reports. An examiner's report shall evaluate the condition of the primary respondent and shall contain, to the best information and belief of the examiner:"

62-5-403(G) should read, "Thirty (30) days after the time for filing a response to the petition has elapsed as to all parties served, the court must conduct a hearing on the merits of the petition. The primary respondent, all parties, and any person who has filed a demand for notice pursuant to subsection (H), must be given notice of the hearing as provided in Section 62-1-401. The primary respondent shall attend the hearing unless excused by the court upon written documentation from a physician that attending the hearing would result in harm to the primary respondent."

62-5-403(H)(1) should read, "Within 30 days of hearing, or with the consent of all parties, upon the finding that a basis for the appointment of a conservator or other protective order has been established as set forth in this section, the court shall make and file an order of appointment or other protective order."

62-5-405(D) should read, "The following powers may be authorized by the court after hearing and with the consent of all necessary parties and parties with a property interest in the primary respondent's assets:"

62-5-405(E) should read, "In exercising or approving a conservator's or special conservator's exercise of the powers set forth in subsection (D) above, the court shall, to the extent ascertainable, give primary weight to what the primary respondent would do under the circumstances if the primary respondent was capable of acting independently. The court shall also consider:"

62-5-405(E)(2) should read, "possible reduction of taxes, including, but not limited to, income, estate, and gift taxes."

62-5-405(F) should read, "In exercising or approving a conservator's or special conservator's exercise of the powers set forth in subsection (D), the court shall set forth in the court's record specific findings of fact upon which the court bases its ruling including that the conservator's actions were reasonable, necessary, in good faith, based upon the known wishes of the primary respondent, and in the best interest of the primary respondent."

62-5-408(1)(i) should read, "a person nominated by a health care facility caring for the primary respondent. A person whose priority is based upon the status under items (a), (c), (d), (e), (f), or (g), may nominate in writing a person to serve in his stead. With respect to persons having equal priority, the court shall select the person it considers best qualified to serve as conservator for the primary

respondent and in the best interest of the primary respondent. The court, acting in the best interest of the primary respondent or upon the known wishes of the primary respondent, may decline to appoint a person having higher priority and appoint a person having lesser priority. The court shall make specific findings of fact as to the reasons for appointing of one with lesser priority."

62-5-409 should read, "The court must require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the conservator according to law and must approve all sureties. The person qualifying for bond shall file a statement under oath with the court indicating the fair market value of the personal estate of the protected person and the earned and unearned income expected from the personal estate during the next calendar year. The court shall determine that the bond is duly executed by a corporate surety, or one or more individual sureties who performance is secured by pledge of personal property, mortgage on real property, or other adequate security. The court may authorize an unrestricted or unbounded account to be used by the conservator for expenses on behalf of the protected person, and all activity in the account shall be reported by the conservator as required by the court. Upon application of the conservator or another interested person, or upon the court's own motion, the court may (a) order the creation, change, or termination of an account, (b) increase or reduce the amount of the bond, (c) release sureties, (d) dispense with security or securities, or (e) permit the substitution of another bond with the same or different sureties."

62-5-411 should read, "By accepting appointment, a conservator submits personally to the jurisdiction of the court in any informal or formal proceeding relating to the conservatorship estate. Notice of any proceeding shall be delivered to the conservator by first class mail."

62-5-412 should read, "Any guardian ad litem, attorney, examiner, conservator, or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the protected person's personal estate not to exceed a total of five (5) percent of the protected person's income for all compensation and only if the protected person's funds are not needed to meet the needs for the health, welfare, care, and maintenance of the protected person or the protected person's dependents. The court must make specific findings of fact that the compensation sought was reasonable, necessary, in good faith, and in the best interest of the protected person. No compensation shall be allowed from the corpus of the protected person's estate."

62-5-413 should read, "The court shall remove a conservator for good cause or accept the resignation of a conservator. After the death, resignation, or removal of a conservator, the court shall, if necessary appoint a successor conservator who succeeds to the title and powers of his predecessor. The removal of a conservator or the discharge of a conservator based upon resignation and, if necessary, the appointment of a successor conservator, shall be in accordance with the procedure set forth in Section 62-5-428."

62-5-414(C) should read, "The court shall order a conservator to file a plan for protecting, managing, expending, and distributing the assets of the protected person's personal estate. The plan shall be approved, disapproved, or modified by the court, in informal or formal proceedings after notice to all

parties with a property interest that may be affected by the plan. The plan must be based on the actual reasonable needs of the protected person and the best interests of the protected person. The plan must be updated, modified, and revised as the needs and circumstanced of the protected person requires. The conservator shall include in the plan: (1) a statement of the extent to which the protected person may be able to develop or recover the ability to manage the person's property and any planned steps to develop or restore the person's ability; (2) an estimate of the duration of the conservatorship, and (3) projections of all expenses and all resources available during the conservatorship."

62-5-414(D) should read, "In investing an estate, selecting assets of the estate for distribution, and invoking powers of revocation or withdrawal available for the use and benefit of the protected person and exercisable by the conservator, a conservator shall take into account the estate plan of the protected person and shall examine the will and any other donative, nominative, or other appointive instrument of the protected person. The conservator shall follow the intent of the protected person as evidenced by his non testamentary transfers and contracts."

62-5-415 should read, "Within thirty (30) days after appointment, every conservator shall prepare and file with the appointing court a complete inventory of the estate of the protected person together with the conservator's oath or affirmation that it is complete and accurate to the best of the conservator's knowledge, information, and belief. The conservator shall provide a copy of the inventory to the protected person's guardian and all parties with an interest in the protected person or his assets. The conservator shall keep suitable records and make them available upon demand to any interested person."

62-5-416(C)(1) should read, "The conservator shall provide a copy of the report to the protected person if he can be located, has attained the age of fourteen years, and has sufficient mental capacity to understand the report, and to any parent or guardian with whom the protected person resides. The conservator shall also provide a copy to all interested parties of the protected person and to all parties with a property interest in the protected person's personal assets."

62-5-419 should read, "Any sale or encumbrance to a conservator, his spouse, agent, or attorney, or any corporation, trust, or other entity in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest by the conservator is void unless the transaction is approved by the court in a proceeding in accordance with the procedure set forth in Section 62-5-428 and after notice and an opportunity to be heard to all persons with a property interest in the protected person's property."

62-5-420 should read, "A person who in good faith either assists a conservator or deals with him for value in any transaction, other than those requiring a court order or approve as required in this part, is protected as if the conservator properly exercised the power. The fact that a person knowingly deals with a conservator requires that person to inquire into the existence of a power or the propriety of its exercise, except that restrictions on powers of conservators which are endorsed on letters as provided in Section 62-5-424 are effective as to third persons. A person is bound to see to the proper application

of estate assets paid or delivered to a conservator. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries."

62-5-422(A)(2) should read, "collect, hold, and retain assets of the estate including land in another state, until, in his judgment, disposition of the assets should be made,"

62-5-422(A)(4) should read, "deposit estate funds in a financial institution,"

62-5-422(A)(5) should be deleted.

62-5-422(A)(11) should read, "insure the assets of the estate against damage or loss,"

62-5-422(A)(13) should be deleted.

62-5-422(A)(17) should be deleted.

62-5-422(A)(18)(a) and (b) should be deleted.

62-5-422(A)(19) should read, "prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of estate assets,"

62-5-422(B) should read, "A conservator may file an application with the court requesting specific authority. The court shall make specific findings of fact that the conservator's actions are reasonable, necessary, in good faith, and in the best interest of the protected person."

62-5-422(B)(2) should be deleted.

62-5-422(B)(6) should be deleted.

62-5-422(B)(10)(a) should be deleted.

62-5-422(B)(10)(b) should be deleted.

62-5-422(C)(1) should read, "The court may approve or deny any application for approval filed by the conservator under item (3) only with notice to all interested parties who may have an actual or potential property interest in the protected person's estate."

62-5-422(C)(2) should read, "A conservator shall apply to the court for ratification of any action taken in good faith that was necessary and reasonable under the circumstances. The court may approve or deny the application only with notice to all interested parties who may have an actual or potential property interest in the protected person's estate."

62-5-422(C)(3) should read, " A conservator shall request instructions concerning the conservator's fiduciary responsibility and shall make requests for expenditures of funds for the protected person by filing an application with the court, or by commencing a formal proceeding in accordance with Section

62-5-428. If application is made, the court may approve or deny the application only with notice to all interested parties who may have an actual or potential property interest in the protected person's estate."

62-5-423(C)(2) should read, "protective proceeding or other petitions with regard to the protected person is pending." ("A protected person under the age of eighteen who is married shall remain a minor for purposes of this subsection until the person attains the age of the age of majority or emancipation" should be deleted. If a person is married, they are considered emancipated.)

62-5-103(F)(1) should read, "If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the deceased protected person which may have come into the conservator's possession, inform the personal representative and all beneficiaries named in the will of the delivery, and retain the estate for delivery to a duly appointed personal representative of the deceased protected person or other persons entitled thereto. The conservator shall deliver the estate of the deceased protected person to his duly appointed personal representative or other persons entitled thereto under the law."

62-5-425 should read, "In investing the estate, and in selecting assets of the estate for distribution, in utilizing powers of revocation or withdrawal available for the support of the protected person, and exercisable by the conservator or the court, the conservator and the court shall take into account any estate plan of the protected person, any revocable trust of which the protected person is settler, and any contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his death to another or others which the protected person may have originated. Neither the court nor a conservator shall change the non testamentary transfers or contracts made by the protected person prior to his incapacity."

62-5-426 should read, "If a creditor has notice of appointment of a conservator, all pleadings must be served upon the conservator. Within thirty days after the conservator becomes aware of a proceeding in which the protected person is a party, the conservator must notify the court. The conservator must request instructions from the court as necessary."

62-5-428(1)(B)(iv) should read, "Thirty (30) days after the time for filing a response to the petition has elapsed as to all parties served, the court must hold a hearing on the merits of the petition. The protected person and all parties must be given notice of the hearing as provided in Section 62-1-401. Nothing in this section prohibits all parties not in default from waiving a hearing on a petition and the court for good cause may entertain a consent order on any petition."

62-5-428(2) should read, "Upon the death of the protected person, the conservator or the personal representative of the deceased protected person's estate shall make application for the termination of the conservatorship and approval of the final accounting of the administration of the conservatorship estate. Notice must be given to all interested parties."

62-5-428(3) should read, “Upon the death of the protected person, the conservator shall make application for the approval of payment of funeral expenses. Notice must be given to all interested parties.”

62-5-429(B) should read, “The person to whom the affidavit is presented shall inquire as to whether any protective proceedings are pending in this State. The person is not discharged as the debtor or possessor until the estate has received proper payment.”

62-5-435 should read, “A person who completed the settlement of a minor’s claims but did not seek court approval during this time period is liable for approving or completing the settlement.”

62-5-501: (A)(2) should read, “Provide in the instrument the principal’s intent that the authority conferred is exercisable notwithstanding the incapacity of the principal, using the words ‘This power of attorney is not affected by the incapacity of the principal which renders the principal incapable of managing his own estate’ or the words ‘This power of attorney becomes effective upon the incapacity of the principal.’”

62-5-502(D) should read, “A durable power of attorney shall be recorded in the same manner as a deed in the county where the principal resides at the time the instrument is recorded. Subject to subsection (E), an instrument that meets the requirements set forth in subsection (A) above is effective notwithstanding the incapacity of the principal.”

62-5-502(E) should read, “An instrument meeting the requirements set forth in subsection (A) above must be recorded to provide notice to third parties presented with it, except that the recording is not necessary if the instrument is a Health Care Power of Attorney pursuant to Section 62-5-524.”

62-5-502(F) should be deleted. A durable power of attorney should always be recorded to be effective.

62-5-502(D) should read, “All acts done by the agent pursuant to a durable power of attorney during a period of the principal’s incapacity or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees, legatees, and personal representative, who have received notice and a chance to be heard, as if the principal were alive and not incapacitated.”

62-5-507 should read, “Except as otherwise provided in the durable power of attorney, a person accepts appointment as an agent under a durable power of attorney by exercising authority, performing duties as an agent, by any other assertion or conduct indicating acceptance, or by recordation of the power of attorney by the agent.”

62-5-508(B) should read, “Unless the durable power of attorney provides a different method for an agent’s removal by the principal, the principal may remove an agent by giving written notice or oral notice later confirmed in writing to the agent.”

62-5-508(C) should read, “The agent’s written notice of resignation and the principal’s written notice of removal must be recorded in the same manner as a deed in the county where the durable power of attorney was recorded. If the durable power of attorney was not recorded, the agent’s written notice of resignation and the principal’s notice of removal shall be recorded in the same manner as a deed in the county where the principal resides at the time of resignation or removal.”

62-5-509(B)(1) should read, “act in accordance with the principal’s expectations to the extent actually known by the agent and, otherwise, in the principal’s best interest.”

62-5-509(B)(5) should read, “keep a record of all receipts, disbursements, and transactions made on behalf of the principal and account to the principal or any interested party upon demand of the principal or the interested party.”

62-5-509(B)(6) should read, “cooperate with a person that has authority to make health-care decisions for the principal, to carry out the principal’s expectations to the extent actually known by the agent, and, otherwise, act in the principal’s best interest, and”

62-5-509(B)(7) should read, “preserve the principal’s estate plan, to the extent actually known by the agent, while also acting in the principal’s best interest based on all relevant factors including:”

62-5-509(B)(7)(c) should read, “minimization of taxes, including income, estate, generation-skipping transfer, and gift taxes; and”

62-5-509(C) should be deleted.

62-5-509(D) should be deleted.

62-5-510(D)(1) should be deleted.

62-5-510(D)(2) should be deleted.

62-5-510(D)(3) should be deleted.

62-5-510(D)(5) should be deleted.

62-5-510(E) should read, “Notwithstanding a grant of authority to do an act described in subsection (D), unless the durable power of attorney otherwise expressly provides, an agent may not exercise authority under a durable power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal’s property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.”

62-5-512(6) should be deleted.

62-5-513(8) and (9) should be deleted.

62-5-515(A) should read, “The death of any principal who has executed a durable power of attorney in writing does not revoke or terminate the agency as to the agent, or other person who, without actual knowledge of the death, of the principal, acts in good faith under the durable power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his heirs, devisees, and personal representatives who have received notice and have had a right to be heard.”

62-5-516(A)(1) should read, “A ‘third person’ means an individual, corporation, organization, or other legal entity.”

62-5-516(B)(1) should read, “the instrument contains the following provision; ‘No person who may act in reliance upon the representations of my agent for the scope of authority granted to the agent shall incur any liability as to me or to my estate as a result of permitting the agent to exercise this authority’ and”

62-5-516(B)(2) should read, “the agent signs and presents to the third person a written certificate as provided in Section 62-5-517; and”

62-5-516(C) should read, “Before honoring a durable power of attorney, a third person shall require that;”

62-5-516(D) should read, “Unless the third person actually has received written notice of the revocation or termination of a durable power of attorney, a third person that honors a durable of attorney in good faith and using ordinary care;”

62-5-517 should be a mandatory form.

62-5-519(A) should read, “unless the durable power of attorney otherwise provides, an agent acting in good faith and using ordinary care is entitled to reimbursement of reasonable and necessary expenses incurred while acting in the best interest of the principal and upon the principal’s known wishes. The agent is entitled to compensation that is reasonable under the circumstances not to exceed five (5) percent of the principal’s yearly gross income. No fees shall be paid unless the principal’s estate is sufficient to provide for the health, welfare, care, and maintenance of the principal’s needs and dependents. No compensation shall be allowed from the corpus of the principal’s estate. The court shall make specific findings of fact that the fees incurred by the attorney are reasonable, necessary, in good faith, and in the best interest of the principal. If two or more attorneys-in-fact are serving together, the compensation paid must be divided by them in a manner as they agree or as determined by a court of competent jurisdiction if they fail to agree. The compensation shall not exceed the compensation allowed for one agent.”

62-5-519(B) should read, “An interested person as defined in Section 62-5-520 may petition a court of competent jurisdiction to review the propriety and reasonableness of payment for reimbursement or compensation to the agent, or any other act of the agent. An agent who has received excessive payment shall be ordered to make appropriate refunds to the principal.”

62-5-521 should read, “The probate court has concurrent jurisdiction with the circuit court of this State over all subject matter related to the creation, exercise, and termination of durable powers of attorney.”

62-5-524(F)(1) should read, “The agent is not entitled to compensation for services performed under the health care power of attorney, but the agent is entitled to reimbursement for all reasonable and necessary expenses incurred in good faith and for the benefit of the principal and incurred as a result of carrying out the health care power of attorney or the authority granted by this section.”

62-5-524(F)(2) should read, “The agent’s consent to health care or to the provision of services to the principal does not cause the agent to be liable for the costs of the care or services unless the agent fails to properly identify his agency of the principal to the health care provider.”

62-5-524(J)(1) should read, “A person who relies upon a person’s representation that he is the person named as agent in the health care power of attorney must inquire and document that the agent has the authority to act. The person may be subject to civil or criminal liability for recognizing the agent’s authority after due inquiry if the agent does not have the authority to act.”

The power of attorney statutory form should be added to the code. It can be found at page 61 at http://www.uniformlaws.org/shared/docs/power%20of%20attorney/upoaa_final_may08.pdf

The subcommittee should consider incorporation of more of the Uniform Power of Attorney Act.

62-5-810 should read, “The court has discretion in determining who will be appointed as a guardian ad litem in each case, subject to the requirements set for the in Section 62-5-820, and shall issue an order of appointment after obtaining the consent of the proposed guardian ad litem and the consent of the primary respondent or a person representing the interests of the primary respondent.”

62-5-830(1)(B)(vi) should read, “visiting the residence of the primary respondent;”

62-5-830(1)(G) should read, “presenting to the court and all parties clear and comprehensive written reports including, but not limited to, a final written report regarding the best interest of the primary respondent. The written report must be submitted to the court and all parties by the deadline set by the court, but at least forty-eight hours prior to the hearing. The guardian ad litem is subject to cross-examination on the facts and conclusions contained in the report.”

62-5-840(1) should read, “At the time of appointment of a guardian ad litem, the court must set forth the rate of compensation for the guardian ad litem based on the factors set forth in subsection (2). The court shall set an overall maximum fee or an hourly rate of compensation not to exceed five (5) percent of the yearly gross income of the primary respondent. All costs for a guardian, guardian ad litem, attorney-in-fact, and conservator shall not in total exceed five (5) percent of the yearly gross income of the primary respondent. If the guardian ad litem determines that it is necessary to exceed the fee initially authorized by the judge, the guardian ad litem shall move the court for additional compensation after notice to all interested parties. The court shall not award any fees if there are insufficient funds to

provide for the health, welfare, care, and maintenance of the primary respondent or his dependents. The court shall instead seek the services of a guardian ad litem pro bono.

62-5-840(2) should read, “A guardian ad litem appointed by the court is entitled reasonable compensation for reasonable and necessary acts on behalf of the primary respondent, subject to the review and approval of the court. A guardian ad litem is entitled reimbursement for reasonable and necessary expenses, subject to the review and approval of the court.”

62-5-840(3) should read, “The guardian ad litem must submit an itemized billing statement of hours, expenses, costs, and fees to the court.”

62-5-840(4) should read, “At any time during the action, any interested party may petition the court to review the reasonableness and necessity of the fees and costs submitted by the guardian ad litem. A guardian ad litem who has been paid excessive fees shall reimburse the primary respondent’s estate and be liable for attorney fees for bringing the action.”

62-5-860(1) should read, “A guardian ad litem may resign or shall be removed from a case at the discretion of the court or upon request of any interested party.”

62-5-870 should read, “A guardian ad litem appointed under this part and acting in the course and scope of the appointment is not liable for damages arising from an act or omission of the guardian ad litem committed in good faith and with ordinary care. The immunity granted by this section does not apply if the conduct constitutes negligence.”