

MAINE STATE LEGISLATURE

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115th MAINE LEGISLATURE

FIRST REGULAR SESSION-1991

Legislative Document

No. 1857

H.P. 1287

House of Representatives, May 14, 1991

Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script that reads "Ed Pert".

EDWIN H. PERT, Clerk

Presented by Representative MARSANO of Belfast.

Cosponsored by Senator GAUVREAU of Androscoggin, Representative PFEIFFER of Brunswick and Representative OTT of York.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND NINETY-ONE

An Act Concerning Authorization to Consent to Powers of Attorney.

Be it enacted by the People of the State of Maine as follows:

2
4 Sec. 1. 18-A MRSA §5-209, as enacted by PL 1979, c. 540, §1,
is amended to read:

6 §5-209. Powers and duties of guardian of minor

8 A guardian of a minor has the powers and responsibilities of
10 a parent who has not been deprived of custody of ~~his~~ the minor
12 and unemancipated child, except that a guardian is not legally
14 obligated to provide from ~~his~~ the guardian's own funds for the
ward and is not liable to 3rd persons by reason of the parental
relationship for acts of the ward. In particular, and without
qualifying the foregoing, a guardian has the following powers and
duties:

16 (a) ~~He~~ The guardian must take reasonable care of ~~his~~ the
18 ward's personal effects and commence protective proceedings if
20 necessary to protect other property of the ward.

22 (b) ~~He~~ The guardian may receive money payable for the
support of the ward to the ward's parent, guardian or custodian
24 under the terms of any statutory benefit or insurance system, or
any private contract, devise, trust, conservatorship or
26 custodianship. ~~He~~ The guardian also may receive money or
property of the ward paid or delivered by virtue of section
28 5-103. Any sums so received shall must be applied to the ward's
current needs for support, care and education. ~~He~~ The guardian
30 must exercise due care to conserve any excess for the ward's
future needs unless a conservator has been appointed for the
32 estate of the ward, in which case excess shall must be paid over
at least annually to the conservator. Sums so received by the
34 guardian are not to be used for compensation for ~~his~~ the
guardian's services except as approved by order of court or as
36 determined by a duly appointed conservator other than the
guardian. A guardian may institute proceedings to compel the
38 performance by any person of a duty to support the ward or to pay
sums for the welfare of the ward.

40 (c) The guardian is empowered to facilitate the ward's
education, social, or other activities and to ~~authorize~~ give or
42 withhold consents or approvals relating to medical, health or
other professional care, counsel, treatment or service for the
44 ward, or advice including life-sustaining treatment when the ward
is in a terminal condition as those terms are defined in section
46 5-701 with respect to qualified patients. Artificially
48 administered nutrition and hydration can not be withheld or
withdrawn by the guardian without the prior approval of the
court. A guardian is not liable by reason of ~~this~~ such giving or
50 withholding of consent for injury to the ward resulting from the
negligence or acts of 3rd persons unless it would have been
52 illegal for a parent to have ~~consented~~ so given or withheld

2 consent. A guardian may consent to the marriage or adoption of
his the ward.

4 (d) A guardian must report the condition of his the ward
and of the ward's estate which has been subject to his the
6 guardian's possession or control, as ordered by court on petition
of any person interested in the minor's welfare or as required by
8 court rule.

10 MAINE COMMENT*

12 Subsection (c) has been revised to make it clear that a
guardian is authorized either to give or to withhold consent in
14 connection with health care decisions, and that this authority
extends to decisions about life-sustaining treatment when the
16 ward is in a terminal condition as defined in section 5-701.
However, this section does not empower the guardian to approve or
18 consent to the withdrawal or withholding of artificially
administered nutrition and hydration without the prior approval
20 of the court.

22 **Sec. 2. 18-A MRSA §5-312, sub-§(a), ¶(3),** as enacted by PL 1979,
c. 540, §1, is amended to read:

24 (3) A guardian may give any or withhold consents or
26 approvals ~~that may be necessary to enable the ward to~~
~~receive~~ relating to medical or other professional care,
28 counsel, treatment or service for the ward, including
life-sustaining treatment as defined in section 5-701 with
30 respect to qualified patients. Artificially administered
nutrition and hydration can not be withheld by the guardian
32 pursuant to this section without the prior approval of the
court.

34 MAINE COMMENT*

36 Subsection (a), paragraph (3) has been revised to make it
38 clear that a guardian is authorized either to give or to withhold
consent in connection with health care decisions, and that this
40 authority extends to decisions about life-sustaining treatment
when the ward is in a terminal condition as defined in section
42 5-701. However, this section does not empower the guardian to
approve or consent to the withdrawal or withholding of
44 artificially administered nutrition and hydration without the
prior approval of the court. Court approval would not be
46 required in circumstances where the ward had executed a valid
declaration under section 5-702 authorizing the withholding or
48 withdrawal of artificially administered nutrition and hydration.

50 **Sec. 3. 18-A MRSA art. V, Pt. 5,** as amended, is repealed and the
following enacted in its place:

PART 5

DURABLE POWER OF ATTORNEY

Commissioners' Prefatory Note

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8 The National Conference included Sections 5-501 and 5-502 in
10 Uniform Probate Code (1969) (1975) concerning powers of attorney
12 to assist persons interested in establishing noncourt regimes for
14 the management of their affairs in the event of later
16 incompetency or disability. The purpose was to recognize a form
of senility insurance comparable to that available to relatively
wealthy persons who use funded, revocable trusts for persons who
are unwilling or unable to transfer assets as required to
establish a trust.

18 The provisions included in the original UPC modify two
20 principles that have controlled written powers of attorney.
22 Section 5-501 (UPC (1969) (1975)), creating what has come to be
24 known as a "durable power of attorney," permits a principal to
26 create an agency in another that continues in spite of the
principal's later loss of capacity to contract. The only
requirement is that an instrument creating a durable power
contain language showing that the principal intends the agency to
remain effective in spite of his later incompetency.

28 Section 5-502 (UPC (1969) (1975)) alters the common law rule
30 that a principal's death ends the authority of his agents and
32 voids all acts occurring thereafter including any done in
34 complete ignorance of the death. The new view, applicable to
36 durable and nondurable, written powers of attorney, validates
38 post-mortem exercise of authority by agents who act in good faith
and without actual knowledge of the principal's death. The idea
here was to encourage use of powers of attorney by removing a
potential trap for agents in fact and third persons who decide to
rely on a power at a time when they can not be certain that the
principal is then alive.

40 To the knowledge of the Joint Editorial Board for the
42 Uniform Probate Code, the only statutes resembling the power of
44 attorney sections of the UPC (1969) (1975) that had been enacted
46 prior to the approval and promulgation of the Code were Sections
11-9.1 and 11-9.2 of Code of Virginia [1950]. Since then, a
variety of UPC inspired statutes adjusting agency rules have been
enacted in more than thirty states.

48 This [Act] [Section] originated in 1977 with a suggestion
50 from within the National Conference that a new free-standing
uniform act, designed to make powers of attorney more useful,
would be welcome in many states. For states that have yet to

2 adopt durable power legislation, this new National Conference
product represents a respected, collective judgment, identifying
4 the best of the ideas reflected in the recent flurry of new state
laws on the subject; additional enactments of a new and improved
6 uniform act should result. For other states that have acted
already, this new act offers a reason to consider amendments,
8 including elimination of restrictions that no longer appear
necessary.

10 In the course of preparing this [Act] [Section], the Joint
Editorial Board for the Uniform Probate Code, acting as a Special
12 Committee on the new project, evolved what it considers to be
improvements in §§5-501 and 5-502 of the 1969 and 1975 versions
14 of the Code. In the main, the changes reflect stylistic
matters. However, the idea reflected in Section 3(a) - that
16 draftsmen of powers of attorney may wish to anticipate the
appointment of a conservator or guardian for the principal - is
18 new, and a brief explanation is in order.

20 When the Code was originally drafted, the dominant idea was
that durable powers would be used as alternatives to
22 court-oriented, protective procedures. Hence, the draftsmen
merely provided that appointment of a conservator for a principal
24 who had granted a durable power to another did not automatically
revoke the agency; rather, it would be up to the court's
26 appointee to determine whether revocation was appropriate. The
provision was designed to discourage the institution of court
28 proceedings by persons interested solely in ending an agent's
authority. It later appeared sensible to adjust the durable
30 power concept so that it may be used either as an alternative to
a protective procedure, or as a designed supplement enabling
32 nomination of the principal's choice for guardian to an
appointing court and continuing to authorize efficient estate
34 management under the direction of a court appointee.

36 The sponsoring committee considered and rejected the
suggestion that the word "durable" be omitted from the title.
38 While it is true that the act describes "durable" and
"nondurable" powers of attorney, this is merely the result of use
40 of language to accomplish a purpose of making both categories of
power more reliable for use than formerly. In the case of
42 nondurable powers, the act extends validity by the provisions in
Section 5-504 protecting agents-in-fact and third persons who
44 rely in good faith on a power of attorney when, unknown to them,
the principal is incompetent or deceased. The general purpose of
46 the act is to alter common law rules that created traps for the
unwary by voiding powers on the principal's incompetency or
48 death. The Act does not purport to deal with other aspects of
powers of attorney, and a label that would result from dropping
50 "durable" would be misleading to the extent that it suggested
otherwise.

52

Maine Prefatory Note

Throughout this Part, the Uniform Act's provisions were revised so that references to the principal are gender-neutral.

§5-501. Definition

(a) A durable power of attorney is a power of attorney by which a principal designates another as the principal's attorney-in-fact in writing and the writing contains the words "This power of attorney is not affected by subsequent disability or incapacity of the principal or lapse of time" or "This power of attorney becomes effective upon the disability or incapacity of the principal" or similar words showing the intent of the principal that the authority conferred is exercisable notwithstanding the principal's subsequent disability or incapacity, and unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument.

UNIFORM ACT COMMENT*

This section, derived from the first sentence of UPC §5-501 (1969) (1975), is a definitional section that supports use of the term "durable power of attorney" in the sections that follow. The second quoted expression was designed to emphasize that a durable power with postponed effectiveness is permitted. Some UPC critics have been bothered by the reference here to a later condition of "disability or incapacity," a circumstance that may be difficult to ascertain if it can be established without a court order. The answer, of course, is that draftsmen of durable powers are not limited in their choice of words to describe the later time when the principal wishes the authority of the agent-in-fact to become operative. For example, a durable power might be framed to confer authority commencing when two or more named persons, possibly including the principal's lawyer, physician or spouse, concur that the principal has become incapable of managing the principal's affairs in a sensible and efficient manner and deliver a signed statement to that effect to the attorney-in-fact.

In this and following sections, it is assumed that the principal is competent when the power of attorney is signed. If this is not the case, nothing in this Act is intended to alter the result that would be reached under general principles of law.

§5-502. Durable power of attorney not affected by disability or incapacity

All acts done by an attorney-in-fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of

2 and bind the principal and the principal's successors in interest
3 as if the principal were competent and not disabled.

4 **UNIFORM ACT COMMENT***

6 This section is derived from the second sentence of UPC
7 §5-501 (1969) (1975) modified by deleting reference to the effect
8 on a durable power of the principal's death, a matter that is now
9 covered in Section 5-504 which provides a single standard for
10 durable and nondurable powers.

12 The words "any period of disability or incapacity of the
13 principal" are intended to include periods during which the
14 principal is legally incompetent, but are not intended to be
15 limited to such periods. In the Uniform Probate Code, the word
16 "disability" is defined, and the term "incapacitated person" is
17 defined. In the context of this section, however, the important
18 point is that the terms embrace "legal incompetence," as well as
19 less grievous disadvantages.

20 **§5-503. Relation of attorney-in-fact to court-appointed fiduciary**

22 (a) If, following execution of a durable power of attorney,
23 a court of the principal's domicile appoints a conservator,
24 guardian of the estate or other fiduciary charged with the
25 management of all of the principal's property or all of the
26 principal's property except specified exclusions, the
27 attorney-in-fact is accountable to the fiduciary as well as to
28 the principal. The fiduciary has the same power to revoke or
29 amend the power of attorney that the principal would have had if
30 the principal were not disabled or incapacitated; provided,
31 however, that a durable power of attorney for health care may be
32 revoked or amended only with the prior approval of the court upon
33 petition by any interested person.

36 (b) A principal may nominate, by a durable power of
37 attorney, the conservator, guardian of the principal's estate or
38 guardian of the principal's person for consideration by the court
39 if protective proceedings for the principal's person or estate
40 are commenced. The court shall make its appointment in
41 accordance with the principal's most recent nomination in a
42 durable power of attorney except for good cause or
43 disqualification.

44 **UNIFORM ACT COMMENT***

46 Subsection (a) closely resembles the last two sentences of
47 UPC §5-501 (1969) (1975); most of the changes are stylistic. One
48 change going beyond style states that an agent-in-fact is
49 accountable both to the principal and a conservator or guardian
50 if a court has appointed a fiduciary; the earlier version
51 described accountability only to the fiduciary.

2 As explained in the introductory comment, the purpose of
3 subsection (b) is to emphasize that agencies under durable powers
4 and guardians or conservators may coexist. It is not the purpose
5 of the act to encourage resort to court for a fiduciary
6 appointment that should be largely unnecessary when an
7 alternative regime has been provided via a durable power.
8 Indeed, the best reason for permitting a principal to use a
9 durable power to express the principal's preference regarding any
10 future court appointee charged with the care and protection of
11 the principal's person or estate may be to secure the authority
12 of the attorney-in-fact against upset by arranging matters so
13 that the likely appointee in any future protective proceedings
14 will be the attorney-in-fact or another equally congenial to the
15 principal and the principal's plans. However, the evolution of a
16 free-standing durable power act increases the prospects that
17 UPC-type statutes covering protective proceedings will not apply
18 when a protective proceeding is commenced for one who has created
19 a durable power. This means that a court receiving a petition
20 for a guardian or conservator may not be governed by standards
21 like those in UPC §5-304 (personal guardians) and §5-401(2) and
22 related sections that are designed to deter unnecessary
23 protective proceedings. Finally, attorneys and others may find
24 various good uses for a regime in which a conservator directs
25 exercise of an agent's authority under a durable power. For
26 example, the combination would confer jurisdiction on the court
27 handling the protective proceeding to approve or ratify a
28 desirable transaction that might not be possible without the
29 protection of a court order. The alternative of a declaratory
30 judgment proceeding might be difficult or impossible in some
31 states.

32 It is to be noted that the "fiduciary" described in
33 subsection (a), to whom an attorney-in-fact under a durable power
34 is accountable and who may revoke or amend the durable power,
35 does not include a guardian of the person only. In subsection
36 (b), however, the authority of a principal to nominate extends to
37 a guardian of the person as well as to conservators and guardians
38 of estates.

39 Discussion of this section in NCCUSL's Committee of the
40 Whole involved the question of whether an agent's accountability,
41 as described here, might be effectively countermanded by
42 appropriate language in a power of attorney. The response was
43 negative. The reference is to basic accountability like that
44 owed by every fiduciary to his beneficiary and that distinguishes
45 a fiduciary relationship from those involving gifts or general
46 powers of appointment. The section is not intended to describe a
47 particular form of accounting. Hence, the context differs from
48 those involving statutory duties to account in court, or with
49 specified frequency, where draftsmen of controlling instruments

2 may be able to excuse statutory details relating to accountings
without affecting the general principle of accountability.

4 **MAINE COMMENT***

6 The last clause to subsection (a) was added to the Uniform
Act version to specify that a durable power of attorney for
8 health care may not be revoked by a fiduciary without prior court
approval, consistent with former Maine section 5-501 (1985).

10 **§5-504. Power of attorney not revoked until notice**

12
14 (a) The death of a principal who has executed a written
power of attorney, durable or otherwise, does not revoke or
terminate the agency as to the attorney-in-fact or other person
who, without actual knowledge of the death of the principal, acts
in good faith under the power. Any action so taken, unless
otherwise invalid or unenforceable, binds successors in interest
of the principal.

20
22 (b) The disability or incapacity of a principal who has
previously executed a written power of attorney that is not a
durable power does not revoke or terminate the agency as to the
attorney-in-fact or other person who, without actual knowledge of
the disability or incapacity of the principal, acts in good faith
under the power. Any action so taken, unless otherwise invalid
or unenforceable, binds the principal and the principal's
successors in interest.

30 **UNIFORM ACT COMMENT***

32 UPC §§5-501 and 5-502 (1969) (1975) are flawed by different
standards for durable and nondurable powers vis a vis the
34 protection of an attorney-in-fact who purports to exercise a
power after the principal has died. Section 5-501 (1969) (1975),
36 applicable only to durable powers, expresses a most
unsatisfactory standard; i.e. the attorney-in-fact is protected
38 if the exercise occurs "during any period of uncertainty as to
whether the principal is dead or alive ..." Section 5-502 (1969)
40 (1975), applicable only to nondurable powers, protects the agent
who "without actual knowledge of the death ... of the principal,
42 acts in good faith under the power of attorney ..." Section
5-504, subsection (a) expresses as a single test the standard now
44 contained in §5-502 (1969) (1975).

46 Subsection (b), applicable only to nondurable powers that
are controlled by the traditional view that a principal's loss of
48 capacity ends the authority of the principal's agents, embodies
the substance of UPC §5-502 (1969) (1975).

50 The discussion in the Committee of the Whole established
52 that the language "or other person" in subsections (a) and (b) is

2 intended to refer to persons who transact business with the
attorney-in-fact under the authority conferred by the power.
4 Consequently, persons in this category who act in good faith and
without the actual knowledge described in the subsections are
6 protected by the statute.

8 Also, there was discussion of possible conflict between the
actual knowledge test here prescribed for protection of persons
10 relying on the continuance of a power and constructive notice
concepts under statutes governing the recording of instruments
12 affecting real estate. The view was expressed in the Committee
of the Whole that the recording statutes would continue to
14 control since those statutes are specifically designed to
encourage public recording of documents affecting land titles.
16 It was also suggested that "good faith," as required by this
section, might be lacking in the unlikely case of one who,
18 without actual knowledge of the principal's death or
incompetency, accepted a conveyance executed by an
attorney-in-fact without checking the public record where the
20 attorney-in-fact would have found an instrument disclosing the
principal's death or incompetency. If so, there would be no
22 conflict between this act and recording statutes.

24 It is to be noted, also, that this section deals only with
the effect of a principal's death or incompetency as a revocation
26 of a power of attorney; it does not relate to an express
revocation of a power or to the expiration of a power according
28 to its terms. Further, since a durable power is not revoked by
incapacity, the section's coverage of revocation of powers of
30 attorney by the principal's incapacity is restricted to powers
that are not durable. The only effect of the Act on rules
32 governing express revocations of powers of attorney is as
described in Section 5-505.

34 §5-505. Proof of continuance of durable and other powers of
36 attorney by affidavit

38 An affidavit executed by the attorney-in-fact under a power
of attorney, durable or otherwise, stating that the
40 attorney-in-fact did not have at the time of exercise of the
power actual knowledge of the termination of the power by
42 revocation or of the principal's death, disability or incapacity
is conclusive proof of the nonrevocation or nontermination of the
44 power at that time with respect to acts taken in good faith
reliance upon the affidavit. If the exercise of the power of
46 attorney requires execution and delivery of any instrument that
is recordable, the affidavit when authenticated for record is
48 likewise recordable. This section does not affect any provision
in a power of attorney for its termination by expiration of time
50 or occurrence of an event other than express revocation or a
change in the principal's capacity.
52

UNIFORM ACT COMMENT*

2
4 This section, embodying the substance and form of UPC
6 §5-502(b) (1969) (1975), has been extended to apply to durable
8 powers. It is unclear whether UPC §5-502(b) (1969) (1975)
applies to durable powers. Affidavits protecting persons dealing
with attorneys-in-fact extend the utility of powers of attorney
and plainly should be available for use by all attorneys-in-fact.

10 The matters stated in an affidavit that are strengthened by
12 this section are limited to the revocation of a power by the
14 principal's voluntary act, death, or, in the case of nondurable
16 power, by incompetence. With one possible exception, other
18 matters, including circumstances made relevant by the terms of
20 the instrument to the commencement of the agency or to its
22 termination by other circumstances, are not covered. The
exception concerns the case of a power created to begin on
"incapacity." The affidavit of the agent-in-fact that all
conditions necessary to the valid exercise of the power might be
aided by the statute in relation to the fact of incapacity. An
affidavit as to the existence or nonexistence of facts and
circumstances not covered by this section nonetheless may be
useful in establishing good faith reliance.

24 §5-506. Durable health care power of attorney

26 (a) A principal may designate another as attorney-in-fact
28 to make decisions on the principal's behalf in matters concerning
30 the principal's medical or health treatment and care in the event
32 of the subsequent disability or incapacity of the principal. An
34 attorney-in-fact designated under a durable health care power of
36 attorney may be authorized to give or withhold consents or
38 approvals relating to any medical, health or other professional
care, counsel, treatment or service of or to the principal by a
licensed or professional certified person or institution engaged
in the practice of, or providing, a healing art, including
life-sustaining treatment when the principal is in a terminal
condition as defined in section 5-701.

40 (b) A durable health care power of attorney must be signed
42 by the principal, or another at the principal's direction, and
44 witnessed by 2 individuals other than the designated
46 attorney-in-fact. This section's requirement of 2 witnesses does
not render ineffective a durable health care power of attorney
validly executed prior to the effective date of this section.

48 (c) A durable health care power of attorney may be revoked
50 or terminated by a fiduciary of the principal only with the prior
approval of the court upon petition by any interested person.

MAINE COMMENT*

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This section has been added to the Uniform Act to deal explicitly with durable health care powers of attorney; to incorporate and clarify prior Maine law on health care powers of attorney; and to coordinate these provisions with those set forth in Part 7 dealing with Living Wills. This section deletes the requirement under prior law that a durable health care power of attorney must be notarized and substitutes a requirement of 2 witnesses, to conform with Part 7.

12
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STATEMENT OF FACT

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18

This bill amends part of the Probate Code that pertains to powers of guardians of minors. The bill also amends part of the Probate Code that pertains to durable power of attorney.