

POWER OF ATTORNEY HOT TOPICS—AMERICAN AND CANADIAN PERSPECTIVES

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I. Legislative Reform

Many states are considering reform of their power of attorney statutes to address pressing policy issues. These include the unreasonable refusal of third persons, such as banks, to accept valid powers of attorney, the increasing use of guardianship actions in family power struggles over vulnerable persons and their assets, and the growing concern that untrustworthy persons may use a power of attorney as a “license to steal.” An inherent tension exists between the goal of preserving the power of attorney as a low-cost, flexible alternative to guardianship and that of providing adequate protection for incapacitated principals. The new Uniform Power of Attorney Act, approved by the Uniform Law Commission in 2006, embodies law reform strategies to address these competing issues.

[Uniform Power of Attorney Act (2006) (*available at* http://www.law.upenn.edu/bll/ulc/ulc_final.htm#final) (hereinafter “UPOAA”)]

A. Statutory Provisions that Promote Self-Determination

1. The principal’s choice of agent is protected.
 - a. If a guardian or conservator is later appointed, the agent’s authority continues unless limited, suspended, or terminated by the court. [UPOAA § 108(b)]
 - b. Upon the principal’s motion, the court must dismiss a petition to review the agent’s conduct unless the court finds that the principal lacks authority to revoke the agent’s authority or the power of attorney. [UPOAA § 116(b)]
2. The principal may choose a nominee for guardian or conservator in the event one is later needed . [UPOAA § 108(a)].
3. The agent is to act in accordance with the principal’s expectations if known; otherwise, in the principal’s best interest. [UPOAA § 114(a)]

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4. Unless otherwise provided, the agent must cooperate with the principal's health care agent. [UPOAA § 114(b)(5)]
5. Unless otherwise provided, the agent must attempt to preserve the principal's estate plan to the extent the plan is known to the agent and preservation is consistent with the principal's best interest. [UPOAA § 114(b)(6)]
6. The principal may grant an agent authority to perform any delegable action; however, certain actions with an increased propensity to dissipate the principal's property or alter the principal's estate plan must be delegated with a specific express grant. [See UPOAA § 201]
7. The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney. [UPOAA § 107]

B. Statutory Provisions that Promote Acceptance of Powers of Attorney

1. Recognition of the validity of powers of attorney created under other law. [UPOAA § 106]
2. Recognition of the validity of a photocopy or electronically transmitted copy of an original power of attorney. [UPOAA § 106(d)]
3. Acknowledged signatures are presumed valid. [UPOAA § 105]
4. Good faith acceptance of an acknowledged power of attorney is protected. [UPOAA § 119]
5. Good faith refusal of a power of attorney is protected. [UPOAA § 120]
6. Recognition of liability for unreasonable refusal of an acknowledged power of attorney. [UPOAA § 120]

C. Statutory Provisions for the Prevention of Abuse

1. Express language is required to grant authority to:
 - a. create, amend, revoke, or terminate an inter vivos trust;
 - b. make a gift;
 - c. create or change rights of survivorship;
 - d. create or change a beneficiary designation;
 - e. authorize another person to exercise authority granted to the agent;
 - f. waive the principal's right to be a beneficiary of a joint and survivor annuity;
 - g. exercise fiduciary powers that the principal has authority to delegate;and

h. disclaim or refuse an interest in property.
[UPOAA § 201(a)]

2. Unless otherwise provided, an agent who is not the principal's ancestor, spouse, or descendant may not exercise authority to create in the agent or in anyone to whom the agent owes a legal obligation of support, an interest in the principal's property. [UPOAA § 201(b)]

3. Unless otherwise provided, all agents are constrained from self-dealing by clearly articulated fiduciary duties. [UPOAA § 114]

4. Unless otherwise provided, a spouse-agent's authority terminates upon the filing of an action for dissolution or annulment of the marriage to the principal, or their legal separation. [UPOAA § 110(b)(3)]

5. A person may refuse an otherwise valid power of attorney if the person in good faith believes that the principal may be subject to abuse by the agent or someone acting in concert with the agent. [UPOAA § 120]

D. Statutory Provisions for the Detection of Abuse

1. A governmental agency charged with protection of the principal (*e.g.*, Adult Protective Services) may request agent disclosure of transactions conducted on behalf of the principal. [UPOAA § 114(h)]

2. Any person who demonstrates sufficient interest in the principal's welfare may petition the court for review of the agent's conduct. [UPOAA § 116(a)]

E. Statutory Provisions for the Redress of Abuse

1. An agent is liable for the amount required to restore the principal's property to what it would have been had the violation not occurred and for reimbursement of attorney's fees and costs paid on the agent's behalf. [UPOAA § 117]

2. Remedies under the Act are not exclusive and do not prevent redress under other statutes that address financial exploitation. [UPOAA § 123]

II. Drafting Considerations

A. Agent Selection

1. Co-agents? (independent or consensus decision making?)
2. Successor agents (initial designation or authorization of another to appoint successors)
3. Should successor agent(s) have the same scope of authority as original agent?

4. Linear succession or appointment of an alternate agent to serve during any period when original agent is unavailable.
5. Communication to agent of principal's expectations for property management.

B. Agent Reimbursement and Remuneration

1. Reasonableness standard or specific guidelines?

C. Agent Duties

1. Should default duties be altered?
2. Should the power of attorney contain an exoneration provision?
3. Should agent be required to account to a third person?

D. Immediate versus Springing Authority

1. Advantages of immediate authority (convenience; opportunity to "test drive" the agency).
2. Advantages of springing authority (maintenance of control and privacy).
3. Determining the trigger for springing authority (reliance on the statutory default method for determining incapacity versus designation of the person(s) to make the determination).
4. May the agent use authority to benefit the agent (and if so, subject to what limits)?

E. Scope of Authority

1. Should any authority be excluded?
2. Should statutory default parameters for authority be limited or enlarged?
3. Special consideration re/ the "hot" powers (*i.e.*, authority with respect to gifts, trusts, beneficiary and survivorship designations, disclaimers, etc.)

F. Education of the Principal and Agent

1. Clarify attorney/client relationship
2. Explain commencement, revocation, and termination of agency.
3. Review consequences of authority granted.
4. Provide pragmatic guidelines (*e.g.*, disclosure of agency relationship when agent is acting for the principal; the importance of appropriate notice if the agent resigns; the importance of notice to third persons when the agency is revoked or terminated)