



THE UNIFORM POWER OF ATTORNEY ACT (2006)

- A Summary -

The development of power of attorney law. The concept of a “power of attorney” was first incorporated into the Uniform Probate Code in 1969 to offer an inexpensive method of surrogate decision-making to those whose modest assets did not justify pre-incapacity planning with a trust or post-incapacity property management with a guardianship. After more than three decades, the durable power of attorney is now used by both the wealthy and the non-wealthy for incapacity planning as well as convenience. The Uniform Power of Attorney Act (UPOAA) is necessary because over the years many states adopted non-uniform provisions to deal with issues on which the Uniform Probate Code and the older Uniform Durable Power of Attorney Act are silent. The UPOAA enhances the usefulness of durable powers while protecting the interests of the principal, the agent, and those who deal with the agent.

A national study of durable powers of attorney conducted in 2002 revealed the need to address issues not contemplated in the original Uniform Durable Power of Attorney Act, such as the authority of multiple agents, the authority of later-appointed guardians, and the impact of dissolution or annulment of the principal’s marriage to the agent. The study also revealed other topics about which the states had legislated including: successor agents, execution requirements, portability, sanctions for dishonor of a power of attorney, and restrictions on powers that alter a principal’s estate plan. In a national survey, trust and estate lawyers’ responses demonstrated a high degree of consensus about the need to improve the acceptance rate and portability of powers of attorneys as well as the need to better protect incapacitated principals from financial abuse.

A new and improved uniform act. The UPOAA consists of four articles. The first contains all of the general provisions about 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 the persons 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 their enhanced risk to the principal’s estate plan. Article 3 contains an optional statutory form 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. Article 4 contains miscellaneous provisions concerning the relationship of the UPOAA to other law and to pre-existing powers of attorney.

The UPOAA seeks to preserve the durable power of attorney as a low-cost, flexible, and private form of surrogate decision-making while deterring use of the power of attorney as a tool for financial abuse. It encourages the acceptance of powers of attorney by third persons, helps safeguard incapacitated principals from fraud, and provides clearer guidelines for agents.

Protections for the principal. Protections for the principal under the UPOAA are multi-faceted and include: mandatory as well as default fiduciary duties for the agent; clear liability for agent misconduct; broad standing provisions for judicial review of the agent’s conduct; and the requirement of express language to grant certain authority with high potential to dissipate the principal’s property or alter the principal’s estate plan. Mandatory duties include acting in good faith, within the scope of the authority

The ULC is a nonprofit formed in 1892 to create nonpartisan state legislation. Over 350 volunteer commissioners—lawyers, judges, law professors, legislative staff, and others—work together to draft laws ranging from the Uniform Commercial Code to acts on property, trusts and estates, family law, criminal law and other areas where uniformity of state law is desirable.

granted and according to the principal's reasonable expectations (or, if unknown, the principal's best interest). Default duties that can be varied in the power of attorney include the duty to preserve the principal's estate plan (subject to certain qualifications) and the duty to cooperate with the person who has the principal's health-care decision making authority.

Clarity for the agent. The UPOAA recognizes that many agents are family members who have inherent conflicts of interest, but that these conflicts may not, in and of themselves, prevent an agent from acting competently for the principal's benefit. While it is well-accepted that an agent under a power of attorney is a fiduciary, most state statutes do not specify what that means. The UPOAA addresses this dilemma in a default provision which recognizes that an agent who 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 conflicting interests. Furthermore, the act permits the principal to include in the power of attorney an exoneration clause for the benefit of the agent. Another provision that operates to the benefit of both the principal and the agent requires notice of an agent's resignation. If the agent cannot effectively notify the principal because the principal is incapacitated, the provision sets out a hierarchy of persons to whom the agent may give notice, including a governmental agency having authority to protect the welfare of the principal.

Certainty for persons asked to accept a power of attorney. The UPOAA provides broad protection for the good faith acceptance or refusal of an acknowledged power of attorney, consequences for unreasonable refusal of an acknowledged power of attorney, and recognition of the portability of powers of attorney validly created under another state's law.

Financial institutions will appreciate the broad liability shield. A person who accepts an acknowledged power of attorney (by a notary or other qualified official) without actual knowledge that the signature is not genuine or that the power of attorney is otherwise invalid may rely on the legal presumption that the power of attorney is valid. Moreover, the act explicitly provides that if the person accepting the power of attorney is an employee, the employer is also shielded from liability as long as the employee has no actual knowledge of a defect. A person who is asked to accept a power of attorney has the right, but no requirement, to request i) an affidavit under penalty of perjury of any factual matter concerning the principal, agent, or power of attorney; ii) an English translation if the power of attorney is in a foreign language; and iii) an opinion of counsel.

The act also seeks to address the problem of arbitrary refusals of powers of attorney. With respect to liability for refusal, the act provides adopting states with two choices: Section 120, Alternative A, sets out liability parameters for refusal of any acknowledged power of attorney not excluded by the statutory safe harbors. Section 120, Alternative B, applies only to refusals of acknowledged statutory form powers of attorney. As an additional protective measure for the principal, both alternative Sections 120 allow refusal of an otherwise valid power of attorney if the person believes 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" and the person makes, or knows that another person has made, a report to Adult Protective Services (or the equivalent governmental agency).

Conclusion. In the final analysis, there may be no perfect solution to meet the surrogate decision making needs of our aging society. The UPOAA balances the competing interests at stake with legislative reforms that enhance the usefulness of durable powers while at the same time protecting the principal, the agent, and those who deal with the agent from undue liability.

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