

## EXPLORING THE NEW UNIFORM POWER OF ATTORNEY ACT

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### *Report on Issues Before the Drafting Committee to Revise the Uniform Durable Power of Attorney Act*

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*The following highlights a number of the key drafting issues under consideration by the Committee to Revise the Uniform Durable Power of Attorney Act. These comments reflect a work-in-progress and have not been reviewed, debated or approved by the National Conference of Commissioners on Uniform State Laws. A full text of the working draft may be obtained from the NCCUSL website at [www.nccusl.org](http://www.nccusl.org). The Reporter may be contacted at [linda.whitton@valpo.edu](mailto:linda.whitton@valpo.edu).*

#### ***Creation: How much formality?***

*Tension–Ease of creation versus safeguards against fraud and forgery*

Present Act: requires only a designation in writing

Proposed New Act: requires the principal's signature and, if a statutory presumption of the signature's validity is desired, an acknowledgment before a notary public or other person authorized to take acknowledgements

Comment: Under the proposed Act, acknowledgment of the principal's signature is encouraged by according a statutory presumption of validity to acknowledged signatures, but the Act does not consider unacknowledged powers of attorney *per se* invalid. Acknowledgement is desirable both as a deterrent to fraudulently obtained powers and because most, if not all, states require acknowledgment for documents to be placed of record.

#### ***Powers: How much specificity?***

*Tension–Convenience of broad grant versus requiring certain powers to be delegated with specificity*

Present Act: silent on requirements for delegating authority or scope of power

Proposed New Act: contains extensive definitions of powers that can be incorporated by reference; requires express authorization for the following powers to:

- (1) create, modify, or revoke a trust;
- (2) fund a trust not created by the principal;
- (3) make a gift of the principal's property;
- (4) create or change rights of survivorship;
- (5) designate or change the designation of a beneficiary;
- (6) create in the agent or a person customarily supported by the agent a gift, survivorship right, or beneficiary designation;
- (7) delegate to another person the agency authority granted under the power of attorney; or
- (8) disclaim property, including a power of appointment over property

Comment: The requirement of a specific grant of authority in a power of attorney for the foregoing powers reflects the concern that powers which have the potential of dissipating the principal's property or altering the principal's estate plan should not be granted casually or by mistake in a general grant of authority.

***Conduct of Agent: What standard of care?***

*Tension—Protection provided by a trustee-type standard which forbids all conflicts of interest versus a more flexible standard to permit relatives or close friends to serve notwithstanding inherent conflicts*

Present Act: silent on agent standard of conduct

Proposed New Act: recognizes that an agent who accepts authority under a power of attorney is a fiduciary who must act loyally with the care, competence, and diligence normally exercised by agents in similar circumstances. The agent is expected to conduct the affairs of the principal according to the reasonable expectations of the principal and, in the absence of reasonably communicated expectations, in the best interest of the principal. The agent is to avoid conflicts of interest that would impair an agent's ability to act in the best interest of the principal, but it is recognized that an agent who otherwise meets fiduciary responsibilities to the principal will not be 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. An agent who possesses special skills and knowledge is



Proposed New Act: agent has duty to keep a complete record of all receipts, disbursements and transactions conducted on behalf of the principal, but no affirmative duty to make reports unless required in the power of attorney or requested by one of the following: the principal, a guardian, conservator, or other fiduciary appointed for the principal, any governmental agency having regulatory authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate, or ordered by a court.

Comment: Although the agent has no affirmative reporting duty under the Act, the Act provides a comprehensive list of those who have standing to request a report as a check and balance on the agent's conduct.

***Judicial Review of Agent's Conduct: Who may petition the court?***

*Tension—Safeguarding an incapacitated or questionably competent principal versus inviting harassment from contentious family members or beneficiaries*

Present Act: silent on judicial review of agent's conduct

Proposed New Act: proposes a broad and inclusive list of those who have standing to petition the court, including: the principal or agent; the principal's spouse, parent or descendant; a conservator, guardian, or other fiduciary charged with management of the principal's property; any person who would qualify as an intestate successor of the principal; any person named as a beneficiary to receive property on the principal's death or as a beneficiary of a trust created by or for the principal; any person who has a right of survivorship in property in which the principal has an interest; any governmental agency having regulatory authority to protect the welfare of the principal; and any other person who demonstrates sufficient interest in the principal's welfare. The court has discretion to award reasonable attorney fees and expenses to the prevailing party in an action to review the agent's conduct.

Comment: The list of persons who have standing to request judicial review of an agent's conduct is intentionally broader than the categories of persons who have standing to request from the agent a report of transactions. This distinction is based on a desire to protect the privacy of the principal's financial affairs on the one hand, and on the other, a need to

protect the incapacitated or questionably competent principal from an abusive agent. The provision for discretionary award of attorney fees and expenses to the prevailing party is designed to both deter harassment of the agent and to encourage legitimate action by those who have a reasonable belief that the principal's interests are endangered by the agent's conduct.

***Reliance of Third Persons: What level of protection?***

*Tension—Bolstering enforceability and acceptance of durable powers versus the benefit of third party scrutiny as a safeguard against forgery, fraud, and abuse*

Present Act: only a narrow provision permitting reliance on the agent's affidavit as conclusive proof of nonrevocation or nontermination

Proposed New Act: a person who accepts an agent's authority in good faith (*i.e.*, without knowledge that the power of attorney is revoked, terminated or invalid, that the agent's authority has been terminated, or that the agent is exceeding or improperly exercising the agent's authority) is protected from liability. The definition of knowledge includes actual knowledge or receipt of notification of a fact, but in the case of a financial organization where notice is received in a branch or office other than where the power of attorney is presented, the organization has "knowledge" not later than three business days after notice is received in the branch or other office. A person who accepts an agent's authority in good faith has no duty to inquire into the extent of the agent's powers or the propriety of their exercise and may rely on the agent's certification as to any matters concerning the power of attorney.

Comment: The new Act seeks to provide maximum assurances to persons dealing with agents that they may rely on the agent's representations and the power of attorney without risk of liability unless there is knowledge that the power of attorney or the agent's authority is invalid or insufficient. This broad-based protection is aimed at promoting acceptance of powers of attorney and facilitating transactions by an agent on behalf of the principal without costly delays or litigation. Given the modern day practice of financial institutions conducting business through branches or offices in multiple cities and states, the Act gives a financial institution a three day period in which to



problem of an agent misusing otherwise valid authority granted by a power of attorney.

***Use of a Statutory Short Form: Should this practice be encouraged?***

*Tension—facilitating uniformity among power of attorney documents and acceptance of powers of attorney versus increasing misuse of powers of attorney through easy access to the documents by the uneducated or those seeking to defraud vulnerable principals*

Present Act: Although the Uniform Durable Power of Attorney Act does not contain a statutory form, one was created by the Uniform Statutory Form Power of Attorney Act.

Proposed New Act: The New Act includes an optional statutory short form which incorporates by reference definitions of the various powers which a principal can elect to give the agent. The form is written in layperson friendly language and intended for use by drafting attorneys as well as the public.

Comment: Currently 17 states have statutory forms of some type. Feedback to the drafting committee from states such as New York and Illinois, where form practice has existed for a considerable period of time, supports the adoption of a standard form power of attorney. Given that internet forms for almost all types of legal transactions are readily available to the public, the committee concluded that it would better serve the public interest to promote a form which has undergone careful scrutiny. Counsel who represent financial institutions have also indicated support for a widely adopted statutory form.