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Andrew H. Hook

Oast & Hook, P.C., Portsmouth, Virginia

Lisa V. Johnson

Last & Hook, P.C., Portsmouth, Virginia

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THE VIRGINIA UNIFORM POWER OF ATTORNEY ACT

Andrew H. Hook *

Lisa V. Johnson **

I. SCOPE NOTE

The laws related to Durable Powers of Attorney (“DPAs”) have largely evolved from the common law of agency and are steadily moving toward a statutory framework. The statutory law is moving from relatively short statutes amending the common law of agency to a comprehensive framework supplemented by the common law.¹ The driving force behind this trend is the desire for increased acceptance and use of DPAs. However, DPAs are still relatively new legal tools. Case law and statutes regarding their interpretation and construction continue to develop and vary from state to state.

The Uniform Power of Attorney Act (“UPOAA”) was promulgated in 2006 by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in an attempt to bring uniformity to this area of the law, which is rapidly emerging as a significant, if not vital, estate planning tool.² A UPOAA bill was introduced into the Virginia General Assembly in January 2009 and passed with a provision that requires the UPOAA to be re-

* Officer, Oast & Hook, P.C., Portsmouth, Virginia. J.D., 1975, University of Virginia School of Law; B.S., 1972, University of Virginia. Mr. Hook is a Fellow of the American College of Trust and Estate Counsel and a Fellow of the National Academy of Elder Law Attorneys. He is a Certified Financial Planner, and he is certified as an Elder Law Attorney by the National Elder Law Foundation.

** Associate, Oast & Hook, P.C., Portsmouth, Virginia. J.D., 2005, Louisiana State University; M.A., 2000, Northwestern State University; B.S., 1998, Louisiana State University.

1. Andrew H. Hook & Thomas D. Begley, Jr., *The New Uniform Power of Attorney Act: From Infancy to Adolescence*, ESTATE PLANNING, Oct. 2007, at 36.

2. See Unif. Law Comm’rs: The Nat’l Conference of Comm’rs on Unif. State Laws, *Why States Should Adopt the Uniform Power of Attorney Act (2006)*, http://www.nccusl.org/update/uniformact_why/uniformacts-why-upoaa.asp.

enacted in the 2010 Session in order to become effective.³ The authors recommend that the General Assembly re-enact the UPOAA in the 2010 Session with the amendments suggested in this article.

II. INTRODUCTION

People are living longer. Due to medical advances, the fastest growing segment of the U.S. population is individuals over the age of sixty-five.⁴ However, with increased age comes the increased likelihood that an individual will suffer some sort of disability or incapacity, during which they will require assistance with the management of their affairs. As such, almost everyone will eventually face a situation where they will have to assist an aging parent with the management of his or her affairs. Most attorneys advise of the importance of planning for the management of one's own affairs in the case of disability or incapacity, often suggesting a durable power of attorney. A DPA is an essential disability and incapacity planning tool which allows a principal to appoint an agent to manage thier property, finances, and personal affairs.⁵ DPAs are considered an inexpensive and easy-to-create alternative to guardianship or conservatorship, and they have become a standard tool in estate planning and elder law.⁶

There is no single appropriate DPA form. Instead, DPAs are "extremely complex, powerful and flexible legal instruments that create significant legal authority, duties, and obligations."⁷ While forms may make creating a DPA easier, a single form often does not take into account the substantial differences among individual clients.⁸ To meet specific client needs, attorneys should spend time educating themselves, as well as their clients, about the various drafting options available in order to customize the DPA.⁹

3. S.B. 855, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___).

4. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, P23-209, 65+ IN THE UNITED STATES: 2005, at 1 (2005).

5. *Durable Powers of Attorney*, Tax Mgmt. (BNA) No. 859-2d, at A-1 (2008).

6. *Id.*

7. *Id.* at A-2.

8. Hook & Begley, Jr., *supra* note 1, at 37.

9. *Id.*

This is especially important with ever-changing family dynamics in today's society.¹⁰

A. *Early History*

Under the common law, a power of attorney became ineffective upon the principal's incapacity. It was not a useful tool to manage the affairs of an incapacitated principal because the principal's loss of capacity terminated the agent's actual authority.¹¹ In 1954, states began to change this common law rule by statute. Virginia became the first state to provide for the continuation of the agency relationship if the instrument expressly stated that it survived the principal's incapacity.¹² With the promulgation of the Uniform Probate Code in 1969¹³ and the Uniform Durable Power of Attorney Act ("UDPAA") in 1979,¹⁴ the adoption of DPA statutes became widespread.

B. *Recent Developments*

There has been an explosion in the use of DPAs and resulting litigation. Many states have responded to the increase in litigation by revising their state DPA statutes to address perceived problem areas. In 2005, the American Law Institute adopted and promulgated the Restatement (Third) of Agency, which recognizes DPAs.¹⁵ Today, all fifty states and the District of Columbia have enacted DPA statutes.¹⁶ However, "most of these statutes are brief and rely heavily on the common law of Agency for the construction and interpretation of DPAs."¹⁷

In 2002, NCCUSL conducted a national study comparing state DPA statutes.¹⁸ The study revealed that, despite initial uniformi-

10. *Id.*

11. RESTATEMENT (THIRD) OF AGENCY § 3.08(1) (2005).

12. *See* VA. CODE ANN. § 11-9.1 (Cum. Supp. 2009) (originally enacted in 1954).

13. UNIF. PROBATE CODE §§ 1-101 to 2-1010 (amended 2006), 8 U.L.A. 1 (2001 & Cum. Supp. 2009).

14. UNIF. DURABLE POWER OF ATTORNEY ACT §§ 1-10 (amended 1987), 8A U.L.A. 246 (2001).

15. *See* RESTATEMENT (THIRD) OF AGENCY § 3.08(2) & cmts. b, c (2006).

16. *Durable Powers of Attorney*, *supra* note 5, at A-2.

17. *Id.* at A-1 to A-2.

18. *See* LINDA S. WHITTON, NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS,

ty among state DPA statutes, there was a growing divergence.¹⁹ Specifically, the NCCUSL study found that a majority of states had begun to enact non-uniform provisions to deal with specific matters upon which the UDPAA was silent.²⁰ These matters included execution requirements, successor agents, portability provisions, and sanctions for third-party refusal to accept DPAs.²¹ Responses to the NCCUSL survey demonstrated a high degree of consensus about many needs that should be addressed by DPAs such as: (1) improving portability; (2) including safeguards, remedies, and sanctions for abuse by an agent; (3) protecting the reliance of other persons on a power of attorney; and (4) including remedies and sanctions for third-party refusal to honor a DPA.²²

As a result of the survey, NCCUSL adopted and promulgated the UPOAA in 2006.²³ The UPOAA “codifies both state legislative trends and collective best practices, and strikes a balance between the need for flexibility and acceptance of an agent’s authority [by third parties] and the need to prevent and redress financial abuse.”²⁴ The UPOAA is basically “a set of default rules that preserve a principal’s freedom to choose both the extent of an agent’s authority and the principles to govern the agent’s conduct.”²⁵ Where the UPOAA is silent, the common law rules of agency apply.²⁶ The UPOAA is similar to the Uniform Trust Code (“UTC”) in that it is a comprehensive statute providing few mandatory rules and many default rules that can be altered by the draftsman. One significant feature of the UPOAA is the inclusion of an optional statutory form DPA, an attempt to add simplicity to the process of creating a DPA.²⁷

NATIONAL DURABLE POWER OF ATTORNEY SURVEY RESULTS AND ANALYSIS (2002), <http://www.law.upenn.edu/bll/archives/ulc/dpoaa/surveyoct2002.pdf>.

19. *Id.* at 1; UNIF. POWER OF ATTORNEY ACT prefatory note, 8B U.L.A. 29 (Cum. Supp. 2009). Unless otherwise noted, citations to the UPOAA are to the 2009 Cumulative Supplement of the *Uniform Laws Annotated*.

20. UNIF. POWER OF ATTORNEY ACT prefatory note, 8B U.L.A. 29.

21. *Id.*, 8B U.L.A. 30.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* § 121 cmt., 8B U.L.A. 59.

27. *See id.* § 301, 8B U.L.A. 79–84.

As of 2009, Idaho, New Mexico, Nevada, Maine, and Colorado have adopted the UPOAA.²⁸ However, Illinois, Indiana, Maryland, Minnesota, Montana, and Oregon, along with Virginia, have all introduced UPOAA bills into their state legislatures in 2009.²⁹ The AARP supports the enactment of the UPOAA.³⁰

C. *History of the UPOAA in Virginia*

Virginia currently has very limited statutes dealing with powers of attorney.³¹ Where Virginia statutes are silent, the common law of agency applies.³² Prior to the development of the UPOAA, Virginia legislators had never fully considered what default rules should be in place to protect principals and third parties and encourage acceptance of powers of attorney. As both the use of powers of attorney and litigation surrounding their use continue to rise, Virginia—as well as all states—should have a comprehensive set of laws in place to define the scope and limits of powers of attorney. There are several states that already have comprehensive statutes pertaining to powers of attorney.³³ As such, the need for legislation such as the UPOAA may not be as great in those states. However, as more states continue to enact the UPOAA, every state should consider its adoption to facilitate uniformity.

Shortly after the UPOAA was developed, the Virginia Bar Association (“VBA”) Trust and Estate Section formed a sub-committee to study the UPOAA and assess the impact of its enactment on current Virginia law.³⁴ The sub-committee met regularly to discuss the UPOAA and revised the Act where it felt Virginia law was superior.³⁵ Additionally, the VBA sub-committee consulted with various organizations, including the Virginia

28. See Unif. Law Comm’rs: The Nat’l Conference of Comm’rs on Unif. State Laws, A Few Facts About the Uniform Power of Attorney Act (2009), http://www.nccusl.org/update/uniformact_factsheets/uniformacts-fs-upoaa.asp.

29. *Id.*

30. AARP, *AARP Report Urges Adoption of Stronger State Laws to Prevent Power of Attorney Abuse*, Dec. 4, 2008, available at http://www.aarp.org/aarp/presscenter/pressrelease/articles/Power_of_Attorney_Abuse_.html.

31. *Cf.* VA. CODE ANN. tit. 26 (Repl. Vol. 2009).

32. See *Hausenfluck v. Commonwealth*, 85 Va. 702, 704, 8 S.E. 683, 684 (1889).

33. *E.g.*, N.Y. GEN. OBLIG. LAW §§ 5-1501 to 5-1506 (McKinney 2006); N.C. GEN. STAT. §§ 32A-1 to 32A-43 (2007 & Supp. 2008).

34. Posting of Andrew Hook to GeriLaw, <http://gerilaw.typepad.com/elderlaw/2009/01/index.html> (Jan. 30, 2009).

35. *Id.*

Bankers Association and the AARP to solicit feedback regarding the UPOAA.³⁶ The modified UPOAA was introduced into the Virginia House of Delegates as House Bill 950 in the 2008 Session—primarily to give notice of the VBA’s intention to seek its enactment the following year.³⁷ The bill was not pursued and was left in the House Commerce and Labor Committee.³⁸ In the fall of 2008, the sub-committee again recommended the modified version of the UPOAA to the Virginia General Assembly for enactment.³⁹ In early 2009, the Act was re-introduced—this time in the Virginia Senate as Senate Bill 855.⁴⁰ The Virginia Bankers Association and the AARP joined the VBA in recommending enactment of the UPOAA.⁴¹ The General Assembly listened, and enacted the bill with amendments made by the House of Delegates and a re-enactment provision that provides: “[T]he provisions of this Act shall not become effective unless reenacted by the 2010 Session of the General Assembly.”⁴²

III. OVERVIEW OF THE VIRGINIA UPOAA

A. Article 1: General Provisions

1. UPOAA Section 101: Short Title

The title “Uniform Power of Attorney Act” does not contain the word “durable” in it.⁴³ Thus, the Act governs both durable and nondurable powers of attorney.

36. *Id.*

37. *Id.*

38. Summary as Introduced, H.B. 950 Uniform Powers of Attorney Act; established (2008), <http://leg1.state.va.us/cgi-bin/legpsoy.exe?ses=081&typ=bi1&val=hb950>.

39. Posting of Andrew Hook to GeriLaw, *supra* note 34.

40. S.B. 855, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___).

41. AARP Virginia Marks Major Accomplishments During the 2009 General Assembly Session, http://www.aarp.org/states/va/advocacy/articles/aarp_virginia_marks_major_accomplishments_during_the_2009_general_assembly_session.html (last visited Oct. 11, 2009).

42. S.B. 855.

43. See Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-71.01); UNIF. POWER OF ATTORNEY ACT § 101, 8B U.L.A. 35 cmt.

2. UPOAA Section 102: Definitions

Several terms that are defined in the UPOAA are worth mentioning. For example, the term “Agent” replaces “Attorney-in-Fact.” This was done to address public confusion about the difference between an attorney-in-fact and an attorney at law.⁴⁴ Virginia Code section 11-9.1 and related sections use both terms.⁴⁵ Additionally, the term “Incapacity” is used in the UPOAA instead of “Disability.”⁴⁶ A disability does not necessarily render an individual incapable of managing his or her property or business affairs.⁴⁷ Virginia also eliminated individuals “who are detained, including incarcerated in the penal system,” from the list of those persons deemed to have an “incapacity.”⁴⁸ This change complies with existing Virginia Code section 53.1-221(D), which provides that, unless a committee has been appointed, an individual who has been convicted of a felony and sentenced to confinement in a state correctional facility continues to have the same capacity, rights, powers, and authority over his property and affairs that he had prior to the conviction and sentencing.⁴⁹

Practice Tip. The UPOAA does not require that a power of attorney be in paper form. The UPOAA defines a “Power of Attor-

44. UNIF. POWER OF ATTORNEY ACT prefatory note, 8B U.L.A. 31.

45. *E.g.*, VA. CODE ANN. § 11-9.1 (Cum. Supp. 2009).

46. *See* UNIF. POWER OF ATTORNEY ACT § 102(5), 8B U.L.A. 36.

47. Maine further defined “incapacity” in its UPOAA, stating that incapacity means the inability of an individual to effectively manage property or business affairs because the individual

[i]s impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause to the extent that the individual lacks sufficient understanding, capacity or ability to receive and evaluate information or make or communicate decisions regarding the individual’s property or business affairs.

See 2009 Me. Legis. Serv. ch. 292 (West) (to be codified at ME. REV. STAT. ANN. tit. 18-A, § 5-902(1)). Colorado added language to its UPOAA which states:

It shall not be inferred from the portion of the definition of “incapacity” in section 15-14-702(5)(b) that an individual who is either incarcerated in a penal system or otherwise detained or outside of the United States and unable to return lacks the capacity to execute a power of attorney as a consequence of such detention or inability to return.

COLO. REV. STAT. ANN. § 15-14-706 (2.5) (West 2006).

48. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-71.01).

49. VA. CODE ANN. § 53.1-221(D) (Repl. Vol. 2009). The UPOAA also defines the following terms: Durable, Electronic, Good Faith, Person, Power of Attorney, Presently exercisable general power of appointment, Principal, Property, Record, Sign, State, and Stocks and bonds. UNIF. POWER OF ATTORNEY ACT § 102(2)-(4), (6)-(14), 8B U.L.A. 35-36.

ney” as a writing or other record that grants an agent authority to act for the principal.⁵⁰ The term “Record” is defined as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.”⁵¹ Therefore, a power of attorney may be in electronic form.

3. UPOAA Section 103: Applicability

The UPOAA does not apply to powers coupled with an interest in the subject of the power, medical powers of attorney, proxy or voting rights for an entity, or powers created on a government form for a government purpose.⁵² Additionally, the UPOAA should not be applicable to a designation of a person to make arrangements for disposition of remains.⁵³ The authors recommend that Virginia Code section 26-71.03—UPOAA section 103’s Virginia counterpart—be amended to expressly provide that the law does not apply to these designations.

4. UPOAA Section 104: Power of Attorney is Durable

Under the UPOAA, a power of attorney is durable unless it expressly states otherwise.⁵⁴ This is a major change from the common law, where a power of attorney had to contain the following provision or words of similar intent: “This power of attorney (or his authority) shall not terminate on disability of the principal.”⁵⁵

Practice Tip. Even though the UPOAA automatically presumes durability unless the document states otherwise, it is recommended that a power of attorney expressly state that it survives the principal’s incapacity.

5. UPOAA Section 105: Execution of Power of Attorney

A power of attorney must be signed by the principal or in the principal’s conscious presence by another individual at the prin-

50. *Id.* § 102(7); 8B U.L.A. 36.

51. *See id.* § 102(11); 8B U.L.A. 36.

52. *Id.* § 103; 8B U.L.A. 36.

53. *See* VA. CODE ANN. § 54.1-2825 (Repl. Vol. 2009).

54. UNIF. POWER OF ATTORNEY ACT § 104, 8B U.L.A. 39.

55. *See* VA. CODE ANN. § 11-9.1(A) (Cum. Supp. 2009).

principal's direction.⁵⁶ A signature is presumed to be genuine if acknowledged before a notary public.⁵⁷ Although acknowledgment of the principal's signature is not mandatory under the UPOAA, only an acknowledged signature carries the statutory presumption of validity.⁵⁸

Practice Tip. To help insure that a durable power of attorney will be recognized in a state that has not enacted the UPOAA, the principal's signature should be witnessed by two unrelated, disinterested witnesses. Some states require that powers of attorney be witnessed or executed in the same manner as a will or a deed.⁵⁹ Witnesses can also testify to the capacity of the principal at the time the power of attorney is executed if the power of attorney is ever challenged on the basis of the principal's lack of capacity. Additionally, any power of attorney that may have to be recorded in the office of a clerk of court (1) should be acknowledged; (2) each individual's surname only, where it first appears, should be underscored or capitalized; (3) each page should be numbered; (4) names of all grantors and grantees should be listed; and (5) the first page should show the name of the draftsman.⁶⁰ The power of attorney should also comply with the requirements of the State

56. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-71.05); UNIF. POWER OF ATTORNEY ACT § 105, 8B U.L.A. 39. Maine's UPOAA requires the inclusion of certain notices, substantially in the form provided by the statute, for a power of attorney to be valid. See 2009 Me. Legis. Serv. ch. 292 (West) (to be codified at ME. REV. STAT. ANN. tit. 18-A, § 5-905). The Nevada UPOAA imposes the additional requirement that if the principal resides in a hospital, assisted living facility, or skilled nursing facility at the time the power of attorney is executed, then a certification of the principal's competency from a physician, psychologist, or psychiatrist must be attached to the power of attorney. See 2009 Nev. Stat. ch. 64, § 20 (to be codified at NEV. REV. STAT. tit. 13).

57. See Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. §§ 26-71.19 to 26-71.20) (provisions which do not apply to unacknowledged powers of attorney).

58. Linda S. Whitton, *Navigating the Uniform Power of Attorney Act*, 3 NAT'L ACAD. OF ELDER L. ATT'YS J. 1, 6 (2007).

59. See ARIZ. REV. STAT. ANN. § 14-5501(D)(4) (2005); FLA. STAT. ANN. § 709.08 (West 2000 & Supp. 2009); OKLA. STAT. ANN. tit. 58 § 1072.2(A)(1) (West Cum. Supp. 2009); S.C. CODE ANN. § 62-5-501(C) (2009).

60. See Virginia Code section 17.1-227 for the rules relating to the recordation of documents and section 55-107, which provides that a power of attorney may be admitted to record in any county or city. VA. CODE ANN. § 17.1-227 (Cum. Supp. 2009); *id.* § 55-107 (Repl. Vol. 2007). The authors are not aware of any problems recording DPAs; however, the authors recommend compliance with recordation rules to avoid potential problems that may arise.

Library Board for the creation, storage, and filing of public records.⁶¹

6. UPOAA Section 106: Validity of Power of Attorney

This section recognizes the validity of powers of attorney created under other law and encourages their portability. The UPOAA does not affect the validity of pre-existing powers of attorney executed under prior law, powers of attorney validly created under the law of another jurisdiction, or military powers of attorney.⁶² Virginia added a statement that powers of attorney created according to the laws of another state are valid in the Commonwealth if the power of attorney was executed outside of Virginia.⁶³ Except as otherwise provided by statute other than the UPOAA,⁶⁴ photocopies and electronically transmitted copies have the same force and effect as the original.⁶⁵

The UPOAA is silent on the issue of whether a power of attorney must be delivered to the agent in order for it to be valid. The omission of a delivery requirement from the UPOAA means that delivery by the principal to the agent is not necessary for the validity of a power of attorney. However, where the UPOAA is silent, the common law applies.⁶⁶ Cases from various common law jurisdictions vary as to whether delivery of the power of attorney

61. See VA. CODE ANN. § 17.1-239 (Repl. Vol. 2003). These requirements provide that the power of attorney must be on white paper, no less than eight and one-half by eleven inches nor larger than eight and one-half by fourteen inches in size, with a paper weight of at least twenty pounds. 17 VA. ADMIN. CODE § 15-70-20 (1996). The writing must be black, and signatures must be in black or dark blue ink. *Id.* § 15-70-30. The printing must be at least nine points in size and the margins one inch on the left, top, and bottom margins, and one-half inch on the right margin. *Id.* §§ 15-70-40, 15-70-50.

62. See UNIF. POWER OF ATTORNEY ACT § 106, 8B U.L.A. 40.

63. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts __ (to be codified at VA. CODE ANN. § 26-71.06(c)(i)).

64. An example of another law that will require presentation of the original power of attorney is the Virginia recordation statute. *Id.*

65. *Id.* While retaining the statutory provision providing that a copy of the power of attorney has the same effect as the original, the Nevada UPOAA also requires that, upon demand by a third party, the agent provide an affidavit stating that the copy is a true and accurate copy of the original. The requested affidavit must also assert that, to the best of the agent's knowledge, the principal is still alive and that the agent's relevant powers have not been altered or terminated. See 2009 Nev. Stat. ch. 64, § 21 (to be codified at NEV. REV. STAT. tit. 13).

66. See *supra* note 26.

to the agent is required for validity.⁶⁷ Virginia common law is silent, but current Virginia statutory law addresses this concern by expressly eliminating the delivery requirement.⁶⁸ If the UPOAA is adopted, current Virginia Code section 11-9.7—the statute eliminating the delivery requirement—will be repealed. To specifically address this issue and to avoid confusion, the Virginia UPOAA should be amended to retain this statute.

7. UPOAA Section 107: Meaning and Effect of Power of Attorney

The UPOAA clarifies that powers of attorney are governed by the law of the jurisdiction indicated in the power of attorney or, if not indicated, by the law of the jurisdiction where the power of attorney was created.⁶⁹

8. UPOAA Section 108: Nomination of Conservator or Guardian—Relation of Agent to Court-Appointed Fiduciary

The UPOAA allows a principal to nominate a conservator or guardian for consideration by the court in the event that protective proceedings begin after the principal executes a power of attorney.⁷⁰ The Virginia version of the UPOAA eliminated the op-

67. See, for example, *Kountouris v. Varvaris*, 476 So. 2d 599, 604 (Miss. 1985), where the Mississippi Supreme Court stated:

As between the parties, the principal and the purported attorney-in-fact, all that is requisite to the enforceability of the power of attorney is execution and delivery in the same sense that, as between grantor and grantee, all that is necessary for a deed to be valid and enforceable is that the grantor execute it and deliver it.

Id. (citing *Davis v. Holified*, 193 So. 2d 723, 726 (Miss. 1957); *Walker v. Walker*, 59 So. 2d 277, 284 (Miss. 1952)).

68. The Virginia Code provides:

An attorney-in-fact or other agent in possession of a general, special or limited power of attorney or other writing vesting any power or authority in him shall, where the instrument is otherwise valid, be deemed to possess the powers and authority granted by such instrument notwithstanding any failure of the principal to deliver the instrument to him, and persons dealing with such attorney-in-fact or agent shall have no obligation to inquire into the manner or circumstances by which such possession was acquired; provided, however, that nothing herein shall preclude the court from considering such manner or circumstances as relevant factors in any proceeding brought to terminate, suspend, or limit the authority of the attorney-in-fact.

VA. CODE ANN. § 11-9.7 (Repl. Vol. 2006).

69. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-71.07); UNIF. POWER OF ATTORNEY ACT § 107, 8B U.L.A. 41.

70. UNIF. POWER OF ATTORNEY ACT § 108, 8B U.L.A. 42. New Mexico added language

tional statement, which directs the court to appoint a guardian or conservator in accordance with the principal's most recent nomination.⁷¹ The UPOAA gives deference to the principal's choice of agent by providing that the agent's authority continues despite the appointment of a guardian or conservator, unless the court decides to limit or terminate the agent's authority.⁷²

9. UPOAA Section 109: When Power of Attorney is Effective

The UPOAA establishes a default rule that a power of attorney is immediately effective unless the principal chooses to create a "springing" power of attorney.⁷³ This default rule is consistent with existing Virginia law.⁷⁴ Under the UPOAA, if the principal creates a springing power of attorney and has not designated an individual to make the determination that the principal is incapacitated, then a physician, licensed psychologist, attorney, judge, or appropriate governmental official is authorized to make the determination.⁷⁵ The Virginia version of the UPOAA narrowed the term "physician" by stating that the capacity evaluation should be made by the "the principal's attending physician and a second physician or licensed clinical psychologist after personal examination of the principal . . ."⁷⁶ Additionally, under the UPOAA, a person authorized to verify the incapacity of the principal is the principal's representative for purposes of the Health Insurance Portability and Accountability Act ("HIPAA"), which includes ob-

to its UPOAA which requires that, following the court appointment of a conservator, notice and the opportunity to be heard be afforded to the agent and the principal prior to the limitation, suspension, or termination of the power of attorney. *See* N.M. STAT. § 46B-1-108 (2007).

71. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-71.08).

72. UNIF. POWER OF ATTORNEY ACT § 108(b), 8B U.L.A. 42. Nevada added language to its UPOAA that terminates a power of attorney when the court appoints a guardian for the principal's estate. *See* 2009 Nev. Stat. ch. 64, § 23 (to be codified at NEV. REV. STAT. tit. 13).

73. *Id.* § 109(a), 8B U.L.A. 43.

74. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-71.09).

75. UNIF. POWER OF ATTORNEY ACT § 109(c), 8B U.L.A. 43. An attorney, judge, or appropriate governmental official operates as a default arbiter of "incapacity" only as that term is defined in UPOAA section 102(5)(B). *Id.* § 109(c)(2), 8B U.L.A. 43. Nevada eliminated this provision from its UPOAA. *See* 2009 Nev. Stat. ch. 64, § 24 (to be codified at NEV. REV. STAT. tit. 13).

76. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-71.09(C)).

taining access to the principal's health-care information and communicating with the principal's health-care provider.⁷⁷

10. UPOAA Section 110: Termination of Power of Attorney or Agent's Authority

The UPOAA expressly provides a list of events that will terminate the power of attorney⁷⁸ or the agent's authority.⁷⁹ A power of attorney will not become ineffective due to a lapse of time since its execution.⁸⁰ To effectively revoke a power of attorney, a subsequently executed power of attorney must expressly provide for the revocation of the previously created power of attorney or state that all other powers of attorney are revoked.⁸¹ A terminating event is not effective as to an agent or other individual who does not have actual knowledge that the power of attorney or the agent's authority is terminated and who "acts in good faith under the power of attorney."⁸² A spouse-agent's authority is terminated if an action is filed for divorce or annulment of the marriage or legal separation from the principal.⁸³ This is a default rule which may be overridden in the power of attorney.⁸⁴

77. UNIF. POWER OF ATTORNEY ACT § 109(d), 8B U.L.A. 43. Since the person authorized to verify the principal's incapacity will likely need access to the principal's health records, the UPOAA qualifies the person to act as the principal's representative for the purposes of HIPAA. It does not authorize the agent to make health-care decisions for the principal, nor does it prevent the principal's authorized health-care agent from also qualifying as a representative under HIPAA. See 45 C.F.R. § 164.502(g)(1)–(2) (2008).

78. UNIF. POWER OF ATTORNEY ACT § 110(a), 8B U.L.A. 44–45. Events that terminate the power of attorney include: (1) death of principal; (2) principal's incapacity, if the power of attorney is not durable; (3) principal revokes the power of attorney; (4) the power of attorney provides that it terminates; (5) the purpose of the power of attorney is accomplished; and (6) the principal revokes the agent's authority, or the agent dies, resigns, or becomes incapacitated, and the power of attorney does not name a successor agent. *Id.*

79. *Id.* § 110(b), 8B U.L.A. 45. Events that terminate the agent's authority include: (1) the principal revokes the authority; (2) the agent dies, resigns, or becomes incapacitated; (3) an action is filed for divorce or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney provides otherwise; or (4) the power of attorney terminates. *Id.*

80. *Id.* § 110(c), 8B U.L.A. 45.

81. *Id.* § 110(f), 8B U.L.A. 45. *But see* Whitley v. Lewis, 55 Va. Cir. 485, 493 (Cir. Ct. 2000) (Fairfax County) (holding original power of attorney revoked when party later created a second power attorney, even though party did not expressly revoke original).

82. UNIF. POWER OF ATTORNEY ACT § 110(d), 8B U.L.A. 45.

83. *Id.* § 110(b)(3), 8B U.L.A. 45.

84. *Id.* § 110(b)(3) cmt., 8B U.L.A. 45.

11. UPOAA Section 111: Co-Agents and Successor Agents

The UPOAA permits co-agents to exercise their authority independently.⁸⁵ This is a default position intended to discourage the execution of multiple co-extensive powers of attorney naming different agents.⁸⁶ However, the UPOAA does not encourage naming co-agents due to the potential for disagreements between agents and the possibility of agents taking inconsistent actions.⁸⁷

With regard to successor agents, unless the power of attorney expressly provides otherwise, they have the same power and authority as the original agent had.⁸⁸ However, there may be circumstances where the principal does not want the successor agent to have the same authority as the original agent.⁸⁹ For example, a principal may wish to give a spouse the power to change beneficiary designations on insurance policies.⁹⁰ However, if the principal designates one of his four children as successor agent, he may not wish to grant his successor agent-child that same authority, especially if the children do not get along.⁹¹ Under these types of circumstances, additional language may be warranted in the power of attorney to alter the default rule.⁹²

An agent is not liable for the actions of another agent unless the former participates in or conceals the latter's breach of fiduciary duty.⁹³ If an agent with actual knowledge of a breach of fiduciary duty by another agent fails to notify the principal or take reasonable action to safeguard the principal's interests, he will be liable for foreseeable damages, which might have been avoided had he acted.⁹⁴

85. *Id.* § 111(a), 8B U.L.A. 46.

86. *Id.* § 111(a) & cmt., 8B U.L.A. 46–47.

87. *Id.* § 111 cmt., 8B U.L.A. 47.

88. *Id.* § 111(b)(1), 8B U.L.A. 46.

89. Whitton, *supra* note 58, at 20.

90. *See id.*

91. *See id.*

92. *Id.*

93. UNIF. POWER OF ATTORNEY ACT § 111(c), 8B U.L.A. 46.

94. *Id.* § 111(d) & cmt., 8B U.L.A. 46–47.

12. UPOAA Section 112: Reimbursement and Compensation of Agent

The UPOAA establishes a default rule that an agent is entitled to reasonable compensation and to “reimbursement of expenses reasonably incurred on behalf of the principal.”⁹⁵

Practice Tip. While it is unlikely that the principal will alter the default rule concerning expenses, it frequently will be appropriate to limit or define the terms of the agent’s compensation.⁹⁶ For example: “My agent is authorized to pay compensation for his services to himself from my funds at the rate of \$____ per month,” or “My agent shall not be entitled to compensation for his services as my agent.”

13. UPOAA Section 113: Agent’s Acceptance

This section creates a default rule that a person accepts his appointment as an agent under a power of attorney when he begins exercising authority, performing duties, or evidencing any other conduct or assertion that indicates that he has accepted.⁹⁷ The UPOAA does not make delivery of the power of attorney a requirement for the agent to act on the principal’s behalf. Until the re-enactment of the UPOAA, Virginia power of attorney statutes specifically state that the principal’s failure to deliver the power of attorney to the agent will not affect its validity.⁹⁸ Acceptance is the “point for commencement of the agency relationship and the imposition of fiduciary duties.”⁹⁹

95. *Id.* § 112, 8B U.L.A. 47. Under the Nevada UPOAA, an agent is only entitled to the reimbursement of expenses, not compensation, unless otherwise provided by the power of attorney. *See* 2009 Nev. Stat. ch. 64, § 27 (to be codified at NEV. REV. STAT. tit. 13).

96. *Id.* § 112 cmt., 8B U.L.A. 48.

97. *Id.* § 113, 8B U.L.A. 48; *see also id.* § 118(b)(2), 8B U.L.A. 48 (creating a default method for agent resignation).

98. *See* VA. CODE ANN. § 11-9.7 (Repl. Vol. 2006).

99. *Id.* § 113 cmt., 8B U.L.A. 48. This is similar to the provisions of Virginia’s enactment of the Uniform Trust Code, which provides that the acceptance of the trust by the trustee is the point at which fiduciary duties are imposed on the trustee. *See* VA. CODE ANN. § 55-548.01 (Repl. Vol. 2007).

14. UPOAA Section 114: Agent's Duties

Although it was well-settled law that an agent under a power of attorney was a fiduciary,¹⁰⁰ the extent of the fiduciary duties imposed upon the agent by Virginia law was previously unclear.¹⁰¹ The UPOAA lists mandatory duties of the agent that cannot be altered by the power of attorney.¹⁰² The mandatory duties provide that all agents must act in good faith, within the scope of authority granted, and in accordance with the principal's reasonable expectations, if known, or in the principal's best interest if the principal's expectations are unknown.¹⁰³ The remaining duties are default rules which can be modified by the principal.¹⁰⁴ These duties include: (1) acting loyally; (2) avoiding conflicts of interests; (3) acting with care, competence, and diligence; (4) keeping records; (5) cooperating with the health-care agent; and (6) attempting to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interests based on all relevant factors.¹⁰⁵

An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.¹⁰⁶ Similarly, an agent who acts with care "for the best interest of the principal is not liable solely because the agent also benefits from the act" or has a conflicting interest.¹⁰⁷ "If an agent is selected by the principal because of special skills or expertise possessed by

100. See RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

101. See UNIF. POWER OF ATTORNEY ACT § 114 cmt., 8B U.L.A. 49–50.

102. *Id.* § 114(a), 8B U.L.A. 48.

103. *Id.* The mandatory duties of an agent under the UPOAA are similar to those imposed on a trustee in Virginia's version of the UTC, namely, "to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries." See VA. CODE ANN. § 55-541.05(B)(2) (Repl. Vol. 2007 & Cum. Supp. 2009).

104. See UNIF. POWER OF ATTORNEY ACT § 114(b), 8B U.L.A. 48–49. The UPOAA does not create a default affirmative duty of periodic accounting. See *id.* § 114(h), 8B U.L.A. 49. The agent is not required to disclose records unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal. *Id.*

105. *Id.* § 114(b), 8B U.L.A. 48–49. The default duties to cooperate with the principal's health-care agent and to preserve the principal's estate plan were included to protect the principal's previously-expressed choices. *Id.* § 114 cmt., 8B U.L.A. 50. The UPOAA does not create a default affirmative duty of periodic accounting. See *id.* § 114(h), 8B U.L.A. 49. The agent is not required to disclose records unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal. *Id.*

106. *Id.* § 114(c), 8B U.L.A. 49.

107. *Id.* § 114(d), 8B U.L.A. 49.

the agent or in reliance on the agent's representation" of those skills or expertise, the special skills or expertise shall be considered in determining whether the agent has acted with care under the circumstances.¹⁰⁸ Absent a breach of duty, "an agent is not liable if the value of the principal's property declines."¹⁰⁹ An agent who exercises authority to delegate to someone else the authority granted by the power of attorney is not liable for any error of that person, provided the agent exercises care in the delegation.¹¹⁰ This section was amended to import existing Virginia Code sections 11-9.6 and 37.2-1018, which require an agent to disclose information to certain individuals.¹¹¹

Practice Tip. When the agent has accepted appointment, fiduciary duties are imposed by UPOAA section 114.¹¹² But is the agent liable if he subsequently fails to act after having accepted the appointment as agent under section 113? The answer is potentially yes, since, unless the power of attorney provides otherwise, an agent must act with "diligence ordinarily exercised by agents in similar circumstances."¹¹³ If this potential liability is a concern, consider including the following provision: "My agent

108. *Id.* § 114(e), 8B U.L.A. 49.

109. *Id.* § 114(f), 8B U.L.A. 49.

110. *Id.* § 114(g), 8B U.L.A. 49. The UPOAA was amended by Virginia to provide expressly that the power to delegate does not abrogate the agent's duties under the Virginia Uniform Prudent Investor Act. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-71.14(G)). Virginia Code section 26-45.13 expressly includes agents under powers of attorneys within the definition of "trustee." VA. CODE ANN. § 26-45.13 (Repl. Vol. 2009). Section 26-45.10 provides:

A. A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

1. Selecting an agent;
2. Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
3. Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

B. In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

C. A trustee who complies with the requirements of subsection A is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.

D. By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this Commonwealth, an agent submits to the jurisdiction of the courts of this Commonwealth.

VA. CODE ANN. § 26-45.10 (Repl. Vol. 2009).

111. VA. CODE ANN. § 6.1-125.15:1 (Repl. Vol. 1999 & Cum. Supp. 2009).

112. UNIF. POWER OF ATTORNEY ACT § 114(a)-(b), 8B U.L.A. 48-49.

113. *Id.* § 114(b)(3), 8B U.L.A. 49.

shall not be liable to me or my estate for the failure to exercise any of the authority granted by this power of attorney.”

15. UPOAA Section 115: Exoneration of Agent

Under the UPOAA, the inclusion of an exoneration provision, relieving the agent of liability for breach of fiduciary duties, is binding on the principal and the principal’s successors in interest unless the agent’s breach is “committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal.”¹¹⁴ As an additional protection for the principal, an exoneration provision also will not be binding if it was inserted in the power of attorney as the result of abuse of a confidential relationship with the principal.¹¹⁵

16. UPOAA Section 116: Judicial Relief

The purpose of this section is to protect vulnerable or incapacitated individuals against financial abuse and to protect the self-determination rights of principals.¹¹⁶ In addition to the remedies afforded by Virginia Code section 26-71.23—UPOAA section 123’s Virginia counterpart—the following persons are authorized to petition a court to construe a power of attorney, review the agent’s conduct, and grant appropriate relief:

- (1) the principal or agent;
- (2) a guardian, conservator, personal representative of a deceased principal’s estate, or other fiduciary acting on the principal’s behalf;
- (3) the principal’s health-care agent;
- (4) the principal’s spouse, parent, or descendant;
- (5) an adult brother, sister, niece, or nephew of the principal;
- (6) a beneficiary under the principal’s estate plan;
- (7) adult protective services;

114. *Id.* § 115(1), 8B U.L.A. 51.

115. *Id.* § 115(2), 8B U.L.A. 51.

116. *Id.* § 116 cmt., 8B U.L.A. 52–53.

(8) the principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and

(9) a person asked to accept the power of attorney.¹¹⁷

Virginia added "adult protective services" to the list of individuals authorized to petition a court to construe a power of attorney or review the agent's conduct, and then grant appropriate relief.¹¹⁸ This addition addresses concerns that the principal may have no family or other listed individuals to petition the court on the principal's behalf.¹¹⁹

Virginia also added paragraph (B) to this section to provide judicial relief for an agent's violation of discovery requests.¹²⁰ Additionally, Virginia added paragraph (C) with a goal of preserving Virginia's so-called "anti-Casey" statute.¹²¹ In *Casey v. Commissioner of Internal Revenue*, the Fourth Circuit held that gifts of a decedent's assets made during the decedent's lifetime by her attorney-in-fact were not authorized by a durable power of attorney held by the attorney-in-fact.¹²² Hence, the gifts were revocable at the time of the decedent's death, and therefore includible in her gross estate for federal estate tax purposes.¹²³ The Virginia General Assembly responded to this decision by enacting Virginia Code section 11-9.5, which grants an agent under a general DPA the

power and authority to make gifts in any amount of any of the principal's property to any individuals or to organizations described in §§ 170(c) and 2522(a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both, in accordance with the principal's personal history of making or joining in the making of lifetime gifts.¹²⁴

Upon motion by the principal, the court shall dismiss a petition filed under section 116 of the Virginia UPOAA unless it finds that

117. *Id.* § 116(a), 8B U.L.A. 52.

118. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ____ (to be codified at VA. CODE ANN. § 26-71.16(A)(7)).

119. *See id.*

120. *Id.* (to be codified at VA. CODE ANN. § 26-71.16(B)).

121. *Id.* (to be codified at VA. CODE ANN. § 26-71.16(C)); *see* VA. CODE ANN. § 11-9.5 (Repl. Vol. 2006 & Cum. Supp. 2009); *Casey v. Comm'r*, 948 F.2d 895, 896 (4th Cir. 1991).

122. *Casey*, 948 F.2d at 896.

123. *Id.* at 901-02.

124. VA. CODE ANN. § 11-9.5 (Repl. Vol. 2006 & Cum. Supp. 2009).

the principal lacks capacity to revoke the agent's authority or the power of attorney.¹²⁵

17. UPOAA Section 117: Agent's Liability

If an agent violates the UPOAA, he is liable to the principal for the restoration value of the principal's property *and* for reimbursement of attorneys' fees and costs paid from the principal's property on the agent's behalf.¹²⁶ An agent who violates the UPOAA will be subject to liability as provided in the Act but may also be subject to civil or criminal liability under separate state statutes dealing with financial abuse.¹²⁷

18. UPOAA Section 118: Agent's Resignation; Notice

This section provides a default procedure for an agent's resignation. An agent must give notice to the principal and, if the principal is incapacitated, the following hierarchy of individuals:

- (1) conservator or guardian, if one has been appointed, and a co-agent or successor agent; or, if none, then
- (2) any adult spouse, child or other descendant, parent, or sibling of the principal; or, if none, then
- (3) another person reasonably believed by the agent to have sufficient interest in the principal's welfare; or, if none, then
- (4) adult protective services.¹²⁸

Virginia modified the hierarchy of persons to whom the agent must give notice to include the adult protective services unit of the local department of social services for the city or county where the principal resides or is located.¹²⁹ This was done to address concerns that the principal may not have had a guardian or con-

125. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-71.16(D)). Idaho added a provision in its UPOAA that allows the court, in its discretion, to award reasonable attorney's fees and costs to the prevailing party in a proceeding to construe the power of attorney or review the agent's conduct. See IDAHO CODE ANN. § 15-12-116(3) (2009).

126. UNIF. POWER OF ATTORNEY ACT § 117, 8B U.L.A. 53.

127. *Id.* § 117 cmt., 8B U.L.A. 53.

128. *Id.* § 118, 8B U.L.A. 53-54.

129. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-71.18).

servator appointed and may have no family members to whom the agent can give notice.¹³⁰

19. UPOAA Section 119: Acceptance and Reliance Upon Acknowledged Power of Attorney

This section provides broad protections for persons who in good faith (i.e., with “honesty in fact”)¹³¹ accept an acknowledged power of attorney without actual knowledge that it is forged, void, invalid, or terminated; that the purported agent’s authority is void, invalid, or terminated; or that the agent is exceeding or improperly exercising her authority.¹³² Under the UPOAA, acknowledged means *purportedly* verified before a notary public or other individual authorized to take acknowledgments.¹³³ So, this section protects third parties who in good faith accept a purportedly acknowledged power of attorney.¹³⁴ To promote the acceptance of powers of attorney, the UPOAA places the risk of invalidity on the principal rather than the third party.¹³⁵ This represents a change in Virginia’s common law. In the past, the Supreme Court of Virginia has held that “[o]ne who deals with an agent does so at his own peril and has the duty of ascertaining the agent’s authority. If the agent exceeds his authority, the principal is not bound by the agent’s act.”¹³⁶ However, protection for third parties against liability for good faith acceptance of acknowledged powers of attorney is a new trend in the law aimed at facilitating greater acceptance of powers of attorney.¹³⁷ Of the twelve states that currently consider it unlawful to unreasonably refuse a power of at-

130. *Id.*

131. The definition of “good faith” is found in section 102 of the UPOAA. UNIF. POWER OF ATTORNEY ACT § 102, 8B U.L.A. 35–36.

132. *Id.* § 105, 8B U.L.A. 39.

133. *Id.* § 119(a), 8B U.L.A. 54 (emphasis added).

134. *Id.* § 119 cmt., 8B U.L.A. 55.

135. *Id.*

136. *Kern v. J.L. Barksdale Furniture Corp.*, 224 Va. 682, 685, 299 S.E.2d 365, 367 (1983) (citing *Kern v. Freed Co.*, 224 Va. 678, 678, 299 S.E.2d 363, 364 (1983); *Seergy v. Morris Realty Corp.*, 138 Va. 572, 577, 121 S.E. 900, 902 (1924)).

137. Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7, 44–45 (2007); see also CAL. PROB. CODE § 4303(a)(2) (West 2009); 755 ILL. COMP. STAT. ANN. 45/2-8 (West 2007 & Cum. Supp. 2009); IND. CODE ANN. § 30-5-8-2 (West 2000); N.C. GEN. STAT. § 32A-40 (2007). The 2009 revision of New York’s Power of Attorney Statute requires that a power of attorney “be signed and dated by a principal with capacity, with the signature of the principal duly acknowledged.” See N.Y. GEN. OBLIG. 5-1501B(1)(c) (McKinney 2009).

torney, five use the term *purports* or *purporting* to clarify that good faith reliance on a power of attorney will be protected absent *actual knowledge* that the power of attorney was not validly executed.¹³⁸

This section of the UPOAA protects good faith acceptances of *purportedly* acknowledged powers of attorney, which could include protection for a forged power of attorney.¹³⁹ According to the Reporter on the UPOAA Drafting Committee, this section was “arguably one of the most difficult intersections of public policy that had to be addressed in the Act.”¹⁴⁰ According to the Drafting Committee’s research and considerable anecdotal evidence, the problem of power of attorney abuse appears to be slight compared to the volume of powers of attorney that are used legitimately.¹⁴¹ Where abuse occurs, the problem is typically abuse of a valid power of attorney or a power of attorney obtained through duress—not a forged durable power of attorney.¹⁴² The threshold

138. See Whitton, *supra* note 137, at 41–42. Professor Whitton discusses a notable case in which a third-party bank relied on a forged power of attorney ostensibly executed by one of their customers. See *Estate of Davis v. Citicorp Savings*, 632 N.E.2d 64, 65 (Ill. App. Ct. 1994). The court placed the risk of accepting an invalid power of attorney on the third party presented with the power, rather than the principal. *Id.* at 66. Illinois has since revised its power of attorney statutes to provide that “[a]ny person who acts in good faith reliance on a copy of a document purporting to establish an agency will be fully protected” 755 ILL. COMP. STAT. ANN. 45/2-8 (West 2007 & Cum. Supp. 2009).

139. E-mail from Linda S. Whitton, Professor of Law, Valparaiso University School of Law and Reporter for the Uniform Power of Attorney Act, to Andrew H. Hook, Attorney at Law, Oast & Hook, P.C. (Mar. 29, 2009, 21:11 CST) (on file with author).

140. *Id.*

141. *Id.* After extensive research, the Ohio State Bar Association was only able to identify four cases dealing with a forged POA. In a 1997 opinion, the United States Court of Appeals for the Third Circuit held that a law firm that disbursed funds out of its trust account based upon instructions given to it by an agent under a forged POA was not liable. *Villanueva v. Brown*, 103 F.3d 1128, 1137 (3d Cir. 1997). In the second case, the Appellate Court of Illinois held a bank liable for amounts paid out pursuant to a forged POA. *Estate of Davis*, 632 N.E.2d at 65–66. In response to this decision, the Illinois legislature amended its POA statute to protect any person who acts in good faith in reliance on a document purporting to establish an agency. 755 ILL. COMP. STAT. ANN. 45/2-8 (West 2007 & Cum. Supp. 2009). In the third case, the United States Bankruptcy Court for the District of Columbia held that a deed of trust executed pursuant to a forged POA is ineffective. *Baxter v. Baxter*, 320 B.R. 30, 39 (Bankr. D.D.C. 2004). In the fourth case, the California Court of Appeal held that a bank was not protected from liability by a purported agent falsely representing authority by use of a forged power of attorney since the conduct did not constitute impersonation within the meaning of the California Commercial Code. *Title Ins. Co. of Minn. v. Comerica Bank-California*, 32 Cal. Rptr. 2d 735, 738 (Ct. App. 1994). See e-mail from Richard E. Davis, Attorney at Law, Krugliak, Wilkins, Griffiths & Dougherty Co., LPA, to Andrew H. Hook, Attorney at Law, Oast & Hook, P.C. (May 11, 2009, 15:49 CST) (on file with author).

142. E-mail from Linda S. Whitton, *supra* note 139.

question which essentially must be addressed is, “Who should bear the risk that a power of attorney is not valid?”¹⁴³ Placing risk upon the principal rather than a third party “enhances the likelihood of acceptance by a third party and strengthens the justification for sanctioning an unreasonable refusal.”¹⁴⁴ However, placing the risk on the principal may reduce due diligence by third parties and increase the number of cases involving forged powers of attorney.

While the UPOAA does not require investigation into the validity of a power of attorney or an agent’s authority, the Act allows a third party to request the agent’s certification under oath as to any factual matter, an English translation of the power of attorney, and an opinion of counsel as to any matter of law concerning the power of attorney—provided the person making the request provides the reason in writing.¹⁴⁵ Virginia added language which clarifies that the third party may request a legal opinion from the principal’s, agent’s, or third party’s counsel.¹⁴⁶ Under the UPOAA, an English translation or the opinion of the agent’s or principal’s counsel must be provided at the principal’s expense.¹⁴⁷ In contrast, Virginia’s version of the UPOAA limits the principal’s obligation to pay for English translations and attorney opinions to those provided for the principal and agent.¹⁴⁸ That is, the principal is not responsible for paying for third-party requests.¹⁴⁹ Virginia also eliminated an exception to this rule that permitted requests made more than seven business days after the power of attorney is presented for acceptance.¹⁵⁰ Virginia’s version of the UPOAA further adds language that requires an agent’s certification, an English translation, or an opinion of counsel to be in recordable form if the exercise of the power requires recordation of any instrument under the laws of the Commonwealth of Virginia.¹⁵¹

143. Whitton, *supra* note 137, at 41.

144. *Id.*

145. UNIF. POWER OF ATTORNEY OF ACT § 119 cmt., 8B U.L.A. 55.

146. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-71.19(D)(3)).

147. UNIF. POWER OF ATTORNEY ACT § 119(e), 8B U.L.A. 55.

148. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-71.19(E)).

149. *See id.*

150. Compare Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-71.19(E)), with UNIF. POWER OF ATTORNEY ACT § 119(e), 8B U.L.A. 55.

151. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. §

UPOAA section 119 also rejects an imputed knowledge standard for those individuals who conduct activities through employees. Specifically, they are held to be without actual knowledge of a fact “if the employee conducting the transaction involving the power of attorney is without actual knowledge of the fact.”¹⁵² For example, if an employee who accepts a forged, invalid, or revoked power of attorney did so honestly and without actual knowledge that it was forged, invalid, or revoked, then the employer is insulated from liability.

20. UPOAA Section 120: Liability for Refusal to Accept Acknowledged Power of Attorney

The UPOAA provides enacting jurisdictions with a choice between alternative liability provisions.¹⁵³ The VBA chose to recommend UPOAA section 120 alternative A, which applies to all acknowledged powers of attorney.¹⁵⁴ The VBA rejected alternative B, which addresses only statutory form powers of attorney.¹⁵⁵ The goal of this recommendation was to facilitate the acceptance of all acknowledged powers of attorney rather than only statutory form powers of attorney.

Generally, under alternative A, a third party must either accept an acknowledged power of attorney or request a certification, translation, or an opinion of counsel within seven business days of presentment.¹⁵⁶ If the third party requests a certification, translation, or opinion of counsel, the third party must accept the power of attorney within five business days of receiving the requested document.¹⁵⁷ Additionally, a third party cannot require an additional or different form of power of attorney.¹⁵⁸ When it enacted the UPOAA, Virginia added language that clarifies that

26-71.19(F)).

152. UNIF. POWER OF ATTORNEY ACT § 119(f), 8B U.L.A. 55.

153. *Id.* § 120, 8B U.L.A. 55–58.

154. *Id.* § 120 alternative A cmt., 8B U.L.A. 56–57.

155. *Id.* § 120 alternative B, 8B U.L.A. 57–58. Of the states that have adopted the UPOAA, New Mexico is the only state to have chosen Alternative B. *Id.* § 120 alternative B cmt., 8B U.L.A. 59.

156. UNIF. POWER OF ATTORNEY ACT § 120(a)(1) alternative A, 8B U.L.A. 56.

157. *Id.* § 120(a)(2) alternative A, 8B U.L.A. 56.

158. *Id.* § 120(a)(1)–(3) alternative A, 8B U.L.A. 56.

the term “business day,” as used in this section, excludes Saturdays, Sundays, and any day designated as a holiday in the Commonwealth of Virginia.¹⁵⁹

This section also provides third parties with significant protection against liability for rejecting a power of attorney by providing clear safe harbors for legitimate refusals.¹⁶⁰ First among these safe harbors, a third party is not required to accept powers of attorney if she is permitted to refuse transacting business with the principal in the same circumstances or the principal has otherwise relieved the third party of the obligation to engage in the transaction with an agent under a power of attorney.¹⁶¹ Second, a third party can reject powers of attorney if engaging in the transaction with the agent or the principal in the same circumstances would be inconsistent with federal law.¹⁶² Similarly, when a third party has actual knowledge of the termination of the agent’s authority or of the power of attorney, she is free to reject the power of attorney.¹⁶³ If a request for a certification, a translation, or an opinion of counsel has been refused, the power of attorney may also be rejected.¹⁶⁴ A fourth safe harbor is reached if the third party believes in good faith that the power of attorney is not valid or that the agent does not have the authority to perform the act requested.¹⁶⁵ Last, if the third party makes, or has actual knowledge that another person has made, a report to the local adult protective services department or adult protective services hotline stating 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, she can reject a power of at-

159. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-71.20(D)).

160. See UNIF. POWER OF ATTORNEY ACT § 120(b) alternative A, 8B U.L.A. 56. Colorado amended this section in its UPOAA to include a safe harbor for individuals who refuse to accept a power of attorney based on their “good faith belief” that the agent was acting “either unlawfully or not in good faith.” However, under the Colorado UPOAA, in order to escape liability for refusing to accept a power of attorney, the person must perform a “good faith” investigation of the situation before so refusing. See COLO. REV. STAT. ANN. §15-14-720 (West 2006).

161. See *id.* § 120(b)(1) alternative A, 8B U.L.A. 56. Financial institutions and third parties can insert in their agreements with principals a provision that the financial institution or other party is not required to accept a power of attorney. This is a departure from the UPOAA.

162. *Id.* § 120(b)(2) alternative A, 8B U.L.A. 56.

163. *Id.* § 120(b)(3) alternative A, 8B U.L.A. 56.

164. *Id.* § 120(b)(4) alternative A, 8B U.L.A. 56.

165. *Id.* § 120(b)(5) alternative A, 8B U.L.A. 56.

torney.¹⁶⁶ Only when a refusal does not meet one of these safe harbors will an individual be subject to a court order mandating acceptance of the power of attorney and liability for the costs and attorneys' fees incurred to obtain that mandate.¹⁶⁷ Notably, the imposition of attorneys' fees is a departure from the existing Virginia common law.¹⁶⁸

While the UPOAA does not require third parties (including financial institutions) to operate as watchdogs for financial abuse, the Act *permits* third parties to do so when there is a good faith belief that the principal may be subject to some type of abuse by the agent or someone acting in concert with the agent.¹⁶⁹ If a third party has such a belief and is willing to make a report to the local adult protective services department or adult protective services hotline, or if she knows that someone else has made such a report, then an otherwise valid power of attorney may legitimately be refused.¹⁷⁰

Practice Tip. When counseling clients about powers of attorney, practitioners should recommend that the client ask financial institutions with whom they do business whether or not her account agreements opted out of accepting powers of attorney in accordance with UPOAA section 120(b), alternative A.

21. UPOAA Section 121: Principles of Law and Equity

Although the UPOAA is a lengthy statute, the common law of agency remains relevant. As stated previously, where the UPOAA is silent, the common law of agency applies.¹⁷¹ For example, matters not covered by the UPOAA include: (1) the authority a principal cannot delegate to an agent;¹⁷² (2) the agent's liability and

166. *Id.* § 120(b)(6) alternative A, 8B U.L.A. 56.

167. *Id.*, 8B U.L.A. 56.

168. *See* Prospect Dev. Co. v. Bershader, 258 Va. 75, 92, 515 S.E.2d 291, 300 (1999) (“The general rule in [the] Commonwealth is that in the absence of a statute or contract to the contrary, a court may not award attorney’s fees to the prevailing party.” (citing Gilmore v. Basic Indus., Inc., 233 Va. 485, 490, 357 S.E.2d 514, 517 (1987))).

169. Linda S. Whitton, Hot Buttons on the New Uniforms: The Controversial Provisions of the UTC, UPOAA, and UPMIFA, Balancing the “Buttons” on the Uniform Power of Attorney Act, American College of Trust & Estate Counsel 2007 Annual Meeting, Symposium 1 (2007).

170. *Id.*

171. UNIF. POWER OF ATTORNEY ACT § 121, 8B U.L.A. 59.

172. Generally, a principal can delegate to an agent any acts that the principal could do for himself unless public policy or contractual obligations require personal performance.

duties to third parties;¹⁷³ (3) the principal's duty to deal fairly and in good faith with the agent;¹⁷⁴ (4) actual and apparent authority;¹⁷⁵ and (5) the capacity of the agent.¹⁷⁶

22. UPOAA Section 122: Laws Applicable to Financial Institutions and Entities

Section 122 addresses the concerns of the banking and insurance industries that laws governing those entities may conflict with certain provisions of the UPOAA. Although no specific conflicts were identified while drafting the UPOAA, Virginia Code section 26-71.22—UPOAA section 122's mirror—provides that in the event that laws applicable to financial institutions, insurance companies, or other entities conflict with the UPOAA, the other law will supersede the UPOAA to the extent of the inconsistency.¹⁷⁷

23. UPOAA Section 123: Remedies Under Other Law

Remedies under the UPOAA are not exclusive and should not prevent aggrieved parties from seeking additional remedies under other laws.¹⁷⁸ Virginia added a provision clarifying that the additional remedies available include a court-supervised accounting.¹⁷⁹

See RESTATEMENT (THIRD) OF AGENCY § 6.08 cmt. c (2006); *see also* First Union Nat'l Bank v. Thomas, 37 Va. Cir. 35, 40 (Cir. Ct. 1995) (Winchester City) ("In the few reported cases dealing specifically with durable powers of attorney, the courts have defined nondelegability rather narrowly."). However, certain acts have been held by some judicial decisions to be non-delegable, including marriage; divorce; voting; executing, amending, or revoking a will; representing the principal in court; and initiating bankruptcy proceedings. Additionally, it is doubtful that an agent in Virginia may make an augmented estate election against the estate of a deceased spouse of the principal. The Virginia conservatorship statute requires a conservator to obtain court approval for the election and there is no similar authority for agents. VA. CODE ANN. § 37.2-1023(A)(6)(ii) (Cum. Supp. 2009).

173. RESTATEMENT (THIRD) OF AGENCY §§ 7.01, 7.02 (2006).

174. *Id.* § 8.15.

175. *Id.* §§ 2.01, 2.03.

176. *Id.* § 3.05.

177. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-71.22); UNIF. POWER OF ATTORNEY ACT § 122, 8B U.L.A. 60.

178. *See* UNIF. POWER OF ATTORNEY ACT § 123, 8B U.L.A. 60.

179. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-71.23).

B. *Article 2: Authority*

1. UPOAA Section 201: Authority That Requires Specific Grant; Grant of General Authority

This section requires that an express, specific grant of authority be given to an agent for certain acts due to the risk those acts pose to the principal's property and estate plan.¹⁸⁰ These acts requiring a specific grant of authority (frequently referred to as the "hot powers") include:

- (1) creating,¹⁸¹ amending, revoking, or terminating¹⁸² an inter vivos trust;
- (2) making a gift;¹⁸³
- (3) creating or changing rights of survivorship;
- (4) creating or changing a beneficiary designation;
- (5) delegating authority granted under the power of attorney;
- (6) waiving the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or
- (7) exercising fiduciary powers that the principal has authority to delegate.¹⁸⁴

180. UNIF. POWER OF ATTORNEY ACT § 201 cmt., 8B U.L.A. 62. The powers requiring a specific grant of authority are often referred to as the "hot powers." The draftsman should pay particular attention to drafting provisions granting this authority.

181. The Virginia Bar Association Trust and Estates Section is recommending the revision of sections 55-544.01 and 55-544.02 of the Virginia Uniform Trust Code to expressly permit an agent under a power of attorney to create a trust where specifically authorized by the terms of the power of attorney. It is further recommending revision of Virginia Code section 55-546.02(E) to provide that the settlor's powers of revocation, amendment, or distribution of trust property may be exercised by an agent acting under a power of attorney that expressly authorizes such action.

182. Virginia Code section 55-546.02(E) provides: "A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent (i) expressly authorized by the terms of the trust or (ii) authorized by the court for good cause shown." VA. CODE ANN. § 55-546.02(E) (Repl. Vol. 2007 & Cum. Supp. 2009). If the client wishes his agent to exercise his powers of revocation, amendment, or distribution under the power of attorney, include language similar to the following in the trust agreement: "My agent under a general durable power of attorney may exercise my powers to revoke, amend, or direct distributions of trust property by a writing signed by agent and delivered to my trustee during my lifetime."

183. *But see* Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-72.01(H)) ("[I]f a power of attorney grants to an agent authority to do all acts that a principal could do, the agent shall have the authority to make gifts in any amount of any of the principal's property to any individuals or [charitable] organizations . . . in accordance with the principal's personal history. . . .").

184. UNIF. POWER OF ATTORNEY ACT § 201(a)(1)-(8), 8B U.L.A. 61.

Virginia eliminated disclaiming property, including a power of appointment, from the list of those acts requiring a specific grant of authority since the Virginia Uniform Disclaimer of Property Interests Act authorizes an agent to make a disclaimer.¹⁸⁵

Practice Tip. Powers of attorney were previously strictly construed in Virginia.¹⁸⁶ Therefore, it was extremely important to clearly state in the instrument what authority an agent has. The authority granted in a power of attorney “is never considered to be greater than that warranted by its language, or indispensable to the effective operation of the authority granted.”¹⁸⁷ The authority granted is not extended beyond the terms in which it is expressed.¹⁸⁸ The general rule of construction with regard to powers of attorney essentially provides that expansive language should be interpreted as intending only to confer those incidental powers necessary to accomplish objectives for which express authority has been granted.¹⁸⁹

In contrast, the UPOAA simplifies defining the agent’s authority. The Act spells out authority which requires a specific, express grant and allows authority to be incorporated into the power of attorney by reference. A grant of general authority under the UPOAA permits an agent to do all acts enumerated in Virginia Code sections 26-72.04 through 26-72.16 (UPOAA sections 204 through 216).¹⁹⁰

Practice Tip. You can prepare a one sentence power of attorney. For example, “I hereby grant my agent the authority to do or perform all acts that I could do.” By including this language in a general durable power of attorney under the UPOAA, a broad grant of authority is automatically given to the agent without need to expressly list each power given.

185. See VA. CODE ANN. § 64.1-196.4(B) (Repl. Vol. 2007). Virginia should consider reinstating a disclaimer as a “hot power” since this code section reads in part: “Except to the extent a fiduciary’s right to disclaim is expressly restricted or limited by another statute of this state . . . , a fiduciary may disclaim” *Id.*

186. *Jones v. Brandt*, 274 Va. 131, 137, 645 S.E.2d 312, 315 (2007).

187. *Id.*

188. *Id.* (citing *Hotchkiss v. Middlekauf*, 96 Va. 649, 653, 32 S.E. 36, 37–38 (1899)).

189. *Id.* However, in *Jones v. Brandt*, the supreme court held that an agent acting pursuant to a power of attorney had the authority to change the beneficiary designation on a certificate of deposit even though the power of attorney did not expressly grant the agent the power to do so. *Id.* at 138, 645 S.E.2d at 315–16.

190. See *infra* Part III.B.4.

Virginia added subsection H with a goal of preserving Virginia's so-called "anti-*Casey*" statute¹⁹¹ and laws related to gifting under pre- and post-UPOAA law.

2. UPOAA Section 202: Incorporation of Authority

The statutory definitions for authority over various subject areas¹⁹² may be incorporated by reference using the optional statutory form provided in Article 3 or by referring to the descriptive term or specific statutory section in which the authority is described.¹⁹³

Practice Tip. As an example of granting general authority with respect to the principal's real property, the power of attorney could state: "I grant my agent general authority to act for me with respect to Real Property as defined in the Virginia UPOAA," or "I grant my agent general authority to act for me as provided in Virginia Code section 26-72.04."

If a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has authority with respect to all of the enumerated subject areas in Article 2 that do not require an express grant of authority.¹⁹⁴ A principal may modify any authority incorporated by reference.¹⁹⁵

3. UPOAA Section 203: Construction of Authority Generally

This section describes incidental authority that accompanies all authority granted to an agent under Virginia Code section 26-72.04 through section 26-72.17 (UPOAA sections 204 through

191. See VA. CODE ANN. § 11-9.5 (Repl. Vol. 2006 & Cum. Supp. 2009); *Casey v. Comm'r*, 948 F.2d 895, 896 (4th Cir. 1991); see also *supra* note 185 and accompanying text.

192. See *generally* Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-72.04 through 26-72.17) (defining the default authority granted by powers of attorney in such matters as real property and stocks and bonds).

193. UNIF. POWER OF ATTORNEY ACT § 202 cmt., 8B U.L.A. 63. Colorado added a provision to its UPOAA that allows a power of attorney to incorporate by reference a writing or any other record in existence at the time the power of attorney is executed. The language of the power of attorney must manifest the intent to incorporate the writing or record, and it must describe the writing or other record "sufficiently to permit its identification." See COLO. REV. STAT. ANN. §15-14-725 (West 2006).

194. See Whitton, *supra* note 58, at 10.

195. UNIF. POWER OF ATTORNEY ACT § 202 cmt., 8B U.L.A. 63.

217), unless modified by the principal.¹⁹⁶ These acts are often necessary to carry out the authority over the subjects described in section 26-72.04 through section 26-72.17.

Incidental authority includes the power to do the following:

- recover money or another thing of value to which the principal is due and to conserve, invest, disburse, or use anything so obtained;
- contract on terms acceptable to the agent and perform, rescind, cancel, or modify the contract or another contract made by the principal;
- execute, acknowledge, deliver, file, or record any instrument;
- initiate, participate in, or settle a claim in favor or against the principal;
- seek on the principal's behalf the assistance of a court or governmental agency;
- engage, compensate, and discharge an attorney, accountant, investment advisor, expert witness, or other advisor;
- prepare, execute and file reports;
- communicate with any representative or employee of a government or governmental agency on behalf of the principal;
- access communications intended for and communicate on behalf of the principal; and
- do any lawful act with the respect to the subject and all property related to the subject.¹⁹⁷

4. UPOAA Sections 204 through 216

A power of attorney may grant an agent authority with respect to a particular subject by using the descriptive term for the subject or by citing to the section in the UPOAA where the authority is described. For example, if a power of attorney grants an agent authority over the principal's real property, the agent will have the authority described in Virginia Code section 26-72.04.¹⁹⁸

196. *Id.* § 203 cmt., 8B U.L.A. 64.

197. *Id.* § 203, 8B U.L.A. 64.

198. The UPOAA defines the authority granted by the following descriptive terms: Real Property; Tangible Personal Property; Stocks and Bonds; Commodities and Options; Banks and Other Financial Institutions; Operation of Entity or Business; Insurance and Annuities; Estates, Trusts, and Other Beneficial Interests; Claims and Litigation; Personal and Family Maintenance; Benefits From Governmental Programs of Civil or Military

Practice Tip. If the principal creates a general power of attorney and the principal's will makes a specific gift of property, the power of attorney or will should expressly address whether the gift is extinguished if the agent sells the property while the principal is incapacitated. The Virginia Code provides for a default nonademption rule.¹⁹⁹ If the principal wishes to provide for ademption, consider adding the following provision to both the will and power of attorney: "I direct that any gift of specific property made in my will shall be extinguished by ademption if my agent under my general power of attorney shall sell the property. I expressly release my agent from any liability to my estate or to any beneficiary of my estate as a consequence of such sale."

Service; Retirement Plans; and Taxes. *Id.* §§ 204–216, 8B U.L.A. 65–77. Nevada added an additional provision to its UPOAA requiring that, when the power of attorney grants specific or general authority for the agent to convey the principal's real property (or any other real property which the principal has the power to convey), the power of attorney must be recorded in the office or place where such conveyances are recorded. Furthermore, Nevada's UPOAA makes clear that when the power of attorney has been properly recorded, it is not terminated by any act of the principal until an instrument containing a revocation is "deposited for record in the same office in which the instrument containing the power is recorded." See 2009 Nev. Stat. ch. 64, § 42 (to be codified at NEV. REV. STAT. tit. 13). Nevada also added a provision under the descriptive term "Banks and Other Financial Institutions," stating that an agent who is not the spouse of the principal must not be listed on any account as a cosigner with the right of survivorship. The agent must solely be listed on the account as agent under the power of attorney. See *id.* ch. 64, § 46 (to be codified at NEV. REV. STAT. tit. 13). With regard to the descriptive term, "Personal and Family Maintenance", Maine's UPOAA omits the provision providing the general authority for an agent to perform the acts necessary to maintain the customary standard of living for the principal's children. See 2009 Me. Legis. Serv. ch. 292 (West) (to be codified at ME. REV. STAT. ANN. tit. 18-A, § 5-943).

199. See VA. CODE ANN. § 64.1-62.3(B) (Repl. Vol. 2007) ("Unless a contrary intention appears in a testator's will or durable power of attorney, a bequest or devise of specific property shall, in addition to such property as is part of the estate of the testator, be deemed to be a legacy of a pecuniary amount if such specific property shall, during the life of the testator and while he is incapacitated, be sold by an agent acting within the authority of a durable power of attorney for the testator, or if proceeds of fire or casualty insurance as to such property are paid to the agent. For purposes of this subdivision, (i) the pecuniary amount shall be the net sale price or insurance proceeds, reduced by the sums received under subdivision 2, (ii) no adjudication of testator's incapacity before death is necessary, (iii) the acts of an agent within the authority of a durable power of attorney are rebuttably presumed to be for an incapacitated testator, and (iv) an "incapacitated" person is one who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions. This subdivision shall not apply (i) if the agent's sale of the specific property or receipt of the insurance proceeds is thereafter ratified by the testator or (ii) to a power of attorney limited to one or more specific purposes.").

Practice Tip. The incorporation of descriptive terms into a power of attorney will permit the draftsman to shorten the length of the document and significantly improve its readability. When this drafting option is used, the authors recommend that the draftsman give the principal a separate document with the full description of the authority granted by each of the descriptive terms.

5. UPOAA Section 217: Gifts

A specific grant of authority to make a gift under Virginia Code section 26-72.01(a) (UPOAA section 201(a)) is subject to the default limitations of Virginia Code section 26-72.17 (UPOAA section 217) unless expressly modified by the principal in the power of attorney.²⁰⁰ Because a gift of the principal's property reduces the principal's estate, the UPOAA sets default limits on gift amounts per donee.²⁰¹ However, the principal may expressly grant the agent greater authority to make gifts of his property. For example, the principal may wish to grant greater authority to the agent to make a gift of his or her assets to qualify for Medicaid Long Term Care assistance.²⁰²

Practice Tip. There is no single gift authority provision that is appropriate for every client. This authority should be carefully discussed with the client and drafted to meet the client's needs and desires.

200. See Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-72.17(B)); UNIF. POWER OF ATTORNEY ACT § 217(b), 8B U.L.A. 77.

201. UNIF. POWER OF ATTORNEY ACT § 201 cmt., 8B U.L.A. 62–63.

202. See 13 VA. DEP'T OF SOC. SERVS., MEDICAID ELIGIBILITY MANUAL sec. M1450.400 (C), (D) (2008), available at <http://www.dss.virginia.gov/benefit/me-famis/manual-cgi> (setting forth the rules relating to transfers that are exempt from the Medicaid transfer of asset rules).

C. Article 3: Statutory Forms

1. UPOAA Section 301: Statutory Form Power of Attorney

Article 3 includes a concise, optional statutory form.²⁰³ The availability of legal forms is widespread;²⁰⁴ eighteen states in addition to Virginia have statutory power of attorney forms.²⁰⁵ The goal of these statutory forms is to promote familiarity and thereby facilitate acceptance of powers of attorney. The statutory form is designed to be understandable to lay persons and still provide attorneys with a “foundation upon which any drafting option under the [UPOAA] can be implemented.”²⁰⁶ The purpose of including a statutory form is to achieve familiarity and a common understanding of powers of attorney through the use of one form with a goal of facilitating acceptance by third parties.²⁰⁷ Critics of the UPOAA have expressed concerns that the inclusion of a statutory form would take business away from attorneys who routinely draft comprehensive powers of attorney. The authors have spoken with attorneys in North Carolina, New York, and sixteen other states with statutory forms, who report that they still frequently draft custom powers of attorney for their clients and that the statutory form has not diminished their practice in this area.

In order to create a more comprehensive, flexible, and therefore useful statutory DPA form, Virginia included the optional hot powers and made several modifications to the UPOAA form. In specific, Virginia added an option that allows for the appointment

203. Of those states that have adopted the UPOAA, Maine is the only state that chose not to include a statutory form. However, Maine did include the Agent’s Certification for the statutory form, which is used by the agent to certify facts concerning a power of attorney. *See* 2009 Me. Legis. Serv. ch. 292 (West) (to be codified at ME. REV. STAT. ANN. tit. 18-A, § 5-951).

204. A Google search for “power of attorney form” resulted in about 5.3 million hits with some power of attorney forms free to download and others costing as little as \$9.99. The same search on Amazon resulted in 1,082 hits. LegalZoom.com sells a customized power of attorney for \$35 with a “LegalZoom Peace of Mind Review” and rush, two-business-day delivery. Thus, even without the assistance of an attorney, a consumer can obtain a power of attorney form without difficulty.

205. *See, e.g.*, ARK. CODE. ANN. § 28-68-401 (2004 & Supp. 2009); COLO. REV. STAT. ANN. § 15-1-1302 (West 2006); KAN. STAT. ANN. § 58-632 (2005); MINN. STAT. ANN. § 523.23 (West 2006); N.C. GEN. STAT. § 32A-1 (2007); OKLA. STAT. ANN. tit. 15, § 1003 (West Cum. Supp. 2009).

206. Whitton, *supra* note 58, at 11.

207. *See* UNIF. POWER OF ATTORNEY ACT art. 3, 8B U.L.A. 79–87.

of co-agents and successor co-agents, including the ability to specify whether co-agents are to exercise their authority independently, by unanimous decision, or by majority decision.²⁰⁸ Virginia also added language to the Grant of General Authority section, stating that if authority is granted over all subjects in this section, the agent may make gifts according to the principal's personal history of making or joining in the making of lifetime gifts.²⁰⁹ Additional limited gifting authority may be granted in the Grant of Specific Authority section of the form.²¹⁰ This specific grant may be further modified in the optional Special Instructions section.²¹¹ The authority to disclaim or refuse an interest in property, including a power of appointment was eliminated from the list of authority which requires a specific grant.²¹² Virginia also added a section that clarifies whether powers of attorney previously created by the principal are revoked by the execution of the statutory form power of attorney.²¹³ Lastly, a line was added in the acknowledgment block for a Notary Identification Number.²¹⁴

The inclusion of the hot powers in the statutory form is an option granted in the UPOAA.²¹⁵ However, fiduciaries generally do not have these powers and agents under a POA are fiduciaries with the least supervision.²¹⁶ Members of the Virginia Elder Law bar have expressed concern that the inclusion of these optional hot powers in the statutory form would increase the likelihood of financial elder abuse using POAs. These members believe that,

208. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-73.01).

209. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-72.01(H)).

210. See Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-73.01).

211. See *id.*

212. The Virginia Uniform Disclaimer of Property Interests Act expressly includes an agent acting under a power of attorney within the definition of "Fiduciary" and permits an agent to make a disclaimer. See VA. CODE ANN. § 64.1-196.1 (Repl. Vol. 2007); see also VA. CODE ANN. § 61.1-196.4(B) (Repl. Vol. 2006) ("Except to the extent a fiduciary's right to disclaim is expressly restricted or limited by another statute of this state or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or in part, any interest in or power over property, including a power of appointment, whether acting in a personal or representative capacity.").

213. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-73.01).

214. See *id.*

215. See *supra* note 185 and accompanying text.

216. See *Jones v. Brandt*, 274 Va. 131, 137, 645 S.E.2d 312, 315 (2007).

despite the cautionary caption, many elderly persons using the statutory form without the assistance of an attorney will simply check all of the boxes on the form without fully considering the extraordinary authority they are granting their agent.²¹⁷ Therefore, the authors recommend that these powers be deleted from the statutory form in 2010.

Practice Tip. Will attorneys draft comprehensive powers of attorneys or statutory short form powers of attorney for their clients? The authors have learned from corresponding with attorneys in other jurisdictions that two practices have developed. The first practice is for the attorney to draft (1) a statutory short form power of attorney for routine transactions with financial institutions and (2) a comprehensive power of attorney to define the full scope of the authority granted and the terms of the relationship. The second practice is for the attorney to draft only a comprehensive power of attorney. However, even in those states that use the statutory short form, the majority of attorneys still utilize addenda (or, in the case of the UPOAA, the Special Instructions section) to tailor the form as needed for individual client circumstances. The authors will likely adopt the first practice of drafting both a short form and a comprehensive power of attorney.

Practice Tip. The statutory short form power of attorney has an excellent, easy to understand set of instructions for agents. Attorneys should consider adopting the instructions for the powers of attorney they draft.

2. UPOAA Section 302: Agent's Certification

This section is optional for an agent certification of facts pertaining to a power of attorney.²¹⁸ The statements of fact in the form are those for which third persons commonly request certification, but the agent may add any other factual statements to the form as needed to satisfy a particular certification request under Virginia Code section 26.1-1.19.²¹⁹

217. This information is based on conversations with elder law attorneys by e-mail and at the Annual Meeting of the Virginia Chapter of the National Association of Elder Law Attorneys.

218. UNIF. POWER OF ATTORNEY ACT art. 3 gen. cmt., 8B U.L.A. 79.

219. *Id.* § 302 cmt., 8B U.L.A. 87.

D. *Article 4: Miscellaneous Provisions*

1. UPOAA Section 401: Uniformity of Application and Construction

UPOAA section 401 provides: “In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.”²²⁰ The Virginia General Assembly deleted UPOAA section 401.²²¹ In the opinion of the authors, it should be restored to the Virginia Uniform Power of Attorney Act in the 2010 Session. The Virginia Uniform Trust Code, Uniform Principal and Income Act, and Uniform Simultaneous Death Act contain this same provision.²²²

2. UPOAA Section 402: Relation to Electronic Signatures in Global and National Commerce Act

The UPOAA modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (“ESGNCA”).²²³ However, the UPOAA does not modify, limit, or supersede section 101(c) or section 103(b) of that Act.²²⁴ Section 101(c) of the ESGNCA provides that if a statute, regulation, or law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, that writing may be in electronic form only if the requirements in section 101(c) are

220. *Id.* § 401, 8B U.L.A. 88.

221. *See generally* Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. §§ 26-71.01 to 26-74.02).

222. *See* VA. CODE ANN. §§ 55-551.01, 55-277.32 (Repl. Vol. 2007); *id.* § 64.1-104.8 (Repl. Vol. 2007).

223. UNIF. POWER OF ATTORNEY ACT § 402, 8B U.L.A. 88.

224. *Id.*

met.²²⁵ Furthermore, section 103(b) prohibits electronic delivery of certain notices.²²⁶

This section, which is being inserted in all Uniform Acts approved in 2000 or later, preempts the ESGNCA. Section 102(a)(2)(B) of the ESGNCA provides that it can be preempted by a later statute of the state that specifically refers to the federal law.²²⁷ For all other purposes, the effect of this section is to leave to state law the procedures for obtaining and validating an electronic signature.²²⁸ The Virginia Electronic Transactions Act provides:

If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.²²⁹

This provision is similar to section 55-551.02 of the Virginia Uniform Trust Code.²³⁰

3. UPOAA Section 403: Effect on Existing Powers of Attorney

The UPOAA applies to both a power of attorney created before, on, or after July 1, 2009, and to a judicial proceeding concerning a

225. Therefore, an agent acting for a principal under the UPOAA is subject to the requirements in section 101(c) of the ESGNC, only when each of the following elements is met: (1) the agent is selling or leasing real or personal property, products, goods, or services for the principal; (2) the recipient of the property, products, goods, or services will use them primarily for personal, family, or household purposes; (3) the transaction is in or affects interstate or foreign commerce; and (4) there is a statute, regulation, or law requiring information relating to the transaction to be in writing. *See* 15 U.S.C. § 7001(c)(1) (2006).

226. This provision prohibits the electronic delivery of the following notices:

(A) the cancellation or termination of utility services (including water, heat, and power);

(B) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual;

(C) the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); or

(D) recall of a product, or material failure of a product, that risks endangering health or safety

15 U.S.C. 7003(b)(2)(A)–(D) (2006).

227. *See id.* § 7002(a)(2)(B).

228. *See id.* § 7002(a).

229. VA. CODE ANN. § 59.1-489 (Repl. Vol. 2006 & Cum. Supp. 2009).

230. *See* VA. CODE ANN. § 55-551.02 (Repl. Vol. 2007).

power of attorney commenced on or after July 1, 2009.²³¹ The UPOAA applies to a judicial proceeding concerning a power of attorney commenced before July 1, 2009, unless the court finds that the application of a provision of the UPOAA would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party.²³² The UPOAA does not affect any action taken by an agent or third party before July 1, 2009.²³³

IV. CONCLUSION

The Virginia UPOAA was enacted this year by the General Assembly with a re-enactment clause which essentially means that it will be reintroduced into the 2010 Session of the General Assembly.²³⁴ The VBA has already modified the UPOAA to retain popular existing Virginia rules concerning discovery by third parties of the acts of the agent, and anti-*Casey* gift rules.²³⁵ However, the authors recommend the following as further amendments to the Virginia UPOAA:

(1) Amend section 26-71.06 to incorporate language similar to that provided in existing Virginia Code section 11-9.7, which eliminates the requirement that the power of attorney must be delivered to the agent in order for it to be valid;²³⁶

(2) Amend section 26.72.01 to delete the hot powers;²³⁷

(3) Amend section 26-71.03 to provide that the UPOAA will not apply to designations of persons to make arrangements for disposition of remains under section 54.1-2825;²³⁸

(4) Amend Article 4 to include UPOAA section 401 to promote uniformity of construction;²³⁹

231. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-74.02(1), (2)). In light of the re-enactment provision, the authors recommend that the Virginia UPOAA be amended to provide for a July 1, 2010 effective date.

232. *Id.* (to be codified at VA. CODE ANN. § 26-74.02(3)).

233. *Id.* (to be codified at VA. CODE ANN. § 26-74.02(4)).

234. *Id.* (to be codified at VA. CODE ANN. § 55-546.02(3)).

235. See *supra* Part III.A.16.

236. See *supra* Part III.A.6.

237. See *supra* Part III.B.1.

238. See *supra* Part III.A.3.

239. See *supra* Part III.D.1.

(5) Amend section 26-74.02 to make the effective date July 1, 2010;²⁴⁰ and

(6) Amend the Virginia UPOAA to provide that the risk of loss for acceptance of a forged power of attorney by a third party will rest with a third party who accepted it rather than with the purported principal.²⁴¹

The Virginia UPOAA, with the amendments noted above, should be re-enacted and become effective in Virginia for several reasons. First, the UPOAA seeks to preserve powers of attorney as a low-cost, flexible, and private form of surrogate decision making. Second, the UPOAA encourages third-party acceptance of powers of attorney by providing broad protection for good faith acceptance or refusal of an acknowledged power of attorney by third parties. Third, the UPOAA provides sanctions for unreasonable refusals of an acknowledged power of attorney. Fourth, the UPOAA provides protection for principals with mandatory and default fiduciary duties for the agent, liability for agent misconduct, broad standing for judicial review, and the requirement for express language to grant certain authority that could dissipate the principal's property or alter the principal's estate plan. Fifth, the UPOAA recognizes that an agent who acts with care, competence, and diligence for the benefit of a principal should not be liable solely because the agent also benefits from the act or has conflicting interest. Sixth, and finally, the UPOAA assists in the drafting of powers of attorney by providing modern definitions of authority that can be granted to an agent by incorporation by reference to descriptive terms and default provisions that can be customized to suit the principal.²⁴²

Powers of attorney have become an essential disability and incapacity planning tool. As the popularity of powers of attorney has increased over the years, so has the resulting litigation surrounding their use. Virginia currently only has a few brief statutes that address powers of attorney.²⁴³ Most of the law in this

240. See *supra* Part III.D.3.

241. See *supra* Part III.A.19. The Virginia Bar Association is currently working on an amendment to accomplish this, although the precise language has not yet been agreed upon.

242. See Unif. Law Comm'rs: The Nat'l Conference of Comm'rs on Unif. State Laws, Summary: Uniform Power of Attorney Act (2006), http://www.nccusl.org/update/uniformact_summaries/uniformacts-s-upoaa.asp.

243. See Whitton, *supra* note 18, at 4-5.

area in Virginia is supplanted by the common law of agency.²⁴⁴ The problem is that the common law of agency was developed for supervised agencies where a principal was still competent to supervise his agent's actions. The common law does not take into account that most powers of attorney are now durable and last beyond a principal's incapacity. A comprehensive statute pertaining to the use of powers of attorney is warranted in Virginia to ensure that default rules are in place when a principal is incapacitated and can't supervise his agent and to protect third parties. The authors feel that the Virginia UPOAA is that statute.

244. *Id.*
