

UPOA Subcommittee of the Statutory Revisions Committee

Minutes from Nov. 20, 2008 meeting

Present: Mike Holder (chair), Michael Kirtland, Lisa Eastin, Josie Faix, John (?) Licht, and Barb Hahn.

The subcommittee resumed discussion of Article I, sec. 102 at (2), and discussed how the definition relates to springing powers of attorney and how these could potentially affect protective proceedings. Next, the group briefly discussed (4), the definition of “good faith” as honesty in fact.

With regard to (5) defining “incapacity,” there was considerable discussion about the nature of the distinctions made in sub (A) and (B). It appears that incapacity is now split into two facets: first is the change of replacing disability with incapacity (which did not result in much discussion), but as to the second facet of the change there was considerable discussion about what this would imply. This incapacity is distinguished from incapacity under the guardianship statute which emanates from incapacity which is determined by functionality test. Here, incapacity flows from the consequences or the fact of the individual’s impairment – rather than the impairment itself. After further discussion it was concluded that the commissioner’s language is consistent with Colorado law, to make it simple to avoid having to resort to court proceedings.

With regard to (6), the definition of “person” is detailed and provides examples which are not inconsistent with Colorado law of defining it as an individual or organization. No definition of “instrumentality” could be found at this point. It looks like the definition in the UPOA merely expands the Colorado definition by offering more detailed examples.

Concerning (7) which defines “power of attorney,” it requires a writing or “other record” but does not require specific reference to the term “power of attorney.” This term is not defined in Colorado law.

The discussion of (8) was lengthy. Those present discussed the circumstances in which this “presently exercisable general power of appointment” might arise. The members discussed the examples set forth in the comments, specifically the Restatement (Third) definition and the delegation of a power held in a fiduciary capacity. Michael K. reminded everyone that the official comments would not be adopted by the legislature and they are meant to be illustrative, not the source of extending debate about the definitions set forth in the statutory language.

Finally, the meeting concluded with discussion of (9), which limits definition of “principal” to and “individual.” The question of why this definition is limited to an individual and not a person was raised, along with whether this would be a change from Colorado law. Josie was charged with answering that question at our next meeting to determine whether this would be a sea change for Colorado law.