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THE UNIFORM POWER OF ATTORNEY ACT BY LISA JOHNSON

The Virginia General Assembly is currently reviewing legislation, which, if signed into law, will have a significant impact on laws related to the use and acceptance of durable powers of attorney (“DPA”). The Uniform Power of Attorney Act, (“UPOAA”) was introduced into the January 2009 legislative session in an effort to bring uniformity to an area of law that has been rapidly emerging as a significant, if not vital, estate planning tool.

A DPA is legal document that grants authority to an agent to act on behalf of the principal, and provides for the continuation of that authority in the event the principal suffers a subsequent disability or incapacity. As the popularity of DPAs continues to increase, so has litigation related to their use. Unlike guardianships and conservatorships, DPAs require little to no oversight. Therefore, financial exploitation by unscrupulous agents is a widespread problem.

DPAs are governed by state law, and those laws vary substantially. In 2002, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) conducted a survey comparing state DPA statutes. The study revealed many issues related to DPAs that needed to be addressed, including (1) improving portability, (2) including safeguards, remedies, and sanctions for abuse by an agent, (3) protecting the reliance of third parties on a DPA, and (4) providing remedies and sanctions for a third party’s refusal to honor a DPA.

As a result of this survey, in 2006 the NCCUSL adopted and promulgated the UPOAA. The UPOAA is an endeavor by the NCCUSL to “codify both state legislative trends and collective best practices, and strike a balance between the need for flexibility and acceptance of an agent’s authority by

third parties and the need to prevent and redress financial abuse.” The UPOAA seeks to preserve DPAs as a low-cost, flexible, and private form of surrogate decision making while at the same time attempting to prevent and redress financial abuse of incapacitated individuals. The UPOAA is basically a set of default rules that preserve a principal’s freedom to choose both the extent of the agent’s authority and the rules that govern the agent’s conduct.

Shortly after the UPOAA was developed, the Trust and Estate Section of the Virginia Bar Association formed a sub-committee, chaired by Oast & Hook attorney Andrew H. Hook, whose task it was to study the UPOAA and assess the impact that its enactment in Virginia would have on current Virginia law. The sub-committee met regularly to discuss the UPOAA and made revisions to the Act where it thought that Virginia law was superior. This sub-committee also consulted with various organizations, such as the Virginia Bankers Association and the AARP, to solicit feedback on the UPOAA. In the fall of 2008, the sub-committee recommended the UPOAA bill to the Virginia General Assembly for enactment.

As of the date of this article, the UPOAA bill has made its way through the Virginia Senate Courts of Justice Committee, and the bill is expected to be voted on by the full Senate within the next few weeks. If the Senate approves the bill, then it will cross over into the House of Delegates for its review and vote. The bill is not expected to receive any opposition. If the General Assembly enacts the UPOAA, then it will bring much needed certainty to Virginia law related to DPAs. The enactment of the UPOAA will also provide greater protections for third parties at a time when a dramatically increasing amount of the nation’s wealth is being managed under DPAs because of the aging of the baby boomer generation. Current Virginia law is inadequate to meet those needs.

Since its inception in 2006, the UPOAA has been enacted by two states, New Mexico and Idaho. In 2008, however, bills were presented to the state legislatures in Indiana, Maine, Maryland, Michigan and Mississippi. These states are carefully studying the UPOAA and assessing the impact its enactment will have on their various constituencies.

For more information on the UPOAA, visit www.nccusl.com.

Lisa Johnson is an elder law attorney with Oast & Hook. She concentrates her practice in the area of estate planning.

Ask Allie

O&H: Allie, we understand you’ve heard a great story about a woman helping stray cats. Please tell us about her.

Allie: I’d be happy to. In 1972, a young woman named Jane DeMartino survived an airplane crash that left her a paraplegic. For years, she lived in the Boston area with her rescued cat named Molly. In the early 1980s, she saw a beautiful feral cat with five kittens, and she knew that she must help them.

She saved those cats, and over the years she and the children in her apartment complex trapped other feral cats, had them spayed or neutered, and found homes for them. Over time, from her wheelchair, she helped save several colonies of feral cats, as well as abused, pregnant and injured strays. Ms. DeMartino's siblings bought her a house in Schenectady, New York, where she has continued her remarkable work with feral and stray cats. The American Red Cross recognized Ms. DeMartino's work in 2004 when it presented her with the Hometown Heroes Award for pet rescue. Ms. DeMartino and Bill and Tricia Stallings established a nonprofit 501(c)(3) organization called Caring About the Strays (C.A.T.S.). The organization helps 30 to 40 cats daily, and it saves more than 100 cats annually. For more information on this inspirational friend to felines, please visit Ms. DeMartino's website at www.all-creatures.org/cats/index.html. Many thanks to Ms. DeMartino and to all of those who help stray and feral cats, like my family at Oast & Hook who helped me.



Please feel free to e-mail your pet- and animal-related questions to Allie at: allie@oasthook.com.

Announcements

Thomas Hoddinott from Thomas Hoddinott Insurance Agency and Andrew Hook will present the "Long-term Care and Elder Care Seminar" at 6:30 p.m., Tuesday, February 10th, at 1530 Breezeport Way, Suite 600, Suffolk, Virginia. Seats are limited, so please register early. For more information or to register please phone Jennifer Lantz at 757-399-7506.

Oast & Hook will hold its quarterly Social Workers and Administrators Breakfast on February 12th at the Virginia Beach Central Library. Registration begins at 8:30 a.m. and the presentation begins at 9:00 a.m. The breakfast is designed to be both a networking opportunity and also an educational opportunity for area professionals who work with seniors, the disabled, and their families. This seminar's topic is "Brain Fitness." The guest speaker is Bethany Gilstrap, Psy.D., from Hampton Roads Neuropsychology. Seats are limited, so please register early. To register for this breakfast, please phone Linda Gerber at 757-967-9704 or register online at <http://oasthooksw.eventbrite.com>.

Andrew Hook will give a presentation entitled "Special Needs Planning: It is More than Drafting a Trust," at the North Carolina Bar Association Foundation's 13th Annual Elder Law Symposium. This symposium will be held at the North Carolina Bar Center in Cary, North Carolina. For more information or to register online, visit the North Carolina Bar Association website at www.ncbar.org/cle/programs/index.aspx?id=574ELS.

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