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Advancing the Law—What's Behind Those New Uniforms: The Uniform Power of Attorney Act Top Ten List[*]

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Background

The catalyst for the new Uniform Power of Attorney Act (the "Act")[1] was a national study in 2002 which revealed growing divergence in state power of attorney legislation.[2] The original Uniform Durable Power of Attorney Act, last amended in 1987, was at one time followed by all but a few jurisdictions. Despite initial uniformity, the study found that a majority of states had enacted non-uniform provisions to deal with specific matters upon which the Uniform Durable Power of Attorney Act is silent. The topics about which there was increasing divergence included: 1) the authority of multiple agents; 2) the authority of a later-appointed fiduciary or guardian; 3) the impact of dissolution or annulment of the principal's marriage to the agent; 4) activation of contingent powers; 5) the authority to make gifts; and 6) standards for agent conduct and liability.[3] Other topics about which states had legislated, although not necessarily in a divergent manner, included: successor agents, execution requirements, portability, sanctions for dishonor of a power of attorney, and restrictions on powers that have the potential to dissipate a principal's property or alter a principal's estate plan.[4]

To ascertain whether there was actual divergence of opinion about default rules for powers of attorney or only the lack of a detailed uniform model, the Joint Editorial Board for Uniform Trust and Estate Acts conducted a national survey. The survey was distributed to probate and elder law sections of all state bar associations, to the fellows of the American College of Trust and Estate Counsel, the leadership of the ABA Section of

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[1] The Final Act with commentary is available at: http://www.law.upenn.edu/bll/ulc/ulc_final.htm#final.
[2] *See* Unif. Power of Att'y. Act prefatory n. (2006).
[3] *Id*.
[4] *Id*.

Real Property, Probate and Trust Law and the National Academy of Elder Law Attorneys, as well as to electronic mailing lists maintained by the ABA Commission on Law and Aging. The survey responses demonstrated a high degree of consensus about the need to improve portability and acceptance of powers of attorney as well as the need to better protect incapacitated principals.[5]

Basic Structure

The Act, which supersedes the Uniform Durable Power of Attorney Act, the Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code,[6] consists of four articles. The first contains all of the general provisions that pertain to creation and use of a power of attorney. While most of these provisions are default rules that can be altered by the power of attorney, certain mandatory provisions in Article 1 serve as safeguards for the protection of the principal, the agent, and persons who are asked to rely on the agent's authority. Article 2 provides default definitions for the various areas of authority that can be granted to an agent. The genesis for most of these definitions is the Uniform Statutory Form Power of Attorney Act (1988); however, the language is updated where necessary to reflect modern day transactions. Article 2 also identifies certain areas of authority that must be granted with express language because of the propensity of such authority to dissipate the principal's property or alter the principal's estate plan.[7] Article 3 contains an optional statutory form power of attorney[8] that is designed for use by lawyers as well as lay persons. Step-by-step prompts are given for designation of the agent, successor agents, and the grant of authority. Article 3 also contains a sample agent certification form.[9] Article 4 contains miscellaneous provisions concerning the relationship of the Act to other law and pre-existing powers of attorney.

Advancements and Innovations: The Uniform Power of Attorney Act Top Ten List

An unavoidable tension in power of attorney legislative reform results from two competing objectives: 1) preservation of the effectiveness of durable powers as a low-cost, flexible, and private form of surrogate decision making, and 2) prevention of financial abuse of incapacitated principals. Further complicating reform efforts is the problem of trustworthy agents who are reluctant to serve under powers of attorney because of contentious family dynamics and the fear of liability. The Act addresses these tension points with provisions that encourage acceptance of powers of attorney by third persons, safeguard the incapacitated principal, and provide clearer guidelines for agents. The following is the "Top Ten List" for why states should adopt the Uniform Power of Attorney Act.

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[5] S*ee* Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis,* National Conference of Commissioners on Uniform State Laws (2002), *available at* http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm).

[6] Unif. Power of Att'y. Act § 404 (2006).

[7] Unif. Power of Att'y. Act § 201(a) (2006).

[8] Unif. Power of Att'y. Act § 301 (2006).

[9] Unif. Power of Att'y. Act § 302 (2006).

1. All powers of attorney created under the Act are durable unless otherwise specified.[10]

The durability of a power of attorney is essential if it is to be an effective hedge against the need for guardianship. It is difficult to imagine a scenario in which a principal would not want the power to be durable. Even for a limited purpose power of attorney, such as one which authorizes an agent to complete a real estate closing on behalf of the principal, the ability to finish the transaction in the event of intervening incapacity is important. This feature of the Act is a departure from the Uniform Durable Power of Attorney Act which required that the power of attorney contain specific language if the principal intended that it be durable.[11]

2. Powers of attorney validly created in other jurisdictions or under pre-existing law are treated as valid under the Act.[12]

Given our mobile society and the frequency with which clients own property in more than one jurisdiction, a power of attorney will be of limited value unless it is honored across state lines. The Act's broad portability provision encourages acceptance of valid powers of attorney created under other law and thereby obviates the necessity of executing multiple powers or obtaining limited guardianship to deal with property in other jurisdictions. The Uniform Durable Power of Attorney Act did not address portability.

3. The meaning and effect of a power of attorney is determined by the law of the jurisdiction under which it was created.[13]

While portability of powers of attorney is desirable, confusion can arise with respect to what law governs interpretation of a power of attorney drafted in another jurisdiction.[14] As the national study of state power of attorney legislation revealed, default rules on matters of authority vary from state to state. The Act clarifies that a principal's intended grant of authority is neither enlarged nor narrowed as a result of the agent using the power of attorney in a different jurisdiction.[15] The Act provides that "[t]he meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power was executed."[16]

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[10] Unif. Power of Att'y. Act § 104 (2006).
[11] Unif. Durable Power of Att'y. Act § 1 (1987).
[12] Unif. Power of Att'y. Act § 106 (2006).
[13] Unif. Power of Att'y. Act § 107 (2006).
[14] *See generally* Linda S. Whitton, *Crossing State Lines with Durable Powers,* PROB. & PROP., Sept./Oct. 2003, at 28 (discussing the challenges of drafting durable powers for mobile clients and suggesting guidelines).
[15] *See* Unif. Power of Att'y. Act § 107 cmt. (2006).
[16] Unif. Power of Att'y. Act § 107 (2006).

4. The agent's authority continues notwithstanding the later appointment of a conservator or guardian unless the court limits, suspends, or terminates the agent's authority.[17]

Reserving to the court, rather than to a later-appointed fiduciary, the authority to modify or terminate an agent's authority, is a departure from the Uniform Durable Power of Attorney Act,[18] but consistent with more recent state legislative trends.[19] When the Uniform Durable Power of Attorney Act was drafted, it was not contemplated that a later-appointed fiduciary, vested with the same authority as the principal to revoke a power of attorney, might use this authority to undermine the principal's advance planning and gain control over an incapacitated principal's assets. The rising use of guardianship as a weapon in family feuds for asset control has been dubbed by some as a "will contest" while the person is still alive.[20] The Act discourages use of guardianship for this purpose and also promotes judicial economy. As the Comments note, "If . . . a fiduciary appointment is required because of the agent's inadequate performance or breach of fiduciary duties, the court, having considered the evidence during the appointment proceedings, may limit or terminate the agent's authority contemporaneously with appointment of the fiduciary."[21]

5. Agent duties are clearly articulated.[22]

In light of the increase in family litigation over elders and their assets and the advent of state civil and criminal penalties for financial abuse, both the principal and the agent are best served by clearly articulated parameters for agent conduct. The Act sets forth mandatory as well as default duties.[23] At a minimum, the agent must act in good faith, within the scope of authority granted, and according to the principal's expectations, if known, and otherwise in the principal's best interest.[24] Unless otherwise provided in the power of attorney, an agent must also:

- act loyally for the principal's benefit;[25]
- avoid creating a conflict of interest that impairs the ability to act impartially in the principal's best interest;[26]

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[17] Unif. Power of Att'y. Act § 108(b) (2006).
[18] *See* Unif. Durable Power of Att'y. Act § 3 (1987).
[19] *See, e.g.,* 755 ILL. COMP. STAT. ANN. 45/2-10 (West 1992); IND. CODE ANN. § 30-5-3-4 (West 1994); KAN. STAT. ANN. § 58-662 (2005); MO. ANN. STAT. § 404.727 (West 2001); N.J. STAT. ANN. § 46:2B-8.4 (West 2003); N.M. STAT. ANN. § 45-5-503A (LexisNexis 2004); UTAH CODE ANN. § 75-5-501 (Supp. 2006); VT. STAT. ANN. tit. 14, § 3509(a) (2002); VA. CODE ANN. § 11-9.1B (2006).
[20] NPR: Legal Battles Over Parental Guardianship (Sept. 5, 2006), http://www.npr.org/templates/story/story.php?storyId=5697280 (containing audio stream of the Talk of the Nation segment aired on August 23, 2006); Alison Barnes, *The Liberty and Property of Elders: Guardianship and Will Contests as the Same Claim*, 11 ELDER L.J. 1 (2003).
[21] Unif. Power of Att'y. Act § 108 cmt. (2006).
[22] *See* Unif. Power of Att'y. Act § 114 (2006).
[23] *Id.*
[24] Unif. Power of Att'y. Act § 114(a) (2006).
[25] Unif. Power of Att'y. Act § 114(b)(1) (2006).
[26] Unif. Power of Att'y. Act § 114(b)(2) (2006).

- act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;[27]
- keep records;[28]
- cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations if known, and if unknown, to act in the principal's best interest;[29]
- 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;[30] and
- account only if requested by the principal, a fiduciary appointed for the principal, a governmental agency having authority to protect the principal's welfare, or the personal representative or successor in interest of the principal's estate, or if ordered by a court.[31]

Notwithstanding the foregoing mandatory and default duties, the Act recognizes that loyalty to the principal does not necessarily preclude conduct that also benefits the agent. The Act provides that "[a]n agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal."[32] This provision recognizes that many agents are family members who have inherent conflicts of interest. The principal is also permitted to exonerate the agent in the power of attorney provided that the exoneration provision is not inserted as the result of abuse of the fiduciary relationship and does not reduce the agent's standard of conduct below a good faith standard.[33] Furthermore, the Act provides that an agent may terminate the agency by giving appropriate notice of resignation.[34]

6. An agent may not do the following unless there is an express grant of authority: a) create, amend, revoke, or terminate an inter vivos trust; b) make a gift; create or change rights of survivorship; c) create or change a beneficiary designation; d) delegate authority granted under the power of attorney; e) waive the principal's right to be a beneficiary of a joint and survivor annuity; f) exercise fiduciary powers that the principal has authority to delegate; g) and disclaim property.[35]

The Act requires an express grant of authority for the foregoing actions because they are among those that are commonly used by untrustworthy agents to dissipate the principal's property or change the principal's estate plan. This approach forecloses arguments that a broad grant of general authority was intended to include these potentially damaging

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[27] Unif. Power of Att'y. Act § 114(b)(3) (2006).
[28] Unif. Power of Att'y. Act § 114(b)(4) (2006).
[29] Unif. Power of Att'y. Act § 114(b)(5) (2006).
[30] Unif. Power of Att'y. Act § 114(b)(6) (2006).
[31] Unif. Power of Att'y. Act § 114(h) (2006).
[32] Unif. Power of Att'y. Act § 114(d) (2006).
[33] Unif. Power of Att'y. Act § 115 (2006).
[34] Unif. Power of Att'y. Act § 118 (2006).
[35] Unif. Power of Att'y. Act § 201(a) (2006).

powers. This approach was patterned after a growing trend in state power of attorney legislation.[36]

7. An agent who is not the principal's ancestor, spouse, or descendant is prohibited from using the power of attorney to create in the agent any interest in the principal's property unless otherwise specified.[37]

Prohibiting all but the principal's closest relatives from using a power of attorney to benefit themselves is an important default safeguard for vulnerable principals. This provision may be modified when required by the principal's donative intentions; however, such modification would generally be the exception rather than the rule. It should be noted that an agent who is the principal's ancestor, spouse, or descendant is still constrained by the mandatory and applicable default duties under the Act[38] and, therefore, may not self deal with the principal's property unless such action is within the principal's expectations.[39]

8. A spouse-agent's authority terminates upon the filing of an action for annulment or dissolution of the marriage to the principal or their legal separation unless otherwise specified.[40]

Termination of a spouse-agent's authority upon the filing of an action to end the marriage or effectuate legal separation is an important default rule for the protection of the principal. However, it can be modified in situations where the marital dissolution is for reasons other than disharmony, such as the need to preserve assets for one spouse when the other has a catastrophic condition that will require long-term institutional care.

9. Good faith acceptances and refusals of powers of attorney are protected.[41]

Assuring acceptance of a power of attorney is one of the most essential components to the effective use of a power of attorney as an alternative to guardianship. The Act's approach to this problem is two-fold: protection of good faith acceptances and refusals of powers of attorney on the one hand and liability for refusals that fall outside of the statutory safe harbors on the other. The Act's broad protection of good faith acceptance of a purportedly acknowledged power of attorney does not require independent verification of the validity of the power of attorney or the agent's authority.[42] The Act also provides that a person conducting activities through employees is without actual

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[36] *See, e.g.,* CAL. PROB. CODE § 4264 (West Supp. 2006); KAN. STAT. ANN. § 58-654(f) (2005); MO. ANN. STAT. 404.710 (West 2001); WASH. REV. CODE ANN. § 11.94.050 (West Supp. 2006) (requiring express authority to make gifts; create, amend, or revoke trusts; and use other non-probate estate planning devices such as survivorship interests and beneficiary designations).

[37] Unif. Power of Att'y. Act § 201(b) (2006).
[38] *See* Unif. Power of Att'y. Act § 114 (2006).
[39] *See* Unif. Power of Att'y. Act § 114 cmt. (2006).
[40] Unif. Power of Att'y. Act § 110(b)(3) (2006).
[41] Unif. Power of Att'y. Act §§ 119 & 120 (2006).
[42] *See* Unif. Power of Att'y. Act § 119 (2006).

knowledge of a fact if the employee conducting the transaction is without actual knowledge of the fact.[43]

A power of attorney may be refused without liability on the following bases:

> (1) the person is not otherwise required to engage in a transaction with the principal in the same circumstances;
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> (2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;
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> (3) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;
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> (4) a request for a certification, a translation, or an opinion of counsel under Section 119(d) is refused;
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> (5) the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under Section 119(d) has been requested or provided; or
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> (6) the person makes, or has actual knowledge that another person has made, a report to the [local adult protective service office] stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.[44]

10. Third persons are liable for unreasonable refusal of a power of attorney.[45]

If a refusal of a power of attorney does not fall under one of the foregoing safe harbors,

[43] Unif. Power of Att'y. Act § 119(f) (2006).
[44] Unif. Power of Att'y. Act §§ 120(b), Alternative A; 120(c), Alternative B (2006).
[45] Unif. Power of Att'y. Act §§ 120(c), Alternative A; 120(d), Alternative B (2006).

the person refusing the power is subject to a court order mandating acceptance and to liability for attorney's fees and costs associated with any proceeding to confirm the validity of the power of attorney or mandate its acceptance.[46] Currently, ten states recognize statutory liability for unreasonable refusal of a power of attorney.[47]

[46] *Id*.

[47] Alaska Stat. § 13.26.353(c) (2004); Cal. Prob. Code § 4306(a) (West Supp. 2006); Fla. Stat. Ann. § 709.08(11) (West 2000 & Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/ 2-8 (West 1992); Ind. Code Ann. § 30-5-9-9 (West Supp. 2005); Minn. Stat. Ann. § 523.20 (West 2006); N.Y. Gen. Oblig. Law § 5-1504 (McKinney 2001); N.C. Gen. Stat. § 32A-41 (2005); 20 Pa. Cons. Stat. Ann. § 5608 (West 2005); S.C. Code Ann. § 62-5-501(F)(1) (Supp. 2005).