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THE UNIFORM CUSTODIAL TRUST ACT: AN ALTERNATIVE TO ADULT GUARDIANSHIP

Louis A. Mezzullo*

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I. INTRODUCTION

The problems associated with court appointed guardianship¹ are axiomatic. The public nature of the court proceeding required for appointment of a guardian is of concern to many families who become involved in the process.² The expense and delay associated with the original hearing, as well as subsequent hearings that may be necessary in the operation of the guardianship, are also a great disadvantage of guardianship. As a means of managing property, guardianship is cumbersome, expensive and inflexible.³ Recently, stories of the expense and potential abuse of guardianship for adults have found their way into the popular press.⁴ While most

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1. The term "conservatorship" is frequently used interchangeably with "guardianship."

2. Huff, *The Power of Attorney—Durable and Nondurable: Boon or Trap?*, 11 INST. ON EST. PLAN. § 306, at 3-1, 3-3 (1977).

3. *Id.*

4. Topolnicki, *The Gulag of Guardianship*, MONEY, Mar. 1989, at 140. An example of such problems associated with guardianship involved a man who was temporarily incapacitated; his appointed guardian sold his house to cover his medical expenses, even though he had enough cash in the bank to cover the bills. The ward recovered and won back his independence, but his house was gone. *Id.* at 141.

In 1987, a woman was declared incompetent as a result of a stroke and her daughter was appointed guardian by the court. When the ward recovered from the stroke and hired an attorney to help her overturn the guardianship, the court held that since she was legally incompetent, there was a question as to her ability to hire a lawyer. The case was adjourned for four months while an appeal on that issue was made to the state supreme court. That court affirmed the ward's right to hire an attorney and ordered a full hearing on the ward's petition to regain her rights. *Id.*

The article also reported the case of a terminally ill woman who had a cousin who was an attorney. This cousin was appointed guardian for the woman. After the woman died, her executor had to get a court order to force an accounting by the guardian and found the guardian had misappropriated more than \$100,000 of the ward's savings while she was still alive. *Id.*; see also Murdoch, *Fighting for Control of a Loved One*, Wash. Post, Aug. 5, 1988,

people think of guardianship as relating solely to minors or people adjudicated as mentally incompetent, guardianship may also be necessary for adults who suffer from functional incapacity below a level that would justify a formal adjudication of mental incapacity.

In August 1987, the National Conference of Commissioners on Uniform State Laws drafted, approved and recommended for enactment in all states the Uniform Custodial Trust Act ("UCTA")⁵ with the intention of alleviating some of the problems of court appointed guardianship for adults. To date, only two states, Missouri and Rhode Island, have enacted the UCTA.⁶ Rhode Island has passed the UCTA with almost no changes.⁷ Although Missouri has

at A1, col. 4; Evans, *Public Guardianship Program Proposed in Va.*, Wash. Post, July 23, 1988, at B5, col. 1 [hereinafter Evans, *Public Guardianship*]; Evans, *Lax Guardianship Rules Frighten Va. Elderly*, Wash. Post, July 18, 1988, at A1, col. 4 [hereinafter Evans, *Lax Guardianship*]; McCartney, *States Act on Guardianship Laws*, Richmond Times Dispatch, Mar. 27, 1988, at A2, col. 2; Sinclair, *Subcommittee Hears Stories of Abuse*, Wash. Post, Sept. 26, 1987, at A3, col. 1.

Reported problems include instances of guardianships being approved based on the two-sentence written report of one doctor. See Evans, *Lax Guardianship*, *supra*, at A1, col. 4. In one case, it appears that the doctor providing the expert testimony for the competency hearing did not even examine the proposed ward. *Id.* at A1, col. 5. An Associated Press study found that in 85 percent of the cases examined a brief, one-paragraph statement from a doctor was all that was used to establish incompetency. McCartney, *supra*, at A2, col. 5.

A guardian ad litem is appointed for the proposed ward when a petition for guardianship is filed with the court. The courts rely heavily on the reports of the guardian ad litem in assessing the need for guardianship. Evans, *Lax Guardianship*, *supra*, at A4, col. 1. There are, however, no guidelines for what the guardian ad litem must do to assist the proposed ward or assess the proposed ward's competency. *Id.*; see also Evans, *Public Guardianship*, *supra*, at B5, col. 6. Some social workers report that a guardian ad litem will sometimes meet them at the courthouse door on their way to the guardianship hearing and ask them what the situation is with the proposed ward. Evans, *Lax Guardianship*, *supra*, at A4 col. 1. This is apparently the first contact between the guardian ad litem and the social worker. Guardians ad litem are not even required to visit the proposed ward personally. *Id.*

Once appointed, there are few standards for what the guardian is expected to do other than to file an annual accounting. Evans, *Lax Guardianship*, *supra*, at A1, col. 5 & A4, col. 1. Nobody checks on how the guardian is treating the ward or whether the ward is no longer in need of a guardian. *Id.* at A1, col. 5. Rarely is the guardian required to justify expenses listed on the annual accounting to the commissioner of accounts. *Id.* at A4, col. 1. So, the accounting is rarely more than a formality which is rubber stamped by the commissioner.

In the fall of 1987, the Associated Press ran a series of stories which examined guardianship laws from a national viewpoint and in each of the 50 states and the District of Columbia. The Associated Press study found overburdened courts that "routinely fail to monitor wards under their jurisdiction, which often opens the door to physical and financial mistreatment." McCartney, *supra* at A2, col. 2.

5. 7A U.L.A. 6-25 (Cum. Supp. 1989).

6. Mo. ANN. STAT. §§ 404.400 to .650 (Vernon Cum. Supp. 1989); R.I. GEN. LAWS §§ 18-13-1 to -22 (1988).

7. Compare R.I. GEN. LAWS §§ 18-13-1 to -22 (1988) with 7A U.L.A. 6-25 (Cum. Supp. 1989).

used the UCTA as a basis for its Personal Custodian Law, the resulting act differs considerably from the UCTA.⁸

This article will discuss the nature and problems of guardianship for adults. It will discuss the state of the law in Virginia related to guardianship and key provisions of the UCTA as passed by the National Conference of Commissioners. Finally, the article will discuss briefly a recent Senate bill that would have enacted the UCTA in Virginia.⁹

II. GUARDIANSHIP FOR ADULTS

People aged 85 or over will be the fastest growing segment of the American population between the years 1985 and 2000.¹⁰ As a result, one might anticipate a growing number of people who are in need of assistance regarding property management. Guardianship is the statutory means by which courts are empowered to appoint a guardian for persons (wards) whom a court has *not* declared incompetent, but who due to age, illness, diminished mental capacity or some other reason can no longer care for their own property or provide for themselves or their dependents.¹¹

The term "guardianship" is used to stand for the office, duty or authority of a guardian.¹² It also refers to the relationship between a guardian and a ward. The guardian is legally responsible for the care of the person or property or both of another who has been adjudicated as incompetent to act for himself or herself. A ward is the incompetent whose person or property is cared for by the guardian.¹³

The process of having a guardian appointed for someone can be quite difficult. For instance, according to New York law, before making an appointment the court must be persuaded by clear and convincing evidence that there is a need for a guardianship and that the proposed ward suffers from a condition that renders the ward substantially incapable of managing his or her property, or supporting himself or herself, or supporting his or her depen-

8. Compare MO. ANN. STAT. §§ 404.400 to .650 (Vernon 1989) with 7A U.L.A. 6-25 (Cum. Supp. 1989).

9. S. 495, Va. General Assembly, 1989 Session (1989).

10. Federman, *Conservatorship: A Viable Alternative to Incompetency*, 14 FORDHAM URBAN L.J. 815 (1986).

11. *Id.*

12. 39 C.J.S. *Guardian & Ward* § 2 (1976).

13. *Id.*

dents.¹⁴ Consequently, the applicant may fail to have a guardian appointed for someone who may in fact be in need of a guardian if the applicant fails to convince the court that the person suffers from such a condition. Even if the court agrees to the appointment of a guardian, the appointed guardian continues to be subject to the court's direction and supervision.¹⁵

Although the guardian has general authority over the property of the ward and is entitled to represent the ward in all legal business transactions,¹⁶ he or she may exercise only those powers that are granted by law. The guardian manages assets and is responsible for implementing a court approved plan for the ward's well-being.¹⁷ Furthermore, the guardian is an agent of the court rather than an agent of the ward.¹⁸

The guardian is similar to a trustee regarding the ward's property, in the sense that both are responsible for preserving the corpus of the property.¹⁹ A key difference between the powers of the guardian and the trustee, however, is that the guardian must often obtain the court's permission to act, while a trustee's powers usually are contained in the trust document.²⁰ For instance, the guardian may not borrow money for the ward's support or education without first obtaining authority from the court.²¹ Furthermore, a court may *not* authorize a guardian to deal with the ward's property as an adult may deal with his or her own property.²² The guardian may dispose of the ward's property only on approval of the court.²³ The guardian may be without authority to bind the ward by contract, and a guardian generally has no power to perform an act which is personal to the ward.²⁴ The guardian's powers are further limited because the guardian may exercise discretion-

14. Federman, *supra* note 10, at 817-18; see N.Y. MENTAL HYG. LAW § 77.01(1) (McKinney Supp. 1986).

15. 39 C.J.S. *Guardian & Ward* § 7 (1976).

16. *Id.* at § 69.

17. Federman, *supra* note 10, at 819.

18. *Id.* at 821.

19. 39 C.J.S. *Guardian & Ward* § 69 (1976).

20. This is, in fact, the crux of the problem with guardianship versus the custodial trust and will be discussed in greater detail later in this article.

21. 39 C.J.S. *Guardian & Ward* § 70(b) (1976).

22. *Id.*

23. Federman, *supra* note 10, at 824.

24. 39 C.J.S. *Guardian & Ward* § 69 (1976); see also Note, *Conservatorship: Mentally Competent Voluntary Conservatee Forfeits Power to Contract*, 19 WASHBURN L.J. 572 (1980) (discussing the legal rights of a conservatee).

ary rights of the ward only when authorized by statute or the court. Since the court fees and other expenses incurred by the guardian to obtain permission to act in various circumstances are expenses of the estate of the ward, these fees and expenses deplete the assets of the estate.²⁵ Furthermore, because there is no pre-planning, the guardian receives no direction from the ward while the ward is capable of making decisions about how the property should be managed.

Estate planning has traditionally centered around the preparation of a will and, where a sizable estate is involved, inter vivos giving. Major emphasis is placed on striking a balance between a desire to minimize taxes and to secure sensible treatment of the beneficiary.²⁶ Traditionally, little or no thought has been given to the possibility that the testator might become physically or mentally incapacitated months or even years before death. Most people will be incapacitated for some period before they die, even if the period is only several hours or days. In many cases there is no mechanism in place to safeguard the testator's property should the testator become incapacitated.²⁷ This presents the classic situation requiring the creation of a guardianship for an adult.

In the late 1800's, several states enacted statutes that allowed for the creation of guardianships.²⁸ Although no adjudication of incapacity was generally required for the creation of a guardianship,²⁹ it appears that a court proceeding to get an appointment was required by the statutes. The necessity for court action continues today.³⁰ A few states currently allow appointment of a temporary guardian without notice.³¹ Most statutes leave selection of the guardian to the discretion of the court,³² and generally the guardian must furnish a bond before undertaking duties.³³

25. 39 C.J.S. *Guardian & Ward* § 80(a) (1976).

26. Rohan, *Caring for Persons Under A Disability: A Critique of the Role of the Conservator and the "Substitution of Judgment Doctrine,"* 52 ST. JOHN'S L. REV. 1 (1977).

27. *Id.*

28. *Id.* at 4; see Act of Apr. 8, 1893, ch. 119, 1893 Colo. Sess. Laws ____; Act of June 14, 1898, ch. 527, 1898 Mass. Acts ____; Act of Mar. 7, 1899, ch. 35, 1899 N.H. Laws ____; Act of June 25, 1895, Pub. L. No. 220, 1895 Pa. Laws ____.

29. Rohan, *supra* note 26, at 4.

30. *Id.* at 5-6.

31. *Id.* at 7 n.37; see, CAL. PROB. CODE § 2201 (West Supp. 1977); D.C. CODE ANN. § 21-1505 (1967); MASS. GEN. LAWS ch. 201, § 21 (Law. Co-op Cum. Supp. 1989); N.H. REV. STAT. ANN. § 464:17 (1968).

32. Rohan, *supra* note 26, at 9.

33. *Id.* at 10.

Only those individuals who can afford sophisticated estate planning are able presently to have standby trusts created while they are still competent. There is a need for legislation that would make it relatively easy for a person to set up a trust-like mechanism that would be activated when he or she became incapacitated. Without such legislation, a case-by-case approach to the development of the role and authority of the guardian will continue. This approach is probably the least satisfactory way to deal with the problems of managing the incapacitated adult's property. When the guardian seeks the court's approval to act on behalf of the ward, the court must determine whether the act is appropriate and whether the legislature intended the guardian to have the authority to do the act. This approach also leads to more litigation since the guardian, to protect himself or herself, usually will seek court approval to be sure that he or she has the power to act.³⁴ This piecemeal approach is likely to lead to inconsistency within a particular state as to a guardian's authority.³⁵ Not only is obtaining court approval expensive, it also often causes the guardian to act slowly. Case by case resolution of the authority of a guardian fails to give guardians, attorneys or others interested in the welfare of an incapacitated adult any kind of advance guidance as to what the guardian may or may not do in particular situations that may demand immediate attention.

III. THE LAW REGARDING GUARDIANSHIP IN VIRGINIA

Currently there is no single part of the Code of Virginia dedicated to guardianship. In fact, neither "Guardianship" nor "Conservatorship" has its own listing in the index to the code.³⁶ Consequently, to find statutory law regarding the appointment, compensation, removal, and power of a guardian, one must look to several disparate sections of the code. Perhaps most telling is the fact that those sections of the code that pertain to adult guardianship are indexed under the heading of *Mentally Ill*, subheading *Guardian & Ward*.³⁷

Section 37.1-132³⁸ of the Code of Virginia provides for appointment of a guardian for a person who "by reason of advanced age or

34. *Id.* at 23-24.

35. *Id.* at 24.

36. VA. CODE ANN. Index (Repl. Vol. 1988).

37. *Id.*

38. VA. CODE ANN. § 37.1-132 (Cum. Supp. 1989).

impaired health or physical disability has become mentally or physically incapable of taking care of himself or his estate.”³⁹ Reasonable notice of the hearing and the right to be present at the hearing must be given to the proposed ward. In addition, some immediate family member, if any is known, must receive five days notice by first class mail of the hearing.⁴⁰ This notice requirement does not necessarily mean that the proposed ward or a family member will be present at the hearing. Evidence of the person’s incapacity may (but need not) consist of a comprehensive social and psychological evaluation ordered by the court, as well as medical or psychiatric data. The hearing may be to a jury upon request.⁴¹

The court must be persuaded by “clear and convincing evidence” that the proposed ward is incapacitated.⁴² Upon such evidence, the court will appoint a guardian of the ward’s person, property or both. The court’s order of appointment must include (1) the nature and extent of the person’s incapacity; (2) the powers and duties of the guardian; (3) a specification of whether the determination of incapacity is perpetual or limited to a specific length of time; and (4) the legal disabilities, if any, of the ward resulting from the finding of incapacity.⁴³ A court’s determination of incapacity pursuant to section 37.1-132 does *not* constitute an adjudication of legal incompetency, and the court’s appointment will limit the powers and duties of the guardian so the ward is left as independent as possible.⁴⁴

The standard of proof requirement is designed to provide safeguards to prevent the inappropriate appointment of a guardian. The “clear and convincing evidence” standard, however, may deny a person who needs a guardian, but who is not adjudicable as a mental incompetent, from having a guardian appointed. In contrast, the court is not required by law to base its judgment on a comprehensive evaluation of the proposed ward, and may in fact

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* Section 37.1-128.02 of the code provides for appointment of a committee for a person found totally unable to care for himself or herself or manage his or her affairs. Such a person is determined to be legally incompetent. *Id.* § 37.1-128.02 (Repl. Vol. 1984). This is contrasted with the situation in which a guardian is appointed for a person who suffers from some degree of incapacity that is less than total. *Id.* §§ 37.1-128.1, -132 (Cum. Supp. 1989).

find "clear and convincing evidence" of incapacity from a brief one-paragraph note from a physician.⁴⁵ Thus, it may be more likely that a person will have a guardian appointed when he or she in fact does not need one than that a person needing one will not have one appointed.

The Code of Virginia does not clearly describe the powers and duties of guardians. Section 37.1-132 specifies that, unless otherwise limited by the court order of appointment, the rights and duties of the guardian are the same as those of committees, guardians and trustees appointed under sections 37.1-128.02, 37.1-128.1 and 37.1-134.⁴⁶ Section 37.1-128.02⁴⁷ describes the procedures necessary to have a person declared mentally incompetent and to have a committee appointed, but other than giving the court the authority to require the committee to post bond, it does not provide any guidance regarding the duties or powers of a committee.⁴⁸ Hence, contrary to section 37.1-132, section 37.1-128.02 provides little guidance as to the powers and duties of a guardian. Section 37.1-128.1⁴⁹ likewise provides no real guidance. Section 37.1-128.1 states that the guardian shall have the same powers, duties and liabilities which pertain to committees and trustees under section 37.1-128.02 or section 37.1-134.⁵⁰ As discussed, section 37.1-128.02 provides no real information on the rights and duties of guardians. Finally, section 37.1-134⁵¹ fails to provide direction since it merely states that the trustee must administer the estate and in such administration has the same powers and duties, and is subject to the same liabilities, as a committee.⁵²

Article 2, chapter 4 of Title 37.1, entitled "Institutions for the Mentally Ill; Mental Health Generally," deals with the powers, duties and liabilities of committees and trustees appointed for people who are mentally ill or mentally retarded.⁵³ Apparently, these are the powers, duties and the liabilities that section 37.1-132 intended to grant to or impose upon guardians appointed for persons who are incapable of taking care of themselves or their property due to

45. See McCartney, *supra* note 4, at A2, col. 2.

46. VA. CODE ANN. § 37.1-132 (Cum. Supp. 1989).

47. *Id.* § 37.1-128.02 (Repl. Vol. 1984).

48. *Id.*

49. *Id.* § 37.1-128.1 (Cum. Supp. 1989).

50. *Id.*

51. *Id.* § 37.1-134 (Repl. Vol. 1984).

52. *Id.*

53. *Id.* §§ 37.1-135 to -147 (Repl. Vol. 1984 & Cum. Supp. 1989).

advanced age, impaired health or physical disability.

Guardians, referred to in this chapter of the code as fiduciaries, appointed pursuant to this chapter are entitled to the custody and control of the person of his or her ward.⁵⁴ In cases where the order of qualification fails to specify that the guardian is to be guardian of the person, it is deemed to be an appointment solely as guardian of the estate.⁵⁵ The guardian takes possession of the ward's estate, and may sue and be sued with respect to all claims or demands of every nature in favor of or against the ward.⁵⁶

Although a guardian is generally without power to bind a ward through contract, a guardian may incur obligations for necessities, such as care and support of the ward, without the prior approval of the court.⁵⁷ Furthermore, the guardian takes control of the whole estate of the ward, and the guardian can sue and be sued with respect to any lawful demand.⁵⁸ This is codified at section 37.1-141 of the Code of Virginia.⁵⁹

The guardian must take care of and preserve the ward's estate and manage it to the best advantage of the ward.⁶⁰ The personal estate must be applied to the payment of the debts of the ward. The rents and profits of the residue of the estate must be applied to the maintenance of the ward's person and his family, if any.⁶¹

With the approval of the court, the guardian may make gifts from income and principal of the ward's estate. This is dependent upon the finding of the court that the ward would have made the gifts if the ward had been of sound mind.⁶² A guardian ad litem must be appointed to represent the ward when the guardian wishes to make gifts, and generally notice must be sent to any beneficiaries who would be substantially affected by the proposed gift.⁶³

54. *Id.* § 37.1-138 (Repl. Vol. 1984).

55. *Id.*

56. *Id.* § 37.1-139 (Repl. Vol. 1984).

57. *Carter v. Cavalier Cent. Bank & Trust Co.*, 223 Va. 571, 292 S.E.2d 305 (1982). For a general discussion of a guardian's power to contract for the ward, see *supra* notes 21-24 and accompanying text.

58. *Merchant's Adm'r v. Shry*, 116 Va. 437, 82 S.E. 106 (1914).

59. VA. CODE ANN. § 37.1-141 (Repl. Vol. 1984).

60. *Id.* § 37.1-142(A) (Cum. Supp. 1989).

61. *Id.*

62. *Id.* § 37.1-142(B) (Cum. Supp. 1989).

63. *Id.* § 37.1-142(D) (Cum. Supp. 1989).

IV. THE UCTA APPROACH TO MANAGEMENT OF AN INCOMPETENT ADULT'S PROPERTY

A. *Basis for the UCTA*

The National Conference of Commissioners on Uniform State Laws considered three models when drafting the Uniform Custodial Trust Act ("UCTA"). These models were a Massachusetts statute, a Missouri statute and the Uniform Transfer to Minors Act ("UTMA").⁶⁴ The UTMA⁶⁵ was selected as the model for the UCTA because of its widespread use and the familiarity of third-party financial institutions with the UTMA.⁶⁶

The UTMA provides for management of property for someone who is legally incompetent due to age through a mechanism that avoids the formalities of a trust or guardianship.⁶⁷ The informal procedures of a custodianship as created under the UTMA are the key elements that distinguish it from a guardianship or a trust. The custodian is not subject to the strict court review of a guardian of property and has substantially greater powers that may be exercised without court approval. Also, the custodian is not required to make an annual accounting.⁶⁸ The absence of these safeguards and the concomitant potential for abuse are the primary reasons why the UTMA recommends that a transfer of greater than \$10,000 by a personal representative, trustee or conservator to a custodian be allowed only upon court approval.⁶⁹

The UTMA allows any kind of property to be transferred to a custodian for the benefit of a minor.⁷⁰ It permits outright inter vivos gifts,⁷¹ transfers from trusts, estates and guardianships,⁷² and transfers from third parties indebted to a minor who does not have a conservator.⁷³ The transferred property is indefeasibly vested in

64. Wade, *The Uniform Custodial Trust Act*, PROB. & PROP. 37, 38 (Nov./Dec. 1987).

65. 8A U.L.A. 207-242 (Cum. Supp. 1989).

66. Wade, *supra* note 64, at 38.

67. Allison, *The Uniform Transfers to Minors Act—New and Improved, But Shortcomings Still Exist*, 10 U. ARK. LITTLE ROCK L.J. 339 (1987-1988).

68. *Id.* at 350-51.

69. *Id.* at 351-52; UNIF. TRANSFERS TO MINORS ACT § 6(c), 8A U.L.A. 218 (Cum. Supp. 1989). The safeguards of court review and annual accounting, discussed above, may not be effective in practice. See *supra* note 4 and accompanying text.

70. UNIF. TRANSFERS TO MINORS ACT, 8A U.L.A. 207, prefatory note at 208, § 1(6), 8A U.L.A. at 211 (Cum. Supp. 1989).

71. *Id.* § 4.

72. *Id.* § 5.

73. *Id.* § 7.

the minor, not the custodian,⁷⁴ but claims of third parties are limited to recourse against the custodial property itself.⁷⁵

B. Purpose of the UCTA and its Major Provisions

The commissioners on Uniform State Laws recognized the need to provide a mechanism whereby individuals can provide for management of assets in the future in the event of incapacity.⁷⁶ The commissioners anticipated that most often the UCTA would be used by elderly individuals to plan for their own incapacity. The commissioners, however, recognized that the creation of a custodial trust would be useful in a number of other circumstances: by a parent for an incapacitated adult child; by adults in the military or adults leaving the country temporarily so their property can be managed by another without relinquishing beneficial ownership; or by young people who have received property under the UTMA in order to get the benefit and convenience of management services performed by the custodial trustee.⁷⁷

Like the UTMA, the UCTA allows any kind of property to be transferred to a custodial trustee.⁷⁸ The UCTA is designed to provide a simple trust that is easy to create, administer and terminate.⁷⁹ The trust can be created by a written transfer of property, evidenced by registration or other instrument of transfer, to another person as trustee and naming the transferor as beneficiary,⁸⁰ or by a written declaration naming as beneficiary a person other than the declarant and naming the declarant as trustee.⁸¹ A declaration of trust for the sole benefit of the declarant does not, however, create a custodial trust under the act.⁸² A person may designate a future custodial trustee to receive property upon the occurrence of a future event, and the designation may be made in a will, a trust, a deed, a multiple-party account, an insurance policy, an instrument exercising a power of appointment, or a writing designating a beneficiary of contractual rights.⁸³

74. *Id.* § 11(b).

75. *Id.* § 17.

76. UNIF. CUSTODIAL TRUST ACT, 7A U.L.A. 6 prefatory note at 6. (Cum. Supp. 1989).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* § 2(a).

81. *Id.* § 2(b).

82. *Id.*

83. *Id.* § 3(a), (c).

A custodial trust may also be created for multiple beneficiaries.⁸⁴ Each beneficial interest in the trust is deemed to be a separate custodial trust of equal undivided interest for each beneficiary. There is no right of survivorship unless (1) the instrument creating the trust expressly provides for survivorship; (2) survivorship is required as to community or marital property; or (3) the trust is for the use and benefit of husband and wife, in which case survivorship is presumed.⁸⁵

Section 18⁸⁶ of the UCTA provides two forms that can be used to create a custodial trust, one form to create a trust for the benefit of the declarant and the other to create a trust for the benefit of another. When either of these forms is used, a transfer of property that otherwise satisfies the property law of the state is sufficient to create a valid trust.⁸⁷

A successor or substitute trustee may be designated by the declarant,⁸⁸ and if there is no successor designated by the declarant, the beneficiary can designate a successor trustee.⁸⁹ To further ease the administration of the custodial trust, a third party dealing in good faith with a person purporting to act as a custodial trustee is protected from liability and is not responsible for determining the validity of the purported trustee's authority or the validity of an instrument executed pursuant to the UCTA.⁹⁰

While a custodial trust is created by a transfer of property that satisfies the requirements of the UCTA, the responsibilities and obligations of the trustee do not arise until the trustee has accepted the transfer.⁹¹ The UCTA provides a suggested form to be used to indicate the trustee's receipt and acceptance.⁹² Once acceptance has occurred, a custodial trustee has all the rights and powers over the trust property that an unmarried adult owner has over individually owned property. Thus a custodial trustee has greater flexibility than a guardian, and a custodial trustee need not continually go to court for permission to act. The trustee, however,

84. *Id.* § 6(a).

85. *Id.*

86. *Id.* § 18.

87. *Id.*

88. *Id.* § 3.

89. *Id.* § 13(c).

90. *Id.* § 11.

91. *Id.* § 4 comment. Acceptance can be expressed or implied.

92. *Id.* § 4.

may exercise those rights and powers in a fiduciary capacity only.⁹³ If the beneficiary is not incompetent, the trustee must follow the directions of the beneficiary "in the management, control, investment, or retention" of the trust property.⁹⁴ Unless otherwise directed by the beneficiary while not incapacitated, the trustee must observe the prudent person standard of care, but is not limited by any other law restricting investments by fiduciaries. A trustee with special skill or expertise must use that skill or expertise.⁹⁵ A trustee may be removed for cause by court petition filed by the beneficiary, the guardian of the beneficiary, an adult member of the beneficiary's family, or a person interested in the welfare of the beneficiary or the trust property.⁹⁶

A principal benefit of the custodial trust is the protection it affords the beneficiary and the beneficiary's dependents against possible future incapacity of the beneficiary without the necessity of a guardianship.⁹⁷ The incapacity of the beneficiary does not terminate the custodial trust, the designation of a successor trustee, any power or authority of the trustee, or the immunities of third persons relying on actions of the trustee.⁹⁸

The UCTA contains several provisions for monitoring and enforcing the trust. The trustee must keep custodial trust property separate from all other property⁹⁹ and must keep records of all transactions regarding the custodial trust property.¹⁰⁰ The trustee must render an accounting to the beneficiary or the beneficiary's legal representative once each year. In addition, the trustee must render an accounting upon the request of the beneficiary, upon the trustee's resignation or removal, and upon the termination of the trust.¹⁰¹ The trust may be terminated by an adult beneficiary who is not incapacitated by delivery to the trustee of a writing declaring the trust terminated. If not previously terminated, the trust terminates on the death of the beneficiary.¹⁰² An attorney-in-fact

93. *Id.* § 8(a).

94. *Id.* § 7(b).

95. *Id.*

96. *Id.* § 13(f).

97. *Id.* prefatory note at 7.

98. *Id.* § 10(f).

99. *Id.* § 7(d).

100. *Id.* § 7(e).

101. *Id.* § 15. This requirement of an annual accounting differs from the UTMA, which has no such requirement. See UNIF. TRANSFERS TO MINORS ACT § 19, 8A U.L.A. 236 (Cum. Supp. 1989).

102. UNIF. CUSTODIAL TRUST ACT § 2(3), 7A U.L.A. 9 (Cum. Supp. 1989).

acting under a durable power of attorney may not terminate the trust, administer the trust, or direct the distribution of the income or principal of the trust.¹⁰³

A beneficiary who is not incapacitated can direct payment of any or all of the trust property,¹⁰⁴ and may have the trustee removed for cause.¹⁰⁵ Consequently, a competent beneficiary is in complete control of the disposition of the trust property. The beneficiary may direct use of the trust property to pay for luxuries and need not limit application of the property to necessities and support.¹⁰⁶ If the beneficiary is incapacitated, the trustee must expend as much of the trust property as the trustee considers advisable for the use and benefit of the beneficiary and the beneficiary's dependents. Such expenditures may be made in the manner, at the time and to the extent that the trustee determines suitable and proper. These expenditures may be made without court order and without regard to other sources of income or support.¹⁰⁷ The trustee may determine that the beneficiary is incapacitated based upon (1) previous directions given by the beneficiary while not incapacitated; (2) certification of incapacity by the beneficiary's physician; or (3) other persuasive evidence.¹⁰⁸

The UCTA limits the liability of the trustee and the beneficiary to third parties.¹⁰⁹ Claims of third parties are limited to recourse against the custodial property unless the trustee or beneficiary is personally at fault. If, however, the trustee fails to reveal the fiduciary capacity in which he or she is acting, then the trustee may be held personally liable.¹¹⁰

Claims against the trustee must be brought within time limits specified in the UCTA.¹¹¹ A claim against the trustee for accounting or breach of duty must be brought within two years after re-

103. *Id.* § 7(f).

104. *Id.* § 9(a).

105. *Id.* § 13(f). This provision of the UCTA is somewhat inconsistent with § 2(e) that allows a competent beneficiary to terminate the trust by delivering a writing to the trustee declaring the termination. See *infra* note 117 and accompanying text. A beneficiary who wishes to remove the trustee may do so only for cause, but the beneficiary may terminate the trust for any reason whatever.

106. UNIF. CUSTODIAL TRUST ACT § 9 comment, 7A U.L.A. 15 (Cum. Supp. 1989).

107. *Id.* § 9(b).

108. *Id.* § 10(b).

109. *Id.* § 12.

110. *Id.*

111. *Id.* § 16.

ceipt of the final account or statement,¹¹² or within three years of the termination of the trust if the person bringing the claim has not received a final account or statement fully disclosing the matter on which the claim is based.¹¹³ An action for fraud, misrepresentation or concealment must be commenced within five years of the termination of the trust.¹¹⁴ Special provisions are made extending the above time limits if the claimant is a minor or an incapacitated adult or if the claimant was an adult who is deceased when the action is brought by his or her estate.¹¹⁵

If not previously terminated, the custodial trust terminates on the death of the beneficiary.¹¹⁶ A beneficiary who is not incapacitated may terminate a custodial trust by delivery to the trustee of a writing signed by the beneficiary declaring the termination. This gives a competent beneficiary effective control of the trust. The guardian for an incapacitated beneficiary may likewise terminate the trust in the beneficiary's stead.¹¹⁷ The transferor cannot terminate the trust unless he or she does so as guardian for the beneficiary as described above or if the transferor is also the beneficiary.¹¹⁸

Upon termination of the trust, the trustee must distribute the unexpended trust property to the beneficiary, if not incapacitated or deceased.¹¹⁹ If the beneficiary is incapacitated, the property is to be distributed to the guardian or other court appointed recipient.¹²⁰ If termination of the trust is due to the death of the beneficiary, the trust property is to be distributed according to the following order of priority: (a) pursuant to written instructions signed by the beneficiary while not incapacitated; (b) to the survivor of multiple beneficiaries if survivorship is provided for; (c) as designated in the instrument that created the trust; or (d) to the beneficiary's estate.¹²¹

112. *Id.* § 16(a)(1).

113. *Id.* § 16(a)(2).

114. *Id.* § 16(b).

115. *Id.* § 16(c).

116. *Id.* § 2(e).

117. *Id.* This is one aspect in which the Virginia version of the UCTA would differ from the uniform act. See *infra* notes 143-44 and accompanying text.

118. UNIF. CUSTODIAL TRUST ACT § 2(d), 7A U.L.A. 9 (Cum. Supp. 1989).

119. *Id.* § 17(a)(1).

120. *Id.* § 17(a)(2).

121. *Id.* § 17(a)(3).

C. *The UCTA and a Durable Power of Attorney*

A power of attorney empowers the attorney-in-fact, the agent, to act on behalf of the grantor of the power, the principal.¹²² The power usually is a written instrument by which one person appoints another as his or her agent and confers upon the agent authority to perform certain specified acts. The power creates an agency and thus establishes the fiduciary relationship which exists between principal and agent.¹²³ Generally, powers of attorney are strictly construed in accordance with the intention of the donor or principal. The principal's intention is gleaned from the instrument itself.¹²⁴ In the absence of statute, no particular form or method of execution is required for creation of a power of attorney,¹²⁵ but in many states if the power includes the authority to convey land, it must be acknowledged the same as a deed or mortgage.¹²⁶

A power of attorney under common law terminated when the principal became incapacitated; that is, legally incompetent. Most state laws permit a person to grant a durable power of attorney that provides for continuance of the power in the event of the incapacity of the principal.¹²⁷ While a normal durable power of attorney takes effect immediately upon execution, under a springing durable power of attorney the agent does not have authority to act until the principal becomes incapacitated or some other event specified in the document occurs.¹²⁸

Since a person can create a springing power of attorney, one might question why there is a need for a custodial trust act. An agent acting pursuant to a power of attorney derives his or her authority from the document itself. Consequently, the authority of

122. 14B MICHIE'S JURISPRUDENCE *Powers* § 2 (Repl. Vol. 1988).

123. *Id.*

124. *Id.* § 4.

125. 3 AM. JUR. 2d *Agency* § 25 (1986).

126. *Id.* § 26. Virginia requires recording of all such powers. VA. CODE ANN. § 17-60 (Repl. Vol. 1988).

127. See VA. CODE ANN. § 11-9.1 (Repl. Vol. 1989).

128. Huff, *supra* note 2, §306, 3-14; VA. CODE ANN. § 11-9.4 (Repl. Vol. 1989). A springing power may be desirable because it keeps control of the principal's assets out of the hands of the agent until the specified event occurs. In reality, however, a springing power of attorney may not keep the assets out of the agent's control. Virginia law allows a third party dealing with an agent to rely on an affidavit presented by the agent stating that the event triggering the agent's authority has in fact occurred. VA. CODE ANN. § 11-9.4 (Repl. Vol. 1989). An agent who intends to inappropriately gain control of the principal's assets surely will not be greatly deterred by the prospect of having to forge an affidavit.

the agent, and his or her ability to convince third-parties of that authority, is to a great extent determined by the wording of the document that created the power.¹²⁹ Thus, problems created by poor drafting may arise with a power of attorney. A trustee appointed under the Uniform Custodial Trust Act, on the other hand, derives his or her powers from the statute.

Nevertheless, the custodial trustee and the agent acting under a springing power of attorney still may have the problem of convincing third-parties that the condition precedent to their authority has in fact occurred. This problem has been particularly prevalent with a springing power. Many title companies, banks and other institutions have been reluctant to honor durable general powers, especially when it is a springing power.¹³⁰ Obtaining a court order defeats the privacy advantages of a power or custodial trust. This problem may be avoided in a power of attorney by specifying in the document that affidavits signed by a physician (or two or more physicians) are conclusive proof to the third-party and protect the third-party from later claims that the agent was acting without the authority and ability to bind the principal.¹³¹ Virginia state law provides that a third-party can rely on an affidavit signed by the agent that the condition precedent has occurred.¹³² On the other hand, the UCTA protects third-parties who deal with the custodial trustee in good faith. In the absence of knowledge to the contrary, the third-party is not responsible for determining the validity of a custodial trustee's claim of authority to act.¹³³ Furthermore, since the UCTA is modeled after the UTMA, already a familiar arrangement to third-party financial institutions, custodial trustees should encounter fewer problems in dealing with these institutions than do agents acting under a springing power of attorney.

Without express authorization in the document, once the principal becomes incapacitated the agent acting under a power of attorney cannot create a trust for the principal nor add assets belonging to the principal to an inter vivos trust created by the agent.¹³⁴ Furthermore, the agent may be liable to the heirs of the principal or

129. Huff, *supra* note 2, § 306, at 3-4.

130. Miller, *Update on Whether to Consider Using a Funded Living Trust to Avoid Probate*, 16 EST. PLAN. 140, 141 (1989).

131. Huff, *supra* note 2, § 306, at 3-14.

132. VA. CODE ANN. § 11-9.4 (Repl. Vol. 1989).

133. UNIF. CUSTODIAL TRUST ACT, § 11, 7A U.L.A. 16 (Cum. Supp. 1989).

134. Huff, *supra* note 2, § 305.2, at 3-10; Restatement (Second) Agency § 17 (1975).

beneficiaries of the principal's will if the agent makes gifts of the principal's assets after the principal becomes incapacitated unless authorized under the power of attorney,¹³⁵ although the agent may make gifts if the heirs or beneficiaries have given their approval. The custodial trustee, on the other hand, has all the rights and powers over the trust property that an unmarried adult owner has over individually owned property.¹³⁶ Thus, while the trustee must exercise these rights only in a fiduciary capacity,¹³⁷ he or she might be able to transfer assets to a trust created by the trustee after the settlor becomes incapacitated or make gifts on behalf of the beneficiary. A custodial trustee under the UCTA has greater flexibility and power than an agent under a power of attorney.

As described above, an agent acting under the authority of a durable power of attorney for an incapacitated beneficiary may not terminate a custodial trust nor direct the administration or distribution of a custodial trust.¹³⁸ Consequently, a custodial trust provides a mechanism to place assets beyond the reach of an attorney-in-fact. This allows the declarant to create a situation where certain specific assets are managed by one individual, while another individual acting as attorney-in-fact manages other assets. This planning flexibility may be a very attractive reason for some clients to use a custodial trust.

A guardian or committee may obtain court permission to revoke, suspend, or terminate all or any part of the authority granted an agent under a durable power of attorney.¹³⁹ Under the UCTA, a guardian of an incapacitated beneficiary may terminate a custodial trust.¹⁴⁰ Consequently, in this regard the UCTA offers no advantages over a durable power of attorney. A guardian may terminate arrangements made by the ward for his or her own incapacity whether the ward used a durable power of attorney or a custodial trust. This may be a serious flaw in the UCTA.

135. *Id.* § 305.4, at 3-12.

136. UNIF. CUSTODIAL TRUST ACT § 8, 7A U.L.A. 14 (Cum. Supp. 1989).

137. *Id.*

138. *Id.* § 7(f); *see also supra* text accompanying note 97 (protection of beneficiary is benefit of a custodial trust). An agent may, however, petition the court to have the trustee removed for cause. *See* UNIF. CUSTODIAL TRUST ACT § 13(f), 7A U.L.A. 18 (Cum. Supp. 1989).

139. UNIF. CUSTODIAL TRUST ACT § 7(f), 7A U.L.A. 14 (Cum. Supp. 1989).

140. *Id.* § 2(e).

V. THE VIRGINIA EXPERIENCE WITH THE UCTA

In the 1989 session of the General Assembly, a bill was sponsored by Senator Holland that would have amended the code by adding new Chapter 2.1 to Title 55, establishing the Uniform Custodial Trust Act in Virginia.¹⁴¹ The bill (Senate Bill 495) was referred to the Committee for the Courts of Justice on January 12. It was reported from the committee with amendments by an eleven to zero vote on February 1. On February 3, the bill passed the senate by a vote of thirty-nine to zero and was communicated to the house, where it was referred to the House Committee for the Courts of Justice after the first reading on February 7. It was reported from that committee on February 20 by a vote of eighteen to one. On February 21, the bill had a second reading, which is standard procedure for a bill as it works its way through the General Assembly. The bill was read a third time, also standard procedure, on February 22. Typically after the third reading a vote is taken on the bill. Once a bill reaches this stage, it is generally passed. After being read the third time, however, Senate Bill 495 was not acted on. The bill was read again on February 23 after which it was re-referred to the Courts of Justice Committee. Since the bill was based on a uniform law, legislators wanted more thorough review and comment on selected sections of the bill by the Trusts and Estates section of the Virginia Bar Association.¹⁴² The Courts of Justice Committee took no further action on the bill during the 1989 session.

The Senate Bill, as amended, has some slight differences from the UCTA. The Virginia version would allow a guardian of an incapacitated beneficiary to terminate a custodial trust, but only if the guardian was granted the power to terminate the trust by the circuit court that appointed him or her in a proceeding in which the custodial trustee is made a party.¹⁴³ The UCTA, on the other hand, would allow a guardian of an incapacitated beneficiary to terminate the trust merely by delivering to the custodial trustee a writing signed by the beneficiary or guardian declaring termination.¹⁴⁴ In this regard, the Virginia version makes the custodial trust a more effective planning tool. The declarant of a custodial trust in

141. S. 495, Va. General Assembly, 1989 Session §§ 55-34.1 to -34.19 (1989).

142. Telephone interview with Senator Holland, sponsor of S. 495 (May 30, 1989).

143. S. 495, Va. General Assembly, 1989 Session § 55-34.2 (1989).

144. UNIF. CUSTODIAL TRUST ACT § 2(e), 7A U.L.A. 9 (Cum. Supp. 1989).

Virginia need not worry that the guardian of an incapacitated beneficiary will be able to revoke the trust simply by sending notice to the trustee.

The Virginia version also would differ from the UCTA in regard to the amount of property that can be transferred by a debtor of the beneficiary to the custodial trustee for the use and benefit of the beneficiary without authorization of the court. Under the Virginia version, the court must authorize such transfers if the value of the property or the debt to the incapacitated individual being paid by the transferor exceeds \$10,000.¹⁴⁵ The UCTA recommends a \$20,000 threshold.¹⁴⁶ The lower threshold apparently provides a greater safeguard against abuse by reducing the amount of property a custodial trustee may control without court supervision.

The greater protection provided by the lower threshold on property transfers and the restrictions on the power of a guardian to unilaterally revoke a custodial trust contrasts sharply with the reduced protection provided by the standard of care required of the custodial trustee in the Virginia version of the UCTA. Senate Bill 495 would require the trustee to observe the standard of care that would be observed by a prudent person dealing with his or her own property.¹⁴⁷ The UCTA establishes a standard of care that would be observed by a prudent person dealing with the property of another.¹⁴⁸ Generally, it is felt that the prudent person dealing with the property of another will be more cautious than a prudent person dealing with one's own property. Thus, it appears that the Virginia version would allow the trustee to be more adventuresome and less risk-averse when investing the trust property than the UCTA would allow.¹⁴⁹

Both the UCTA and the Virginia version of the UCTA as proposed in Senate Bill 495 grant the custodial trustee all the rights and power over custodial property which an unmarried adult owner has over individually owned property.¹⁵⁰ Senate Bill 495 ex-

145. S. 495, Va. General Assembly, 1989 Session § 55-34.5 (1989).

146. UNIF. CUSTODIAL TRUST ACT § 5(a), 7A U.L.A. 12 (Cum. Supp. 1989).

147. S. 495, Va. General Assembly, 1989 Session § 55-34.7 (1989).

148. UNIF. CUSTODIAL TRUST ACT § 7(b), 7A U.L.A. 13-14 (Cum. Supp. 1989).

149. It should be noted, however, that the "prudent person dealing with his or her own property" standard used in Senate Bill 495 parallels Virginia's prudent person rule, which applies to fiduciaries in general, and the standard in the Virginia UTMA. See VA. CODE ANN. §§ 26-45.1(a), 37-48(B) (Repl. Vol. 1985 & Cum. Supp. 1989).

150. Compare UNIF. CUSTODIAL TRUST ACT § 8(a), 7A U.L.A. 14 (Cum. Supp. 1989) with S. 495 Va. General Assembly, 1989 Session § 55-34.8 (1989).

pressly states that the custodial trustee's powers include, but are not limited to, the powers of fiduciaries set forth in section 64.1-57 of the Code of Virginia.¹⁵¹

VI. SUMMARY

Estate planning rarely includes planning for the principal's own incapacity. This can be a grave oversight as most people will be incapacitated prior to death, if even for only a few hours or days. With recent advances in medical technology, and those that will come in the future, many people will be incapacitated for much longer periods, weeks, or perhaps months and years. Historically, an extended period of incapacity was dealt with only as it arose, and then through the use of a guardianship.

Guardianship, however, is a relatively inflexible and expensive means for managing the estate of an incapacitated person. It requires a judicial decision in a public hearing that the proposed ward is incapable of caring for himself or herself. Guardianship is subject to various forms of abuse and lax control by overburdened courts. While a springing durable power of attorney allows a person to plan for his or her own incapacity, the durable power of attorney also suffers from various problems that make its use as a planning tool less than totally effective.

A custodial trust created pursuant to the UCTA would allow a person to plan for his or her own incapacity while avoiding many of the pitfalls and shortcomings of guardianship and springing durable powers. A custodial trust is inexpensive to create and flexible to administer, yet provides safeguards for the settlor. No court proceeding is required, either at its creation or during its operation. Since the UCTA is modeled after the UTMA, the concept should be recognized and accepted readily by third-party financial institutions.

Senate Bill 495, introduced in the 1989 session of the Virginia General Assembly, would have enacted the UCTA into Virginia law. Passage of the Virginia Uniform Custodial Trust Act should be supported by legislators so Virginians can use this flexible arrangement in their estate planning.¹⁵²

151. VA. CODE ANN. § 64.1-57 (Cum. Supp. 1989); S. 495, Va. General Assembly, 1989 Session § 55-34.8 (1989).

152. The Virginia Uniform Custodial Trust Act, H.B. 257, passed the Virginia House by a vote of 98-0, on February 5. The Senate had not yet acted on the bill as this issue of the *Law Review* went to press. —Ed.

