

THE NEW UNIFORM POWER OF ATTORNEY ACT

By William P. LaPiana

The project to revise the Uniform Durable Power of Attorney began with a study of current law commissioned by the Joint Editorial Board for Uniform Trust and Estate Acts. The study was conducted by Susan Gary, Linda Whitton, Rebecca Morgan, and Karen Boxx. The study showed that although the Uniform Act had once been the law almost everywhere, states had increasingly enacted non-uniform provisions designed to meet problems which had become obvious since the promulgation of the Uniform Act and which the Act did not address. As summarized by Prof. Whitton, Reporter for the new Act, in the Prefatory Note to the current draft of the Revised Act, the principal topics with respect to which there was increasing divergence among the states 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. Other topics on which states have enacted legislation include "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."

The study was followed up with a national survey of practitioners designed to determine if there was agreement on topics not covered by the existing Uniform Act. As Prof. Whitton observes in the draft Prefatory Note:

"The survey responses demonstrated a consensus of opinion in excess of seventy percent that a power of attorney statute should:

- (1) provide for a confirming affidavit to activate contingent powers;
- (2) revoke a spouse-agent's authority upon the dissolution or annulment of the marriage

to the principal;

- (3) include a portability provision;
- (4) require gift making authority to be expressly stated in the grant of authority;
- (5) provide a default standard for fiduciary duties;
- (6) permit the principal to alter the default fiduciary standard;
- (7) require notice by an agent when the agent is no longer willing or able to act;
- (8) include safeguards against abuse by the agent;
- (9) include remedies and sanctions for abuse by the agent;
- (10) protect the reliance of other persons on a power of attorney; and
- (11) include remedies and sanctions for refusal of other persons to honor a power of attorney.”

Armed with this information, The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) created a Drafting Committee, chaired by Jack Burton of Santa Fe, New Mexico with Prof. Whitton as Reporter. Abigail Kampmann is RPPT Advisor to the Committee and the author of this article is ABA Advisor. The Committee met for the first time in April 2003 and the draft Act had its first reading at the NCCUSL Annual Meeting in August 2004. The Committee met in October 2004 and is scheduled to meet for the last time in April 2005. The Act is scheduled for its final reading and promulgation at the 2005 Annual Meeting of NCCUSL.

The draft that emerged from the October 2004 meeting of the Drafting Committee is currently being revised in light of comments made at meetings between Prof. Whitton and interested parties, included a meeting held as part of the RPPT fall leadership meeting. The latest version of this “rolling draft” will be posted on the RPPT web site as soon as it is available in late January. In the meantime, what follows is a brief discussion of some of the most important provisions of the current draft and the major issues that still face the Committee. The next version of the draft will of course embody the latest thinking on those issues and comments are actively sought. The rest of this article points out the most important provisions of the draft Act as well as subjects that are not yet settled and

on which comments are especially needed. The views expressed in this brief article are those of the author and should not be attributed to NCCUSL, the Drafting Committee, the Reporter, nor anyone else.

The new Act has been renamed. It is now the Uniform Power of Attorney Act. The Drafting Committee has decided that the default rule for powers of attorney should be durability. The section dealing with the scope of the Act, therefore, excludes from its operation powers of attorney that do not involve financial management such as those that authorize corporate officers to act on behalf of the corporation. Also excluded is a power of attorney for health care. Such powers are the subject of a unique body of law which should be kept separate from that governing financial powers of attorney.

The section dealing with definitions includes one important innovation. The attorney-in-fact is referred to throughout the Act as the “agent,” a term which should be more easily understood by the lay public. This section also includes the standard NCCUSL definition of “sign” accommodating electronic signatures.

The formal requisites for a power of attorney are few. The principal must sign the instrument granting authority to the agent or must direct another to sign the instrument in the principal’s presence. The principal must also acknowledge the signature before a notary or another person authorized to take acknowledgments in order for the signature to carry a statutory presumption of validity.

The presumption of validity is a very important part of the Act. In order to preserve the power of attorney as a convenient, simple, and low cost alternative to guardianship or equivalent forms of supervision, those to whom the power of attorney is presented must be able to act on it without fear of liability. A countervailing concern, however, is abuse of the power of attorney by faithless agents.

As noted above, several of the points of agreement revealed by the survey of practitioners involved prevention of abuse, remedies for abuse, protection for those accepting the power of attorney, and sanctions for refusals to accept the agent's authority.

The Drafting Committee is still working on these important and difficult details. The next version of the draft probably will protect from liability any third party relying on a power of attorney which is notarized and otherwise regular on its face unless the third party has notice of the revocation or termination of the power of attorney. The definition of "notice" is still under consideration as is the proper period of time during which the third party can decide whether to accept the power of attorney. Also important is the drafting of a provision which will recognize the nature of modern branch banking by providing some brief but practical time period during which notice to one branch of the bank is assumed to reach the entire organization.

Closely linked to the provisions protecting parties who rely on a power of attorney are provisions sanctioning those third parties who unjustifiably refuse to honor a power of attorney. Such provisions exist in several states and the respondents to the survey strongly supported such provisions. The current draft of the Act makes the third party liable to the principal or the principal's successors in interest to the same extent the third party would be liable had the third party refused to accept the authority of a principal who has capacity to act in his or her own behalf. The minimum recovery is \$1000, plus costs and attorney's fees.

Also related to reliance and sanctions is the question of portability. The goal is to create a workable framework within which a power of attorney valid in the jurisdiction where executed is honored in other jurisdictions. The provisions in the current draft (section 107) will be revised in the next draft to make clear that the Act will not enlarge the scope of a power beyond that given it under the

law of the jurisdiction where it was executed.

The provisions described above all deal with the acceptance of the power of attorney by third parties, with the relationship between the principal and the agent on one hand and the rest of the world on the other. Another set of provisions deals with the relationship between the principal and the agent. The goal is to erect obstacles to abuse of the agent's powers and thus provide protection for vulnerable principals. Perhaps the most important provision is currently contained in section 115(a) which states that the agent's acceptance of the authority given by the power of attorney creates a fiduciary relationship between the agent and the principal. The next version of the draft will have language dealing with the nature of the required "acceptance." Section 115 also describes the nature of the fiduciary duty which includes the duty to keep complete records and to take the principal's estate plan into account to the extent known to the agent. The revised draft will also include language dealing with conflicts of interest on the part of the agent.

Another protective provision is found in section 108 which deals with the agent's authority. Current section 108(b) requires that express authority be granted to the agent if the agent is to have authority to dispose of the principal's assets by, for example, making or modifying a trust, funding a trust created by someone other than the principal, changing rights of survivorship, and making gifts. The requirement of express authorization will help to prevent overreaching by an agent.

The current draft facilitates review of the agent's actions by giving several categories of persons, including a governmental agency having authority to protect the principal's welfare, the right to request judicial review of the agent's actions. The list also includes the principal's family and a caregiver or any other person "who demonstrates sufficient interest in the principal's welfare. The court may award attorney's fees and expenses to the prevailing party in such a proceeding. Again, this provision is

designed to help protect a vulnerable principal, whether or not incapacitated, by giving those who have an interest in the principal's welfare perhaps coupled with an interest in the principal's property, the ability to bring an erring agent to court. In addition, the possibility of the court awarding attorney's fees to the prevailing party will help to deter frivolous challenges.

These and other provisions governing the operation of powers of attorney, such as termination of the agent's authority, the relationship between concurrent and successor agents, resignation by an agent, are all dealt with in Article 1 of the Act. Article 2 sets forth in detail the powers that can be granted to an agent, each section dealing with power related to one subject, for example, real estate. The Act provides that these powers can be incorporated into a power of attorney by reference to the section number or to the descriptive caption of the section. Use of these sections allows a principal to grant powers to an agent sufficient to deal with almost every sort of transaction the principal could accomplish for herself. The Committee especially welcomes comments on the statutory powers so that they may be as comprehensive as possible.

Article 3 sets forth a statutory short form power of attorney. The statutory form would allow a principal to create a power of attorney granting all or as many of the statutory powers as the principal wishes in a form that will be widely recognized and, it is hoped, widely accepted. There are many issues related to the content and graphical presentation of the statutory form on which the Committee is still working. The Committee believes, however, that the availability of a statutory form will promote the acceptance of powers of attorney.

Article 4 completes the Act by setting forth miscellaneous provisions governing effective date, effect on existing powers of attorney and coordination with existing statutory provisions.

The next version of the draft will be available on the RPPT web site in late January.

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