

# VALPARAISO UNIVERSITY SCHOOL OF LAW



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## Chapter 9

### The New Uniform Power of Attorney Act: Balancing Protection of the Principal, the Agent, and Third Persons

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**Linda S. Whitton**

## CHAPTER 9

### THE NEW UNIFORM POWER OF ATTORNEY ACT: BALANCING PROTECTION OF THE PRINCIPAL, THE AGENT, AND THIRD PERSONS<sup>†</sup>

Linda S. Whitton\*

#### *Abstract*

*In the current climate of power of attorney legislative reform, there exists an inherent tension between two objectives: 1) preservation of the effectiveness of durable powers as a low-cost, flexible, and private form of surrogate decision making and 2) protection of incapacitated principals from financial abuse. Achieving the first objective is further complicated by fear of liability on the part of trustworthy agents and the third parties who are asked to accept their authority. This article examines these policy intersections and analyzes how the new Uniform Power of Attorney Act balances competing interests to enhance the usefulness of powers of attorney while at the same time protecting the principal, the agent, and third parties who accept powers of attorney.*

#### Synopsis

¶ 900 Introduction

¶ 901 Protection of the Principal

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#### ¶ 900 INTRODUCTION

The Uniform Power of Attorney Act (hereinafter the “Act” or “UPOAA”) supersedes the Uniform Durable Power of Attorney Act, the Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code. The need for the new Act was evidenced by a study of state power of attorney legislation as well as a national survey. The study indicated that the majority of state statutes, originally patterned after the Uniform Durable Power of Attorney Act, had been amended to include provisions about issues not covered by that act, thus eroding uniformity. The survey revealed, however, that despite divergent state legislation, significant consensus existed about issues critical to power of attorney practice.<sup>1</sup>

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<sup>1</sup> See Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis*, National Conference of Commissioners on Uniform State Laws (2002), available at <http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm>.

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**UNIFORM POWER OF ATTORNEY ACT**

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Over the three-year drafting process, drafting committee members met with numerous professional groups, individual lawyers, and corporate counsel to identify what legislative trends and best practices should be reflected in the Act. The Act attempts to strike a balance between preserving powers of attorney as a flexible, low-cost method of surrogate decision making and deterring financial abuse perpetrated through misuse of powers of attorney. The following discussion highlights features of the Act that promote prudent use of powers of attorney while at the same time protecting the principal, the agent, and persons who are asked to accept powers of attorney.

**¶ 901 PROTECTION OF THE PRINCIPAL**

Although a competent principal may choose to empower an agent to act for the sake of mere convenience—as in the circumstance of an out-of-town real estate closing, most principals execute a power of attorney to provide for surrogate decision making in the event of later incapacity. The need to protect a principal who may later become incapacitated is two-fold. First, the principal’s self-determination interests should be protected by respecting the principal’s choice of agent and the principal’s expectations about how decisions should be made when the principal can no longer give contemporaneous instructions. Second, an incapacitated principal should be protected, to the extent feasible, from financial exploitation at the hands of an untrustworthy agent who takes advantage of the principal’s inability to monitor transactions. The Act contains provisions that address each of these objectives.

**¶ 901.1 PRESERVATION OF SELF DETERMINATION**

One of the advantages of a power of attorney over a guardianship or a trust is the degree of privacy that can be maintained with respect to the principal’s property and property management objectives. The success of this arrangement depends on selection of a trustworthy agent who knows the principal’s expectations and is willing to implement them. In theory, a principal who has granted an agent broad authority under a power of attorney should not need a guardian if there is a later loss of capacity. However, an increase in guardianship battles over

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elderly parents and their assets suggests that advance planning with powers of attorney may be jeopardized without adequate legislative safeguards.<sup>2</sup>

*A. Choice of Agent*

The Act protects the principal's choice of agent by providing that the agent's authority continues after later court appointment of a fiduciary unless the court limits, suspends, or terminates the agent's authority (UPOAA § 108(b)). This departure from the Uniform Durable Power of Attorney Act, which gave a court-appointed fiduciary "the same power to revoke or amend the power of attorney that the principal would have had if he were not disabled or incapacitated,"<sup>3</sup> protects the principal's choice of agent and promotes judicial economy. If a fiduciary is needed because of the agent's substandard performance, the same evidence that supports fiduciary appointment will support limitation or termination of the agent's authority. Reserving to the court the authority to limit or terminate the agent's authority, either by acting directly or by authorizing the court-appointed fiduciary to do so, is now the majority position in states that have departed from the Uniform Durable Power of Attorney Act.<sup>4</sup>

The new Act, like the original Uniform Durable Power of Attorney Act, permits a principal to nominate a person to serve as

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<sup>2</sup> See, e.g., NPR, Legal Battles over Parental Guardianship, Legal Affairs, September 5, 2006, <http://www.npr.org/templates/story/story.php?storyId=5697280> (audio webcast of the Talk of the Nation program aired August 23, 2006 on National Public Radio); Rachel Emma Silverman, *Latest Custody Battle: Who Gets Mom*, WALL ST. J., Aug. 17, 2006, at D1; Alison Barnes, *The Liberty and Property of Elders: Guardianship and Will Contests as the Same Claim*, 11 ELDER L.J. 1 (2003).

<sup>3</sup> Unif. Durable Power of Atty. Act § 3(a) (1987).

<sup>4</sup> See 755 ILL. COMP. STAT. ANN. 45/2-10 (West 1992); IND. CODE ANN. § 30-5-3-4 (West 1994); KAN. STAT. ANN. § 58-662 (2005); MO. ANN. STAT. § 404.727 (West 2001); N.J. STAT. ANN. § 46:2b-8.4 (West 2003); N.M. STAT. ANN. § 45-5-503a (LexisNexis 2004); UTAH CODE ANN. § 75-5-501 (Supp. 2006); VT. STAT. ANN. Tit. 14, § 3509(a) (2002); VA. CODE ANN. § 11-9.1B (2006).

conservator or guardian in the event a court later determines that one is needed, and directs the court to appoint the nominee unless there is good cause to do otherwise (UPOAA § 108(a)). Giving first priority to the principal's nominee is consistent with the trend in guardianship statutes that establish a hierarchy for appointment. A principal who wishes to emphasize the preference for the agent as the chosen decision maker should therefore also consider nominating the agent as the principal's choice for conservator or guardian.

*B. Expectations for Property Management*

A tension exists with respect to what standard should govern the actions of a surrogate: substituted judgment—acting in a manner that the surrogate believes the person would choose if able to make that choice, versus best interest—acting in a manner that an ordinarily prudent person would choose in the same or similar circumstances. This tension is resolved in the context of a trust through the terms of the trust instrument. The settlor can specify which of the trustee's actions are to be governed by the settlor's expectations and which are to be subject to the trustee's discretion. While the actions of guardians were historically guided by a best interest standard, the modern trend is a preference for substituted judgment as the standard that best respects the incapacitated person's self-determination interests.<sup>5</sup> The new Act clearly favors the substituted judgment approach by mandating that the agent “act in accordance with the principal's reasonable expectations to the extent actually known by the agent, and otherwise, in the principal's best interest” (UPOAA § 114(a)(1)).

In the absence of contrary instructions from the principal, the Act also provides that an agent must attempt to preserve the

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<sup>5</sup> See Wingspan—The Second National Guardianship Conference, Recommendations, 31 STETSON L. REV. 595, 603 (2002) (recommending that “[t]he guardian use a substituted judgment standard in making decisions on behalf of the person with diminished capacity” which “entails determining what the person with diminished capacity would decide if he or she had capacity”); UNIF. GUARDIANSHIP & PROTECTIVE PROC. ACT § 314 (a) (1997) (“A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian.”).

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principal's estate plan to the extent the plan is actually known to the agent and if preservation is consistent with the principal's best interest (UPOAA § 114(b)(6)). The duty to preserve the estate plan is of necessity qualified because the principal is under no affirmative obligation to disclose to an agent any information about the principal's property or estate plan. Even when the agent is aware of the plan, the principal's expectations may at times conflict, or the incapacitated principal's needs may require expenditure of resources that the principal had hoped would pass at death. The Act's approach balances respect for the principal's previously expressed choices with the pragmatic need to respond to unforeseen circumstances after the principal has lost capacity.

Respect for the principal's choices is also apparent in the Act's default requirement that an agent cooperate with the principal's health-care agent (UPOAA § 114(b)(5)). Although the Act does not apply to health-care powers of attorney (UPOAA § 103), the Act recognizes that health-care and financial decisions are often interdependent and will require the cooperation of both agents when the authority for each is not held by the same person.

Another feature of the Act that protects self-determination is the requirement of an express grant of authority for certain actions that could substantially dissipate the principal's property or alter the principal's estate plan. Authority for such actions, which include making a gift, creating or changing beneficiary designations or rights of survivorship, and creating, amending, revoking, or terminating an inter vivos trust, may not be inferred from a general grant of authority (UPOAA § 201(a)). Rising concern over abuse of durable powers has prompted a growing number of legislatures to require express authority for extraordinary actions.<sup>6</sup> Actions that require an express grant of authority under the Act are listed in a separate section of the

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<sup>6</sup> See, e.g., CAL. PROB. CODE § 4264 (West Supp. 2006); KAN. STAT. ANN. § 58-654(f) (2005); MO. ANN. STAT. 404.710 (West 2001); WASH. REV. CODE ANN. § 11.94.050 (West Supp. 2006).

optional statutory form and are preceded by a cautionary notice to the principal (UPOAA § 301).

Probably the most important protection under the Act for the self-determination interests of the principal is recognition of liability for unreasonable refusal of a power of attorney. Once a principal has lost capacity, the degree to which a power of attorney is effective for property management depends primarily on the willingness of other persons to accept it. Under the Act, third persons may be subject to a court order mandating acceptance of a valid power of attorney and to liability for attorney's fees and costs incurred in any action to confirm the validity of the power of attorney (UPOAA §§ 120(c), Alternative A; 120(d), Alternative B). The Act offers adopting states a choice between alternative liability sections—one provides liability for unreasonable refusal of any acknowledged power of attorney (UPOAA § 120, Alternative A), and the other limits liability to unreasonable refusal of an acknowledged statutory form power of attorney (UPOAA § 120, Alternative B). While the Act subjects third persons to liability for unreasonable refusal of a power of attorney, the Act also provides broad protections for good faith acceptances and refusals of powers of attorney (see ¶ 903).

### *C. Privacy*

One of the advantages of a power of attorney over a trust or a guardianship is the greater degree of privacy a principal can maintain over financial matters and the principal's capacity to handle those matters. Although the Act contains default mechanisms for determining the principal's incapacity if incapacity is a triggering event for the power of attorney (UPOAA § 109(c)), the Act also permits the principal to choose who may determine that the triggering event has occurred (UPOAA § 109(b)). Furthermore, a third person who wants verification of the triggering event may request and rely upon, without further investigation, the agent's certification of any factual matter concerning the principal, the agent, or the power of attorney (UPOAA § 119(d)).

The principal may also designate to whom and on what basis the agent must disclose information about transactions conducted

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on the principal's behalf. If the principal does not provide specific instructions, the Act requires an agent to disclose this information only if requested by the principal, a fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, the personal representative or successor in interest of the principal's estate, or if ordered by a court (UPOAA § 114(h)).

#### ¶ 901.2 PROTECTION FROM FINANCIAL EXPLOITATION

Although the principal's self-determination and privacy interests are of paramount importance in advance planning with a durable power of attorney, consideration must also be given to the increased risk of financial exploitation posed by a principal's incapacitation. In response to growing public concern about the use of powers of attorney as a "license to steal,"<sup>7</sup> the Act contains a number of safeguards that promote prevention, detection, and redress of financial abuse without unduly constraining the usefulness of the power of attorney.

##### *A. Prevention*

As previously discussed, one innovation in the Act that discourages financial exploitation is the requirement of express language to authorize actions that have significant potential for dissipating the principal's property or altering the principal's estate plan (see ¶ 901.1[B]). These actions include authority to:

- (1) create, amend, revoke, or terminate an inter vivos trust;
- (2) make a gift;
- (3) create or change rights of survivorship;

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<sup>7</sup> See, e.g., Mirry M. Hwang, *Durable Power of Attorney: Financial Planning Tool or License to Steal?*, J. LONG-TERM HEALTH CARE, Spring 1996, at 13; Hans A. Lapping, *License to Steal: Implied Gift-Giving Authority and Powers of Attorney*, 4 ELDER L.J. 143 (1996).

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- (4) create or change a beneficiary designation;
- (5) authorize another person to exercise authority granted to the agent;
- (6) waive the principal's right to be a beneficiary of a joint and survivor annuity;
- (7) exercise fiduciary powers that the principal has authority to delegate; and
- (8) disclaim or refuse an interest in property, including a power of appointment

(UPOAA § 201(a)). Furthermore, unless the power of attorney otherwise provides, the Act prohibits an agent who is not the principal's ancestor, spouse, or descendant from exercising authority under the power of attorney to create in the agent, or in anyone to whom the agent owes a legal obligation of support, an interest in the principal's property (UPOAA § 201(b)).

Even if an agent is the principal's ancestor, spouse, or descendant, the agent is constrained from self-dealing by clearly articulated fiduciary duties in the Act (UPOAA § 114). These duties are divided into mandatory duties—acting in good faith, within the scope of authority granted, and in accordance with the principal's expectations (UPOAA § 114(a)), and default duties—which include, among others, the duty to act loyally and the duty to avoid conflicts of interest that would undermine the agent's ability to act impartially for the principal's best interest (see UPOAA § 114(b)).

Another provision in the Act is aimed specifically at preventing financial abuse at the hand of a spouse-agent. Under this default provision, a spouse-agent's authority terminates if an action is filed for dissolution or annulment of the marriage to the principal, or their legal separation (UPOAA § 110(b)(3)). This is a default provision because there may be special circumstances in which a principal would want the ex-spouse to continue as agent—such as when a marital dissolution is for the primary purpose of separating marital assets and qualifying a catastrophically-ill principal for public benefits.

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One of the most important protective provisions in the Act is directed at the role of persons who accept powers of attorney. The Act permits a person to refuse an otherwise valid power of attorney if the person in good faith believes that the principal may be subject to some type of abuse by the agent or someone acting in concert with the agent (UPOAA §§ 120(b)(6), Alternative A; 120(c)(6), Alternative B). The power of attorney may be refused if the person makes, or knows that someone has made, a report to the appropriate local governmental agency such as adult protective services. Persons who accept powers of attorney are not required under the Act to investigate the actions of an agent, but this provision permits third persons to serve a gate-keeping function on abuse if they so choose.

#### *B. Detection*

While protection of the principal's privacy is one of the benefits of incapacity planning with a power of attorney, juxtaposed against this benefit is the risk that financial abuse will go undetected if the principal becomes incapacitated. Although it could be argued that the principal assumes this risk when choosing the agent, the trend in state power of attorney statutes is to provide a mechanism for uncovering abuse if the agency relationship goes awry. The Act contains two such provisions. One allows a governmental agency, such as adult protective services, to request agent disclosure of transactions conducted on behalf of the principal (UPOAA § 114(h)).<sup>8</sup> The other permits any person who demonstrates sufficient interest in the principal's welfare to

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<sup>8</sup> See also 755 ILL. COMP. STAT. ANN. § 45/2-7.5 (West Supp. 2006 & 2006 ILL. LEGIS. SERV. 1754) (permitting a representative of a provider agency, of the Office of the State Long Term Care Ombudsman, or of the Office of Inspector General for the Department of Human Services to request an accounting); 20 PA. CONS. STAT. ANN. § 5604(d) (West 2005) (permitting agency acting pursuant to Older Adults Protective Services Act to petition); VT. STAT. ANN. tit. 14, § 3510(b) (2002 & LexisNexis 2006-3 VT. ADV. LEGIS. SERV. 228) (permitting the commissioner of disabilities, aging, and independent living to petition).

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petition a court to review the agent's conduct (UPOAA § 116(a)).<sup>9</sup> The rationale for allowing intervention by a third party is that a vulnerable person is often isolated and it may be a long-time neighbor or trusted friend, rather than a relative, who is in a position to suspect abuse. As a counterbalance to this potential intrusion into the principal's privacy, the Act requires a court to dismiss the petition for review upon a motion by the principal unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney (UPOAA § 116(b)).

### *C. Redress*

The Act provides redress for financial abuse at the hands of an agent, but remedies under the Act are not exclusive and do not prevent recourse under other statutes that may address financial exploitation (UPOAA § 123). Under the Act, an agent is liable for the amount required to restore the principal's property to what it would have been had the violation not occurred. An agent must also reimburse the principal for any attorney's fees and costs paid on the agent's behalf (UPOAA § 117).

## ¶ 902 PROTECTION OF THE AGENT

In light of the increase in family litigation over elders and their assets and the advent of state statutes with special civil and criminal penalties for financial abuse,<sup>10</sup> well-meaning agents need

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<sup>9</sup> The approach of the UPOAA is consistent with nine of the eleven states that have standing provisions for review of the agent's conduct. Like the UPOAA, five of these states permit any person interested in the welfare of the principal to petition the court for review. CAL. PROB. CODE § 4540 (West Supp. 2006); KAN. STAT. ANN. § 58-662 (2005); MO. ANN. STAT. § 404.727 (West 2001); N.H. REV. STAT. ANN. § 506:7 (LexisNexis 1997 & Supp. 2005); WASH. REV. CODE ANN. § 11.94.100 (Supp. 2006). The other four states allow "an interested person" to petition, but do not define interested person. COLO. REV. STAT. § 15-14-609 (West 2005); 755 ILL. COMP. STAT. ANN. § 45/2-10 (West 1992); IND. CODE ANN. § 30-5-3-5 (West 1994); WIS. STAT. ANN. § 243.07(6r) (West 2001). Only Pennsylvania and Vermont limit standing to the principal and a governmental agency or official. 20 PA. CONS. STAT. ANN. § 5604 (West 2005); VT. STAT. ANN. tit. 14, § 3510(b) (2002 & 2006-3 VT. ADV. LEGIS. SERV. 228).

<sup>10</sup> For a discussion of various state statutory responses to financial exploitation, see Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 MCGEORGE L. REV. 267 (2003).

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clearly articulated parameters in order to avoid an inadvertent breach of duty to the principal. Unlike a trustee or guardian, who oversees an estate that is well defined, an agent under a power of attorney is at the mercy of whatever information the principal chooses to convey. Recognizing that most agents are relatives of the principal and usually laypersons, the Act contains a number of provisions that delineate context-specific liability standards for agents. In addition, the Act provides guidance as to when the agency relationship and fiduciary duties commence and terminate.

#### ¶ 902.1 CONTEXT-SPECIFIC LIABILITY STANDARDS

At a minimum, the Act requires an agent to act in good faith, within the scope of authority granted, and according to the principal's expectations, if known, and otherwise in the principal's best interest (UPOAA § 114(a)). Unless otherwise provided in the power of attorney, the agent must also act loyally and with ordinary care, competence, and diligence (UPOAA § 114(b)). However, if the principal chooses, the power of attorney may contain an exoneration provision which relieves the agent of liability for breach of duty provided the breach was not committed dishonestly, with an improper motive, or with reckless indifference (UPOAA § 115). In other words, the principal may choose to hold an agent to a good faith standard for all conduct rather than an ordinary negligence or higher standard.<sup>11</sup>

Even without a general exoneration provision, the Act states that an agent who acts in good faith will not be liable to any beneficiary of the principal's estate plan for failure to preserve the plan (UPOAA § 114(c)), and that absent a breach of duty, an agent is not liable if the value of the principal's property declines (UPOAA § 114(f)). Recognizing that many agents have inherent

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<sup>11</sup> See Unif. Power of Atty. Act § 115 Comment (noting that the "mandatory minimum standard of conduct required of an agent is equivalent to the good faith standard applicable to trustees, and citing to the Unif. Trust Code § 1008 Comment (2003) for the proposition that a trustee's failure to adhere to a good faith standard may not be excused by language in the trust instrument.)

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conflicts of interest with the principal such as inheritance interests and shared property ownership, the Act also provides that an agent who acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has conflicting interests (UPOAA § 114(d)).<sup>12</sup> This provision clarifies that it is possible for an agent to act according to the principal's expectations, or best interest as the case may be, without necessarily acting in the principal's sole interest.

**¶ 902.2 COMMENCEMENT AND TERMINATION OF THE AGENCY**

Designation of an agent in a power of attorney does not obligate the agent to serve. This unique aspect of a power of attorney creates potential problems. One is determining exactly when the agency commences and fiduciary duties attach; the other is determining when the agent who has accepted the agency is no longer subject to fiduciary duties. The Act addresses both of these concerns.

With respect to commencement of the agency, the Act states that "a person accepts appointment . . . by exercising authority or performing duties . . . or by any other assertion or conduct indicating acceptance" (UPOAA § 113). Thus, it takes more than mere knowledge that one has been appointed an agent under a power of attorney for the agency to commence. At a minimum, some assertion or conduct is required.

An agent may terminate the agency relationship by resigning (UPOAA § 110(b)(2)), and the Act further provides that resignation may be accomplished by giving notice (UPOAA § 118). Unless the principal is incapacitated or the power of attorney provides otherwise, resignation can be accomplished by giving notice to the principal. If the principal is incapacitated, the Act provides a hierarchy of persons to whom effective notice may be given. Where no fiduciary has been appointed for the principal

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<sup>12</sup> The Act's approach is modeled after state statutes which recognize that loyalty to the principal is not mutually exclusive to an incidental benefit to the agent. *See, e.g.*, CAL. PROB. CODE § 4232(b) (West Supp. 2006); 755 ILL. COMP. STAT. ANN. 45/2-7 (West 1992); IND. CODE ANN. § 30-5-9-2 (West 1994 & Supp. 2005).

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and there is no coagent or successor agent, the agent may choose to give notice to the principal's caregiver, a person interested in the principal's welfare, or a governmental agency that has authority to protect the welfare of the principal (UPOAA § 118). This mechanism prevents endangerment of a vulnerable principal while at the same time providing the agent with a responsible way to terminate the agency.

#### ¶ 903 PROTECTION OF THIRD PERSONS

Taking the lead from states that have addressed the problem of arbitrary refusals of powers of attorney by entities such as banks, brokerage houses, and insurance companies, the Act provides broad protection for good faith acceptance or refusal of an acknowledged power of attorney, and liability for unreasonable refusals.<sup>13</sup> Protection of third persons is the necessary counterpart to mandating acceptance of powers of attorney that do not meet statutory safe harbors for good faith refusal.

#### ¶ 903.1 GOOD FAITH ACCEPTANCE OF POWERS OF ATTORNEY

Third parties are protected for good faith acceptance of any purportedly acknowledged power of attorney without any duty to independently verify the validity of the power of attorney, the agent's authority, or the proper exercise of authority by the agent (UPOAA § 119(c)). Thus, the principal, rather than the person who accepts the power of attorney, bears the risk that the power of attorney or the agent's authority is invalid. Nonetheless, third parties may request and rely upon an agent's certification as to any factual matter concerning the principal, agent, or power of

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<sup>13</sup> Recognizing liability for unreasonable refusal of a power of attorney is a growing state trend. *See, e.g.*, ALASKA STAT. § 13.26.353(c) (2004); CAL. PROB. CODE § 4306(a) (West Supp. 2006); FLA. STAT. ANN. § 709.08(11) (West 2000 & Supp. 2006); 755 ILL. COMP. STAT. ANN. 45/ 2-8 (West 1992); IND. CODE ANN. § 30-5-9-9 (West Supp. 2005); MINN. STAT. ANN. § 523.20 (West 2006); N.Y. GEN. OBLIG. LAW § 5-1504 (McKinney 2001); N.C. GEN. STAT. § 32A-41 (2005); 20 PA. CONS. STAT. ANN. § 5608 (West 2005); S.C. CODE ANN. § 62-5-501(F)(1) (Supp. 2005).

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attorney; an opinion of counsel as to any matter of law concerning the power of attorney; or an English translation of the power of attorney if any part of the power of attorney is in a language other than English (UPOAA § 119(d)). While the Act does not require verification by any of the foregoing methods, third persons may elect to request the additional information as a condition to acceptance of the power of attorney.

An additional protection for third persons is the role of “actual knowledge” when a person conducts activities through employees. The Act provides that such a person does not have actual knowledge “of a fact relating to a power of attorney, a principal, or an agent if the employee conducting the transaction involving a power of attorney is without actual knowledge of the fact” (UPOAA § 119(f)). For example, if a principal notifies a bank’s branch office that a power of attorney is revoked, but the agent transacts business at another office with a teller who has no knowledge of the revocation, the bank will not be liable for accepting the power of attorney.

**¶ 903.2 GOOD FAITH REFUSAL OF POWERS OF ATTORNEY**

While the Act is intended to encourage the acceptance of powers of attorney, concern for the protection of the principal and the business autonomy of persons who are asked to accept powers of attorney requires that the Act also provide safe harbors for legitimate refusals. These include refusals on the following bases:

- “(1) the person is not otherwise required to engage in a transaction with the principal in the same circumstances;
- (2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;
- (3) the person has actual knowledge of the termination of the agent’s authority or of the power of attorney before exercise of the power;
- (4) a request for a certification, a translation, or an opinion of counsel under Section 119(d) is refused;

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(5) the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under Section 119(d) has been requested or provided; or

(6) the person makes, or has actual knowledge that another person has made, a report to the [local adult protective service office] stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.”

(UPOAA §§ 120(b), Alternative A; 120(c), Alternative B). By providing broad protection for good faith acceptance and good faith refusal of a power of attorney, the Act removes common impediments to the acceptance of valid powers of attorney.

#### ¶ 904 CONCLUSION

When undertaking reform of power of attorney legislation, an unavoidable tension exists between two objectives: 1) preservation of the effectiveness of durable powers as a low-cost, flexible, and private form of surrogate decision making and 2) protection of incapacitated principals from financial abuse. Achieving the first objective is further complicated by the fear of liability on the part of trustworthy agents and the third parties who are asked to accept their authority. In the final analysis, there may be no perfect mechanism for surrogate decision making, but the Act’s legislative reforms balance these competing interests to enhance the usefulness of powers of attorney while at the same time protecting the principal, the agent, and those who are asked to accept powers of attorney.

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¶ 905 Appendix: Uniform Power of Attorney Act (UPOAA)

**UNIFORM POWER OF ATTORNEY ACT**

drafted by the

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ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT  
IN ALL THE STATES

at its

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**UNIFORM POWER OF ATTORNEY ACT**


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## UNIFORM POWER OF ATTORNEY ACT

### Prefatory Note

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

A national survey was then conducted by the Joint Editorial Board for Uniform Trust and Estate Acts (JEB) to ascertain whether there was actual divergence of opinion about default rules for powers of attorney or only the lack of a detailed uniform model. The survey was distributed to probate and elder law sections of all state bar associations, to the fellows of the American College of Trust and Estate Counsel, the leadership of the ABA Section of Real Property, Probate and Trust Law and the National Academy of Elder Law Attorneys, as well as to special interest list serves of the ABA Commission on Law and Aging. Forty-four jurisdictions were represented in the 371 surveys returned.

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

- (1) provide for confirmation that contingent powers are activated;

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

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Informed by the review and the survey results, the Conference's drafting process also incorporated input from the American College of Trust and Estate Counsel, the ABA Section of Real Property, Probate and Trust Law, the ABA Commission on Law and Aging, the Joint Editorial Board for Uniform Trust and Estate Acts, the National Conference of Lawyers and Corporate Fiduciaries, the American Bankers Association, AARP, other professional groups, as well as numerous individual lawyers and corporate counsel. As a result of this process, the Act 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 and the need to prevent and redress financial abuse.

While the Act contains safeguards for the protection of an incapacitated principal, the Act is primarily 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. Among the Act's features that enhance drafting flexibility are the statutory definitions of powers in Article 2, which can be incorporated by reference in an individually drafted power of attorney or selected for inclusion on the optional statutory form provided in Article 3. The statutory definitions of enumerated powers are an updated version of those in the Uniform Statutory Form Power of Attorney Act (1988), which the Act supersedes. The national review found that eighteen jurisdictions had adopted some type of statutory form power of attorney. The decision to include a statutory form power of attorney in the Act was based on this trend and the proliferation of power of attorney forms currently available to the public.

Sections 119 and 120 of the Act address the problem of persons refusing to accept an agent's authority. Section 119 provides protection from liability for persons that in good faith accept an acknowledged power of attorney. Section 120 sanctions refusal to accept an acknowledged power of attorney unless the refusal meets limited statutory exceptions. An alternate Section 120 is provided for states that may wish to limit sanctions to refusal of an acknowledged statutory form power of attorney.

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In exchange for mandated acceptance of an agent's authority, the Act does not require persons that deal with an agent to investigate the agent or the agent's actions. Instead, safeguards against abuse are provided through heightened requirements for granting authority that could dissipate the principal's property or alter the principal's estate plan (Section 201(a)), provisions that set out the agent's duties and liabilities (Sections 114 and 117) and by specification of the categories of persons that have standing to request judicial review of the agent's conduct (Section 116). The following provides a brief overview of the entire Act.

### **Overview of the Uniform Power of Attorney Act**

The Act consists of 4 articles. The basic substance of the Act is located in Articles 1 and 2. Article 3 contains the optional statutory form and Article 4 consists of miscellaneous provisions dealing with general application of the Act and repeal of certain prior acts.

**Article 1—General Provisions and Definitions**—Section 102 lists definitions which are useful in interpretation of the Act. Of particular note is the definition of “incapacity” which replaces the term “disability” used in the Original Act. The definition of “incapacity” is consistent with the standard for appointment of a conservator under Section 401 of the Uniform Guardianship and Protective Proceedings Act as amended in 1997. Another significant change in terminology from the Original Act is the use of “agent” in place of the term “attorney in fact.” The term “agent” was also used in the Uniform Statutory Form Power of Attorney Act and is intended to clarify confusion in the lay public about the meaning of “attorney in fact.” Section 103 provides that the Act is to apply broadly to all powers of attorney, but excepts from the Act powers of attorney for health care and certain specialized powers such as those coupled with an interest or dealing with proxy voting.

Another innovation is the default rule in Section 104 that a power of attorney is durable unless it contains express language indicating otherwise. This change from the Original Act reflects the view that most principals prefer their powers of attorney to be durable as a hedge against the need for guardianship. While the Original Act was silent on execution requirements for a power of attorney, Section 105 requires

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the principal's signature and provides that an acknowledged signature is presumed genuine. Section 106 recognizes military powers of attorney and powers of attorney properly executed in other states or countries, or which were properly executed in the state of enactment prior to the Act's effective date. Section 107 states a choice of law rule for determining the law that governs the meaning and effect of a power of attorney.

Section 108 addresses the relationship of the agent to a later court-appointed fiduciary. The Original Act conferred upon a conservator or other later-appointed fiduciary the same power to revoke or amend the power of attorney as the principal would have had prior to incapacity. In contrast, the Act reserves this power to the court and states that the agent's authority continues until limited, suspended, or terminated by the court. This approach reflects greater deference for the previously expressed preferences of the principal and is consistent with the state legislative trend that has departed from the Original Act.

The default rule for when a power of attorney becomes effective is stated in Section 109. Unless the principal specifies that it is to become effective upon a future date, event, or contingency, the authority of an agent under a power of attorney becomes effective when the power is executed. Section 109 permits the principal to designate who may determine when contingent powers are triggered. If the trigger for contingent powers is the principal's incapacity, Section 109 provides that the person designated to make that determination has the authority to act as the principal's personal representative under the Health Insurance Portability and Accountability Act (HIPAA) for purposes of accessing the principal's health-care information and communicating with the principal's health-care provider. This provision does not, however, confer on the designated person the authority to make health-care decisions for the principal. If the trigger for contingent powers is incapacity but the principal has not designated anyone to make the determination, or the person authorized is unable or unwilling to make the determination, the determination may be made by a physician or licensed psychologist, who must find that the principal's ability to manage property or business affairs is impaired, or by

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an attorney at law, judge, or appropriate governmental official, who must find that the principal is missing, detained, or unable to return to the United States.

The bases for termination of a power of attorney are covered in Section 110. In response to concerns expressed in the JEB survey, the Act provides as the default rule that authority granted to a principal's spouse is revoked upon the commencement of proceedings for legal separation, marital dissolution or annulment.

Sections 111 through 118 address matters related to the agent, including default rules for coagents and successor agents (Section 111), reimbursement and compensation (Section 112), an agent's acceptance of appointment (Section 113), and the agent's duties (Section 114). Section 115 provides that a principal may lower the standard of liability for agent conduct subject to a minimum level of accountability for actions taken dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal. Section 116 sets out a comprehensive list of persons that may petition the court to review the agent's conduct and Section 117 addresses agent liability. An agent may resign by following the notice procedures described in Section 118.

Sections 119 and 120 are included in the Act to address the frequently reported problem of persons refusing to accept a power of attorney. Section 119 protects persons that in good faith accept an acknowledged power of attorney without actual knowledge that the power of attorney is revoked, terminated, or invalid or that the agent is exceeding or improperly exercising the agent's powers. Subject to statutory exceptions, alternative Sections 120 impose liability for refusal to accept a power of attorney. Alternative A sanctions refusal of an acknowledged power of attorney and Alternative B sanctions only refusal of an acknowledged statutory form power of attorney.

Sections 121 through 123 address the relationship of the Act to other law. Section 121 clarifies that the Act is supplemented by the principles of common law and equity to the extent those principles are not displaced by a specific provision of the Act, and Section 122 further clarifies that the Act is not intended to supersede any law applicable to financial institutions or other entities. With respect to

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remedies, Section 123 provides that the remedies under the Act are not exclusive and do not abrogate any other cause of action or remedy that may be available under the law of the enacting jurisdiction.

**Article 2—Authority**—The Act offers the drafting attorney enhanced flexibility whether drafting an individually tailored power of attorney or using the statutory form. Like the Uniform Statutory Form Power of Attorney Act, Sections 204 through 217 of the Act set forth detailed descriptions of authority relating to subjects such as “real property,” “retirement plans,” and “taxes,” which a principal, pursuant to Section 202, may incorporate in full into the power of attorney either by a reference to the short descriptive term for the subject used in the Act or to the section number. Section 202 further states that a principal may modify in a power of attorney any authority incorporated by reference. The definitions in Article 2 also provide meaning for authority with respect to subjects enumerated on the optional statutory form in Article 3. Section 203 applies to all incorporated authority and grants of general authority, providing further detail on how the authority is to be construed.

Article 2 also addresses concerns about authority that might be used to dissipate the principal’s property or alter the principal’s estate plan. Section 201(a) lists specific categories of authority that cannot be implied from a grant of general authority, but which may be granted only through express language in the power of attorney. Section 201(b) contains a default rule prohibiting an agent that is not an ancestor, spouse, or descendant of the principal from creating in the agent or in a person to whom the agent owes a legal obligation of support an interest in the principal’s property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

**Article 3—Statutory Forms**—The optional form in Article 3 is designed for use by lawyers as well as lay persons. It contains, in plain language, instructions to the principal and agent. Step-by-step prompts are given for designation of the agent and successor agents, and grant of general and specific authority. In the section of the form addressing general authority, the principal must initial the subjects over

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which the principal wishes to delegate general authority to the agent. In the section of the form addressing specific authority, the Section 201(a) categories of specific authority are listed, preceded by a warning to the principal about the potential consequences of granting such authority to an agent. The principal is instructed to initial only the specific categories of actions that the principal intends to authorize. Article 3 also contains a sample agent certification form.

**Article 4—Miscellaneous Provisions**—The miscellaneous provisions in Article 4 clarify the relationship of the Act to other law and pre-existing powers of attorney. Enacting jurisdictions should repeal their existing power of attorney statutes, including, if applicable, the Uniform Durable Power of Attorney Act, The Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code.

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**UNIFORM POWER OF ATTORNEY ACT****[ARTICLE] 1****GENERAL PROVISIONS****General Comment**

The Uniform Power of Attorney Act replaces the Uniform Durable Power of Attorney Act, the Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code. The primary purpose of the Uniform Durable Power of Attorney Act was to provide individuals with an inexpensive, non-judicial method of surrogate property management in the event of later incapacity. Two key concepts were introduced by the Uniform Durable Power of Attorney Act: 1) creation of a durable agency—one that survives, or is triggered by, the principal's incapacity, and 2) validation of post-mortem exercise of powers by an agent who acts in good faith and without actual knowledge of the principal's death. The success of the Uniform Durable Power of Attorney Act is evidenced by the widespread use of durable powers in every jurisdiction, not only for incapacity planning, but also for convenience while the principal retains capacity. However, the limitations of the Uniform Durable Power of Attorney Act are evidenced by the number of states that have supplemented and revised their statutes to address myriad issues upon which the Uniform Durable Power of Attorney Act is silent. These issues include parameters for the creation and use of powers of attorney as well as guidelines for the principal, the agent, and the person who is asked to accept the agent's authority. The general provisions and definitions of Article 1 in the Uniform Power of Attorney Act address those issues.

In addition to providing greater detail than the Uniform Durable Power of Attorney Act, this Act changes two presumptions in the earlier act: 1) that a power of attorney is not durable unless it contains language to make it durable; and 2) that a later court-appointed fiduciary for the principal has the power to revoke or amend a previously executed power of attorney. Section 104 of this Article reverses the non-durability presumption by stating that a power of attorney is durable unless it expressly provides that it is terminated by the incapacity of the principal. Section

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108 gives deference to the principal's choice of agent by providing that if a court appoints a fiduciary to manage some or all of the principal's property, the agent's authority continues unless limited, suspended, or terminated by the court.

Although the Act is primarily a default statute, Article 1 also contains rules that govern all powers of attorney subject to the Act. Examples of these rules include imposition of certain minimum fiduciary duties on an agent who has accepted appointment (Section 114(a)), recognition of persons who have standing to request judicial construction of the power of attorney or review of the agent's conduct (Section 116), and protections for persons who accept an acknowledged power of attorney without actual knowledge that the power of attorney or the agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the power (Section 119). In contrast with the rules of general application in Article 1, the default provisions are clearly indicated by signals such as "unless the power of attorney otherwise provides," or "except as otherwise provided in the power of attorney." These signals alert the draftsman to options for enlarging or limiting the Act's default terms. For example, default provisions in Article 1 state that, unless the power of attorney otherwise provides, the power of attorney is effective immediately (Section 109), coagents may exercise their authority independently (Section 111), and an agent is entitled to reimbursement of expenses reasonably incurred and to reasonable compensation (Section 112).

**SECTION 101. SHORT TITLE.** This [act] may be cited as the Uniform Power of Attorney Act.

### Comment

This Act, which replaces the Uniform Durable Power of Attorney Act, does not contain the word "durable" in the title. Pursuant to Section 104, a power of attorney created under the Act is durable unless the power of attorney provides that it is terminated by the incapacity of the principal.

**SECTION 102. DEFINITIONS.** In this [act]:

(1) "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise.

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The term includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated.

(2) "Durable," with respect to a power of attorney, means not terminated by the principal's incapacity.

(3) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(4) "Good faith" means honesty in fact.

(5) "Incapacity" means inability of an individual to manage property or business affairs because the individual:

(A) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or

(B) is:

(i) missing;

(ii) detained, including incarcerated in a penal system; or

(iii) outside the United States and unable to return.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Power of attorney" means a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used.

(8) "Presently exercisable general power of appointment," with respect to property or a property interest subject to a power of appointment, means power exercisable at the time in question to vest absolute ownership in the principal individually, the principal's estate, the principal's creditors, or the creditors of the principal's estate. The term includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period only after the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified period. The term does not include a power exercisable in a fiduciary capacity or only by will.

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(9) “Principal” means an individual who grants authority to an agent in a power of attorney.

(10) “Property” means anything that may be the subject of ownership, whether real or personal, or legal or equitable, or any interest or right therein.

(11) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(12) “Sign” means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic sound, symbol, or process.

(13) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(14) “Stocks and bonds” means stocks, bonds, mutual funds, and all other types of securities and financial instruments, whether held directly, indirectly, or in any other manner. The term does not include commodity futures contracts and call or put options on stocks or stock indexes.

*Legislative Note: An enacting jurisdiction should review its respective guardianship, conservatorship, or other protective proceedings statutes and amend, if necessary for consistency, the definition of incapacity.*

#### **Comment**

Although most of the definitions in Section 102 are self-explanatory, a few of the terms warrant further comment.

“Agent” replaces the term “attorney in fact” used in the Uniform Durable Power of Attorney Act to avoid confusion in the lay public about the meaning of the term and the difference between an attorney in fact and an attorney at law. Agent was also used in the Uniform Statutory Form Power of Attorney Act which this Act supersedes.

“Incapacity” replaces the term “disability” used in the Uniform Durable Power of Attorney Act in recognition that disability does not necessarily render an individual incapable of property and business management. The definition of

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incapacity stresses the operative consequences of the individual's impairment— inability to manage property and business affairs—rather than the impairment itself. The definition of incapacity in the Act is also consistent with the standard for appointment of a conservator under Section 401 of the Uniform Guardianship and Protective Proceedings Act as amended in 1997.

The definition of “power of attorney” clarifies that the term applies to any grant of authority in a writing or other record from a principal to an agent which appears from the grant to be a power of attorney, without regard to whether the words “power of attorney” are actually used in the grant.

“Presently exercisable general power of appointment” is defined to clarify that where the phrase appears in the Act it does not include a power exercisable by the principal in a fiduciary capacity or exercisable only by will. *Cf.* Restatement (Third) of Property (Wills and Don. Trans.) § 19.8 cmt. d (Tentative Draft No. 5, approved 2006) (noting that unless the donor of a presently exercisable power of attorney has manifested a contrary intent, it is assumed that the donor intends that the donee's agent be permitted to exercise the power for the benefit of the donee). Including in a power of attorney the authority to exercise a presently exercisable general power of appointment held by the principal is consistent with the objective of giving an agent comprehensive management authority over the principal's property and financial affairs. The term appears in Section 211 (Estates, Trusts, and Other Beneficial Interests) in the context of authority to exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal (*see* Section 211(b)(3)), and in Section 217 (Gifts) in the context of authority to exercise for the benefit of someone else a presently exercisable general power of appointment held by the principal (*see* Section 217(b)(1)). The term is also incorporated by reference when using the statutory form in Section 301 to grant authority with respect to “Estates, Trusts, and Other Beneficial Interests” or authority with respect to “Gifts.” If a principal wishes to delegate authority to exercise a power that the principal holds in a fiduciary capacity, Section 201(a)(7) requires that the power of attorney contain an express grant of such authority. Furthermore, delegation of a

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power held in a fiduciary capacity is possible only if the principal has authority to delegate the power, and the agent's authority is necessarily limited by whatever terms govern the principal's ability to exercise the power.

**SECTION 103. APPLICABILITY.** This [act] applies to all powers of attorney except:

(1) a power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction;

(2) a power to make health-care decisions;

(3) a proxy or other delegation to exercise voting rights or management rights with respect to an entity; and

(4) a power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.

**Comment**

The Uniform Power of Attorney Act is intended to be comprehensive with respect to delegation of surrogate decision making authority over an individual's property and property interests, whether for the purpose of incapacity planning or mere convenience. Given that an agent will likely exercise authority at times when the principal cannot monitor the agent's conduct, the Act specifies minimum agent duties and protections for the principal's benefit. These provisions, however, may not be appropriate for all delegations of authority that might otherwise be included within the definition of a power of attorney. Section 103 lists delegations of authority that are excluded from the Act because the subject matter of the delegation, the objective of the delegation, the agent's role with respect to the delegation, or a combination of the foregoing, would make application of the Act's provisions inappropriate.

Paragraph (1) excludes a power to the extent that it is coupled with an interest in the subject of the power. This exclusion addresses situations where, due to the agent's interest in the subject matter of the power, the agent is not intended to act as the principal's fiduciary. See Restatement (Third) of Agency § 3.12 (2006) and M.T. Brunner, Annotation, *What Constitutes Power Coupled with Interest within Rule as to Termination of Agency*, 28 A.L.R.2d 1243 (1953). Common examples of

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powers coupled with an interest include powers granted to a creditor to perfect or protect title in, or to sell, pledged collateral. While the example of “a power given to or for the benefit of a creditor in connection with a credit transaction” is highlighted in paragraph (1), it is not meant to exclude application of paragraph (1) to other contexts in which a power may be coupled with an interest, such as a power held by an insurer to settle or confess judgment on behalf of an insured. *See, e.g., Hayes v. Gessner*, 52 N.E.2d 968 (Mass. 1944).

Paragraph (2) excludes from the Act delegations of authority to make health-care decisions for the principal. Such delegations are covered under other law of the jurisdiction. The Act recognizes, however, that matters of financial management and health-care decision making are often interdependent. The Act consequently provides in Section 114(b)(5) a default rule that an agent under the Act must cooperate with the principal’s health-care decision maker.

Likewise, paragraph (3) excludes from the Act a proxy or other delegation to exercise voting rights or management rights with respect to an entity. The rules with respect to those rights are typically controlled by entity-specific statutes within a jurisdiction. *See, e.g., Model Bus. Corp. Act § 7.22 (2002); Unif. Ltd. Partnership Act § 118 (2001); and Unif. Ltd. Liability Co. Act § 404(e) (1996)*. Notwithstanding the exclusion of such delegations from the operation of this Act, Section 209 contemplates that a power granted to an agent with respect to operation of an entity or business includes the authority to “exercise in person or by proxy . . . a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds . . .”(see paragraph (5) of Section 209). Thus, while a person that holds only a proxy pursuant to an entity voting statute will not be subject to the provisions of this Act, an agent that is granted Section 209 authority is subject to the Act because the principal has given the agent authority that is greater than that of a mere voting proxy. In fact, typical entity statutes contemplate that a principal’s agent or “attorney in fact” may appoint a proxy on behalf of the principal. *See, e.g., Model Bus. Corp. Act § 7.22 (2002); Unif. Ltd. Partnership Act § 118 (2001); and Unif. Ltd. Liability Co. Act § 404(e) (1996)*.

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Paragraph (4) excludes from the Act any power created on a governmental form for a governmental purpose. Like the excluded powers in paragraphs (2) and (3), the authority for a power created on a governmental form emanates from other law and is generally for a limited purpose. Notwithstanding this exclusion, the Act specifically provides in paragraph (7) of Section 203 that a grant of authority to an agent includes, with respect to that subject matter, authority to “prepare, execute, and file a record, report, or other document to safeguard or promote the principal’s interest under a statute or governmental regulation.” Section 203, paragraph (8), further clarifies that the agent has the authority to “communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality, on behalf of the principal.” The intent of these provisions is to minimize the need for a special power on a governmental form with respect to any subject matter over which an agent is granted authority under the Act.

**SECTION 104. POWER OF ATTORNEY IS DURABLE.** A power of attorney created under this [act] is durable unless it expressly provides that it is terminated by the incapacity of the principal.

**Comment**

Section 104 establishes that a power of attorney created under the Act is durable unless it expressly states otherwise. This default rule is the reverse of the approach under the Uniform Durable Power of Attorney Act and based on the assumption that most principals prefer durability as a hedge against the need for guardianship. *See also* Section 107 Comment (noting that the default rules of the jurisdiction’s law under which a power of attorney is created, including the default rule for durability, govern the meaning and effect of a power of attorney).

**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 directed by the principal to sign the principal’s name on the power of attorney. A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments.

**Comment**

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While notarization of the principal's signature is not required to create a valid power of attorney, this section strongly encourages the practice by according acknowledged signatures a statutory presumption of genuineness. Furthermore, because Section 119 (Acceptance of and Reliance Upon Acknowledged Power of Attorney) and alternative Sections 120 (Alternative A—Liability for Refusal to Accept Acknowledged Power of Attorney, and Alternative B—Liability for Refusal to Accept Acknowledged Statutory Form Power of Attorney ) do not apply to unacknowledged powers, persons who are presented with an unacknowledged power of attorney may be reluctant to accept it. As a practical matter, an acknowledged signature is required if the power of attorney will be recorded by the agent in conjunction with the execution of real estate documents on behalf of the principal. *See R.P.D., Annotation, Recording Laws as Applied to Power of Attorney under which Deed or Mortgage is Executed*, 114 A.L.R. 660 (1938).

This section, at a minimum, requires that the power of attorney be signed by the principal or by another individual who the principal has directed to sign the principal's name. If another individual is directed to sign the principal's name, the signing must occur in the principal's "conscious presence." The 1990 amendments to the Uniform Probate Code codified the "conscious presence" test for the execution of wills (Section 2-502(a)(2)), which generally requires that the signing is sufficient if it takes place within the range of the senses—usually sight or hearing—of the individual who directed that another sign the individual's name. *See Unif. Probate Code § 2-502 cmt. (2003)*. For a discussion of acknowledgment of a signature by an individual whose name is signed by another, see R.L.M., *Annotation, Formal Acknowledgment of Instrument by One Whose Name is Signed thereto by Another as an Adoption of the Signature*, 57 A.L.R. 525 (1928).

**SECTION 106. VALIDITY OF POWER OF ATTORNEY.**

(a) A power of attorney executed in this state on or after [the effective date of this [act]] is valid if its execution complies with Section 105.

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(b) A power of attorney executed in this state before [the effective date of this [act]] is valid if its execution complied with the law of this state as it existed at the time of execution.

(c) A power of attorney executed other than in this state is valid in this state if, when the power of attorney was executed, the execution complied with:

(1) the law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to Section 107; or

(2) the requirements for a military power of attorney pursuant to 10 U.S.C. Section 1044b [, as amended].

(d) Except as otherwise provided by statute other than this [act], a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.

**Legislative Note:** *The brackets in subsections (a) and (b) of this section indicate where an enacting jurisdiction may elect to insert the actual effective date of the Act.*

#### **Comment**

One of the purposes of the Uniform Power of Attorney Act is promotion of the portability and use of powers of attorney. Section 106 makes clear that the Act does not affect the validity of pre-existing powers of attorney executed under prior law in the enacting jurisdiction, powers of attorney validly created under the law of another jurisdiction, and military powers of attorney. While the effect of this section is to recognize the validity of powers of attorney created under other law, it does not abrogate the traditional grounds for contesting the validity of execution such as forgery, fraud, or undue influence.

This section also provides that unless another law in the jurisdiction requires presentation of the original power of attorney, a photocopy or electronically transmitted copy has the same effect as the original. An example of another law that might require presentation of the original power of attorney is the jurisdiction's recording act. *See, e.g.,* Restatement (Third) of Property (Wills & Don. Trans.) § 6.3 cmt. e (2003) (noting that in order to record a deed, "some states require that the document of transfer be signed, sealed, attested, and acknowledged").

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**SECTION 107. MEANING AND EFFECT OF POWER OF ATTORNEY.**

The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.

**Comment**

This section recognizes that a foreign power of attorney, or one executed before the effective date of the Uniform Power of Attorney Act, may have been created under different default rules than those in this Act. Section 107 provides that the meaning and effect of a power of attorney is to be determined by the law under which it was created. For example, the law in another jurisdiction may provide for different default rules with respect to durability of a power of attorney (*see* Section 104), the authority of coagents (*see* Section 111) or the scope of specific authority such as the authority to make gifts (*see* Section 217). Section 107 clarifies that the principal's intended grant of authority will be neither enlarged nor narrowed by virtue of the agent using the power in a different jurisdiction. For a discussion of the issues that can arise with inter-jurisdictional use of powers of attorney, see Linda S. Whitton, *Crossing State Lines with Durable Powers*, Prob. & Prop., Sept./Oct. 2003, at 28.

This section also establishes an objective means for determining what jurisdiction's law the principal intended to govern the meaning and effect of a power of attorney. The phrase, "the law of the jurisdiction indicated in the power of attorney," is intentionally broad, and includes any statement or reference in a power of attorney that indicates the principal's choice of law. Examples of an indication of jurisdiction include a reference to the name of the jurisdiction in the title or body of the power of attorney, citation to the jurisdiction's power of attorney statute, or an explicit statement that the power of attorney is created or executed under the laws of a particular jurisdiction. In the absence of an indication of jurisdiction in the power of attorney, Section 107 provides that the law of the jurisdiction in which the power of attorney was executed controls. The distinction between "the law of the jurisdiction indicated in the power of attorney" and "the law of the jurisdiction in

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which the power of attorney was executed” is an important one. The common practice of property ownership in more than one jurisdiction increases the likelihood that a principal may execute in one jurisdiction a power of attorney that was created and intended to be interpreted under the laws of another jurisdiction. A clear indication of the jurisdiction’s law that is intended to govern the meaning and effect of a power of attorney is therefore advisable in all powers of attorney. *See, e.g.*, Section 301 (providing for the name of the jurisdiction to appear in the title of the statutory form power of attorney).

**SECTION 108. NOMINATION OF [CONSERVATOR OR GUARDIAN];  
RELATION OF AGENT TO COURT-APPOINTED FIDUCIARY.**

(a) In a power of attorney, a principal may nominate a [conservator or guardian] of the principal’s estate or [guardian] of the principal’s person for consideration by the court if protective proceedings for the principal’s estate or person are begun after the principal executes the power of attorney. [Except for good cause shown or disqualification, the court shall make its appointment in accordance with the principal's most recent nomination.]

(b) If, after a principal executes a power of attorney, a court appoints a [conservator or guardian] of the principal’s estate or other fiduciary charged with the management of some or all of the principal's property, the agent is accountable to the fiduciary as well as to the principal. [The power of attorney is not terminated and the agent’s authority continues unless limited, suspended, or terminated by the court.]

*Legislative Note:* The brackets in this section indicate areas where an enacting jurisdiction should reference its respective guardianship, conservatorship, or other protective proceedings statutes and amend, if necessary for consistency, the terminology and substance of the bracketed language.

**Comment**

Section 108(b) is a departure from the Uniform Durable Power of Attorney Act which gave a court-appointed fiduciary the same power to revoke or amend a power of attorney as the principal would have if not incapacitated. *See* Unif. Durable Power of Atty. Act § 3(a) (1987). In contrast, this Act gives deference to the

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principal's choice of agent by providing that the agent's authority continues, notwithstanding the later court appointment of a fiduciary, unless the court acts to limit or terminate the agent's authority. This approach assumes that the later-appointed fiduciary's authority should supplement, not truncate, the agent's authority. If, however, a fiduciary appointment is required because of the agent's inadequate performance or breach of fiduciary duties, the court, having considered this evidence during the appointment proceedings, may limit or terminate the agent's authority contemporaneously with appointment of the fiduciary. Section 108(b) is consistent with the state legislative trend that has departed from the Uniform Durable Power of Attorney Act. *See, e.g.*, 755 Ill. Comp. Stat. Ann. 45/2-10 (West 1992); Ind. Code Ann. § 30-5-3-4 (West 1994); Kan. Stat. Ann. § 58-662 (2005); Mo. Ann. Stat. § 404.727 (West 2001); N.J. Stat. Ann. § 46:2B-8.4 (West 2003); N.M. Stat. Ann. § 45-5-503A (LexisNexis 2004); Utah Code Ann. § 75-5-501 (Supp. 2006); Vt. Stat. Ann. tit. 14, § 3509(a) (2002); Va. Code Ann. § 11-9.1B (2006). Section 108(b) is also consistent with the Uniform Health-Care Decisions Act § 6(a) (1993), which provides that a guardian may not revoke the ward's advance health-care directive unless the court appointing the guardian expressly so authorizes. Furthermore, it is consistent with the Uniform Guardianship and Protective Proceedings Act (1997), which provides that a guardian or conservator may not revoke the ward's or protected person's power of attorney for health-care or financial management without first obtaining express authority of the court. *See* Unif. Guardianship & Protective Proc. Act § 316(c) (guardianship), § 411(d) (protective proceedings).

Deference for the principal's autonomous choice is evident both in the presumption that an agent's authority continues unless limited or terminated by the court, and in the directive that the court shall appoint a fiduciary in accordance with the principal's most recent nomination (*see* subsection (a)). Typically, a principal will nominate as conservator or guardian the same individual named as agent under the power of attorney. Favoring the principal's choice of agent and nominee, an approach consistent with most statutory hierarchies for guardian selection (*see* Unif. Guardianship & Protective Proc. Act § 310(a)(2) (1997)), also discourages

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guardianship petitions filed for the sole purpose of thwarting the agent's authority to gain control over a vulnerable principal. *See* Unif. Guardianship & Protective Proc. Act § 310 cmt. (1997). *See also* Linda S. Ershow-Levenberg, *When Guardianship Actions Violate the Constitutionally-Protected Right of Privacy*, NAELA News, Apr. 2005, at 1 (arguing that appointment of a guardian when there is a valid power of attorney in place violates the alleged incapacitated person's constitutionally protected rights of privacy and association).

**SECTION 109. WHEN POWER OF ATTORNEY EFFECTIVE.**

(a) A power of attorney is effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.

(b) If a power of attorney becomes effective upon the occurrence of a future event or contingency, the principal, in the power of attorney, may authorize one or more persons to determine in a writing or other record that the event or contingency has occurred.

(c) If a power of attorney becomes effective upon the principal's incapacity and the principal has not authorized a person to determine whether the principal is incapacitated, or the person authorized is unable or unwilling to make the determination, the power of attorney becomes effective upon a determination in a writing or other record by:

(1) a physician [or licensed psychologist] that the principal is incapacitated within the meaning of Section 102(5)(A); or

(2) an attorney at law, a judge, or an appropriate governmental official that the principal is incapacitated within the meaning of Section 102(5)(B).

(d) A person authorized by the principal in the power of attorney to determine that the principal is incapacitated may act as the principal's personal representative pursuant to the Health Insurance Portability and Accountability Act, Sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, [as amended,] and applicable regulations, to obtain access to the principal's health-care information and communicate with the principal's health-care provider.

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**Legislative Note:** *The phrase “or licensed psychologist” is bracketed in subsection (c)(1) to indicate where an enacting jurisdiction should insert the appropriate designation for the mental health professional or professionals in that jurisdiction who are qualified to make capacity determinations. An enacting jurisdiction should also review its respective guardianship, conservatorship, or other protective proceedings statutes and amend, if necessary for consistency, the definition of incapacity.*

### Comment

This section establishes a default rule that a power of attorney is effective when executed. If the principal chooses to create what is commonly known as a “springing” or contingent power of attorney—one that becomes effective at a future date or upon a future event or contingency—the principal may authorize the agent or someone else to provide written verification that the event or contingency has occurred (subsection (b)). Because the person authorized to verify the principal’s incapacitation will likely need access to the principal’s health information, subsection (d) qualifies that person to act as the principal’s “personal representative” for purposes of the Health Insurance Portability and Accountability Act (HIPAA). *See* 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that for purposes of disclosing an individual’s protected health information, “a covered entity must . . . treat a personal representative as the individual”). Section 109 does not, however, empower the agent to make health-care decisions for the principal. *See* Section 103 and comment (discussing exclusion from this Act of powers to make health-care decisions).

The default rule reflects a “best practices” philosophy that any agent who can be trusted to act for the principal under a springing power of attorney should be trustworthy enough to hold an immediate power. Survey evidence suggests, however, that a significant number of principals still prefer springing powers, most likely to maintain privacy in the hope that they will never need a surrogate decision maker. *See* Linda S. Whitton, *National Durable Power of Attorney Survey Results*

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*and Analysis*, National Conference of Commissioners on Uniform State Laws, 6-7 (2002), <http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm> (reporting that 23% of lawyer respondents found their clients preferred springing powers, 61% reported a preference for immediate powers, and 16% saw no trend; however, 89% stated that a power of attorney statute should authorize springing powers).

If the principal's incapacity is the trigger for a springing power of attorney and the principal has not authorized anyone to make that determination, or the authorized person is unable or unwilling to make the determination, this section provides a default mechanism to trigger the power. Incapacity based on the principal's impairment may be verified by a physician or licensed psychologist (subsection (c)(1)), and incapacity based on the principal's unavailability (*i.e.*, the principal is missing, detained, or unable to return to the United States) may be verified by an attorney at law, judge, or an appropriate governmental official (subsection (c)(2)). Examples of appropriate governmental officials who may be in a position to determine that the principal is incapacitated within the meaning of Section 102(5)(B) include an officer acting under authority of the United States Department of State or uniformed services of the United States or a sworn federal or state law enforcement officer. The default mechanism for triggering a power of attorney is available only when no incapacity determination has been made. It is not available to challenge the determination made by the principal's authorized designee.

**SECTION 110. TERMINATION OF POWER OF ATTORNEY OR AGENT'S AUTHORITY.**

- (a) A power of attorney terminates when:
- (1) the principal dies;
  - (2) the principal becomes incapacitated, if the power of attorney is not durable;
  - (3) the 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; or

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(6) the principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

(b) An agent's authority terminates when:

(1) the principal revokes the authority;

(2) the agent dies, becomes incapacitated, or resigns;

(3) an action is filed for the [dissolution] or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides; or

(4) the power of attorney terminates.

(c) Unless the power of attorney otherwise provides, an agent's authority is exercisable until the authority terminates under subsection (b), notwithstanding a lapse of time since the execution of the power of attorney.

(d) Termination of an agent's authority or of a power of attorney is not effective as to the agent or another person that, without actual knowledge of the termination, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(e) Incapacity of the principal of a power of attorney that is not durable does not revoke or terminate the power of attorney as to an agent or other person that, without actual knowledge of the incapacity, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(f) The execution of a power of attorney does not revoke a power of attorney previously executed by the principal unless the subsequent power of attorney provides that the previous power of attorney is revoked or that all other powers of attorney are revoked.

**Legislative Note:** The word "dissolution" is bracketed in subsection (b)(3) to indicate where an enacting jurisdiction should insert that jurisdiction's term for divorce or marital dissolution.

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**Comment**

This section addresses termination of a power of attorney or an agent's authority under a power of attorney. It first lists termination events (*see* subsections (a) and (b)), and then lists circumstances that, in contrast, either do not invalidate the power of attorney (*see* subsections (c) and (f)) or the actions taken pursuant to the power of attorney (*see* subsections (d) and (e)).

Subsection (c) provides that a power of attorney under the Act does not become "stale." Unless a power of attorney provides for termination upon a certain date or after the passage of a period of time, lapse of time since execution is irrelevant to validity, a concept carried over from the Uniform Durable Power of Attorney Act. *See* Unif. Durable Power of Atty. Act § 1 (as amended in 1987). Similarly, subsection (f) clarifies that a subsequently executed power of attorney will not revoke a prior power of attorney by virtue of inconsistency alone. To effect a revocation, a subsequently executed power of attorney must expressly revoke a previously executed power of attorney or state that all other powers of attorney are revoked. The requirement of express revocation prevents inadvertent revocation when the principal intends for one agent to have limited authority that overlaps with broader authority held by another agent. For example, the principal who has given one agent a very broad power of attorney, including general authority with respect to real property, may later wish to give another agent limited authority to execute closing documents with respect to out-of-town real estate.

Subsections (d) and (e) emphasize that even a termination event is not effective as to the agent or person who, without actual knowledge of the termination event, acts in good faith under the power of attorney. For example, the principal's death terminates a power of attorney (*see* subsection (a)(1)), but an agent who acts in good faith under a power of attorney without actual knowledge of the principal's death will bind the principal's successors in interest with that action (*see* subsection (d)). The same result is true if the agent knows of the principal's death, but the person who accepts the agent's apparent authority has no actual knowledge of the principal's death. *See* Restatement (Third) of Agency § 3.11 (2006) (stating that "termination of actual authority does not by itself end any apparent authority held by an agent"). *See also* Section 119(c) (stating that "[a] person that in good faith

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accepts an acknowledged power of attorney without actual knowledge that the power of attorney is . . . terminated . . . may rely upon the power of attorney as if the power of attorney were . . . still in effect . . .”). These concepts are also carried forward from the Uniform Durable Power of Attorney Act. *See* Unif. Durable Power Atty. Act § 4 (1987).

Of special note in the list of termination events is subsection (b)(3) which provides that a spouse-agent’s authority is revoked when an action is filed for the dissolution or annulment of the agent’s marriage to the principal, or their legal separation. Although the filing of an action for dissolution or annulment might render a principal particularly vulnerable to self-interested actions by a spouse-agent, subsection (b)(3) is not mandatory and may be overridden in the power of attorney. There may be special circumstances precipitating the dissolution, such as catastrophic illness and the need for public benefits, that would prompt the principal to specify that the agent’s authority continues notwithstanding dissolution, annulment or legal separation.

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**SECTION 111. COAGENTS AND SUCCESSOR AGENTS.**

(a) A principal may designate two or more persons to act as coagents. Unless the power of attorney otherwise provides, each coagent may exercise its authority independently.

(b) A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. A principal may grant authority to designate one or more successor agents to an agent or other person designated by name, office, or function. Unless the power of attorney otherwise provides, a successor agent:

(1) has the same authority as that granted to the original agent; and

(2) may not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.

(c) Except as otherwise provided in the power of attorney and subsection (d), an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent.

(d) An agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal's best interest. An agent that fails to notify the principal or take action as required by this subsection is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action.

**Comment**

This section provides several default rules that merit careful consideration by the principal. Subsection (a) states that if a principal names coagents, each coagent may exercise its authority independently unless otherwise directed in the power of attorney. The Act adopts this default position to discourage the practice of executing separate, co-extensive powers of attorney in favor of different agents, and to facilitate transactions with persons who are reluctant to accept a power of attorney from only one of two or more named agents. This default rule should not, however, be interpreted as encouraging the practice of naming coagents. For a principal who

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can still monitor the activities of an agent, naming coagents multiplies monitoring responsibilities and significantly increases the risk that inconsistent actions will be taken with the principal's property. For the incapacitated principal, the risk is even greater that coagents will use the power of attorney to vie for control of the principal and the principal's property. Although the principal can override the default rule by requiring coagents to act by majority or unanimous consensus, such a requirement impedes use of the power of attorney, especially among agents who do not share close physical or philosophical proximity. A more prudent practice is generally to name one original agent and one or more successor agents. If desirable, a principal may give the original agent authority to delegate the agent's authority during periods when the agent is temporarily unavailable to serve (*see* Section 201(a)(5)).

Subsection (b) states that unless a power of attorney otherwise provides, a successor agent has the same authority as that granted to the original agent. While this default provision ensures that the scope of authority granted to the original agent can be carried forward by successors, a principal may want to consider whether a successor agent is an appropriate person to exercise all of the authority given to the original agent. For example, authority to make gifts, to create, amend, or revoke an inter vivos trust, or to create or change survivorship and beneficiary designations (*see* Section 201(a)) may be appropriate for a spouse-agent, but not for an adult child who is named as the successor agent.

Subsection (c) provides a default rule that an agent is not liable for the actions of another agent unless the agent participates in or conceals the breach of fiduciary duty committed by that other agent. Consequently, absent specification to the contrary in the power of attorney, an agent has no duty to monitor another agent's conduct. However, subsection (d) does require that an agent that has actual knowledge of a breach or imminent breach of fiduciary duty must notify the principal, and if the principal is incapacitated, take reasonably appropriate action to safeguard the principal's best interest. Subsection (d) provides that if an agent fails to notify the principal or to take action to safeguard the principal's best interest, that

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agent is only liable for the reasonably foreseeable damages that could have been avoided had the agent provided the required notification.

**SECTION 112. REIMBURSEMENT AND COMPENSATION OF AGENT.**

Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances.

**Comment**

This section provides a default rule that an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to reasonable compensation. While it is unlikely that a principal would choose to alter the default rule as to expenses, a principal's circumstances may warrant including limitations in the power of attorney as to the categories of expenses the agent may incur; likewise, the principal may choose to specify the terms of compensation rather than leave that determination to a reasonableness standard. Although many family-member agents serve without compensation, payment of compensation to the agent may be advantageous to the principal in circumstances where the principal needs to spend down income or resources to meet qualifications for public benefits.

**SECTION 113. AGENT'S ACCEPTANCE.** Except as otherwise provided in the power of attorney, a person accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.

**Comment**

This section establishes a default rule for agent acceptance of appointment under a power of attorney. Unless a different method is provided in the power of attorney, an agent's acceptance occurs upon exercise of authority, performance of duties, or any other assertion or conduct indicating acceptance. Acceptance is the critical reference point for commencement of the agency relationship and the imposition of fiduciary duties (*see* Section 114(a)). Because a person may be unaware that the principal has designated the person as an agent in a power of attorney, clear demarcation of when an agency relationship commences is necessary

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to protect both the principal and the agent. *See* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 41 (2001) (noting that “fiduciary duties should be imposed only to the extent the attorney-in-fact knows of the role, is able to accept responsibility, and affirmatively accepts”). The Act also provides a default method for agent resignation (*see* Section 118), which terminates the agency relationship (*see* Section 110(b)(2)).

#### **SECTION 114. AGENT'S DUTIES.**

(a) Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall:

- (1) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
- (2) act in good faith; and
- (3) act only within the scope of authority granted in the power of attorney.

(b) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:

- (1) act loyally for the principal's benefit;
- (2) act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
- (3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;
- (4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
- (5) cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and
- (6) attempt 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 interest based on all relevant factors, including:
  - (A) the value and nature of the principal's property;

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- (B) the principal's foreseeable obligations and need for maintenance;
- (C) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and
- (D) eligibility for a benefit, a program, or assistance under a statute or regulation.

(c) 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.

(d) An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.

(e) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

(f) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.

(g) An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person.

(h) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.

**Comment**

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Although well settled that an agent under a power of attorney is a fiduciary, there is little clarity in state power of attorney statutes about what that means. *See generally* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1 (2001); Carolyn L. Dessin, *Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role*, 75 Neb. L. Rev. 574 (1996). Among states that address agent duties, the standard of care varies widely and ranges from a due care standard (*see, e.g.*, 755 Ill. Comp. Stat. Ann. 45/2-7 (West 1992); Ind. Code Ann. § 30-5-6-2 (West 1994)) to a trustee-type standard (*see, e.g.*, Fla. Stat. Ann. § 709.08(8) (West 2000 & Supp. 2006); Mo. Ann. Stat. § 404.714 (West 2001)). Section 114 clarifies agent duties by articulating minimum mandatory duties (subsection (a)) as well as default duties that can be modified or omitted by the principal (subsection (b)).

The mandatory duties—acting in accordance with the principal's reasonable expectations, if known, and otherwise in the principal's best interest; acting in good faith; and acting only within the scope of authority granted—may not be altered in the power of attorney. Establishing the principal's reasonable expectations as the primary guideline for agent conduct is consistent with a policy preference for “substituted judgment” over “best interest” as the surrogate decision-making standard that better protects an incapacitated person's self-determination interests. *See Wingspan—The Second National Guardianship Conference, Recommendations*, 31 Stetson L. Rev. 595, 603 (2002). *See also* Unif. Guardianship & Protective Proc. Act § 314(a) (1997).

The Act does not require, nor does common practice dictate, that the principal state expectations or objectives in the power of attorney. In fact, one of the advantages of a power of attorney over a trust or guardianship is the flexibility and informality with which an agent may exercise authority and respond to changing circumstances. However, when a principal's subjective expectations are potentially inconsistent with an objective best interest standard, good practice suggests memorializing those expectations in a written and admissible form as a precaution against later challenges to the agent's conduct (*see* Section 116).

If a principal's expectations potentially conflict with a default duty under the Act, then stating the expectations in the power of attorney, or altering the default rule to accommodate the expectations, or both, is advisable. For example, a principal may want to invest in a business owned by a family member who is also the agent in order to improve the economic position of the agent and the agent's family. Without the principal's clear expression of this objective, investment by the agent of the principal's property in the agent's business may be viewed as breaching the default duty to act loyally for the principal's benefit (subsection (b)(1)) or the default duty to avoid conflicts of interest that impair the agent's ability to act impartially for the principal's best interest (subsection (b)(2)).

Two default duties in this section protect the principal's previously-expressed choices. These are the duty to cooperate with the person authorized to make health-care decisions for the principal (subsection (b)(5)) and the duty to preserve the

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principal's estate plan (subsection (b)(6)). However, an agent has a duty to preserve the principal's estate plan only to the extent the plan is actually known to the agent and only if preservation of the estate plan is consistent with the principal's best interest. Factors relevant to determining whether preservation of the estate plan is in the principal's best interest include the value of the principal's property, the principal's need for maintenance, minimization of taxes, and eligibility for public benefits. The Act protects an agent from liability for failure to preserve the estate plan if the agent has acted in good faith (subsection (c)).

Subsection (d) provides that an agent acting with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has a conflict of interest. This position is a departure from the traditional common law duty of loyalty which required an agent to act solely for the benefit of the principal. *See* Restatement (Second) of Agency § 387 (1958); *see also* Unif. Trust Code § 802(a) (2003) (requiring a trustee to administer a trust "solely in the interests" of the beneficiary). Subsection (d) is modeled after state statutes which provide that loyalty to the principal can be compatible with an incidental benefit to the agent. *See* Cal. Prob. Code § 4232(b) (West Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/2-7 (West 1992); Ind. Code Ann. § 30-5-9-2 (West 1994 & Supp. 2005). The Restatement (Third) of Agency § 8.01 (2006) also contemplates that loyal service to the principal may be concurrently beneficial to the agent (*see* Reporter's note a). *See also* John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 943 (2005) (arguing that the sole interest test for loyalty should be replaced by the best interest test). The public policy which favors best interest over sole interest as the benchmark for agent loyalty comports with the practical reality that most agents under powers of attorney are family members who have inherent conflicts of interest with the principal arising from joint property ownership or inheritance expectations.

Subsection (e) provides additional protection for a principal who has selected an agent with special skills or expertise by requiring that such skills or expertise be considered when evaluating the agent's conduct. If a principal chooses to appoint a family member or close friend to serve as an agent, but does not intend that agent to serve under a higher standard because of special skills or expertise, the principal should consider including an exoneration provision within the power of attorney (*see* comment to Section 115).

Subsections (f) and (g) state protections for an agent that are similar in scope to those applicable to a trustee. Subsection (f) holds an agent harmless for decline in the value of the principal's property absent a breach of fiduciary duty (*cf.* Unif. Trust Code § 1003(b) (2003)). Subsection (g) holds an agent harmless for the conduct of a person to whom the agent has delegated authority, or who has been engaged by the agent on the principal's behalf, provided the agent has exercised care, competence, and diligence in selecting and monitoring the person (*cf.* Unif. Trust Code § 807(c) (2003)).

Subsection (h) codifies the agent's common law duty to account to a principal (*see* Restatement (Third) of Agency § 8.12 (2006); Restatement (First) of Agency § 382 (1933)). Rather than create an affirmative duty of periodic accounting, subsection (h) states that the agent is not required to disclose receipts, disbursements or transactions unless ordered by a court or requested by the principal, a fiduciary

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acting for the principal, or a governmental agency with authority to protect the welfare of the principal. If the principal is deceased, the principal's personal representative or successor in interest may request an agent to account. While there is no affirmative duty to account unless ordered by the court or requested by one of the foregoing persons, subsection (b)(4) does create a default duty to keep records.

The narrow categories of persons that may request an agent to account are consistent with the premise that a principal with capacity should control to whom the details of financial transactions are disclosed. If a principal becomes incapacitated or dies, then the principal's fiduciary or personal representative may succeed to that monitoring function. The inclusion of a governmental agency (such as Adult Protective Services) in the list of persons that may request an agent to account is patterned after state legislative trends and is a response to growing national concern about financial abuse of vulnerable persons. *See* 755 Ill. Comp. Stat. Ann. 45/2-7.5 (West Supp. 2006 & 2006 Ill. Legis. Serv. 1754); 20 Pa. Cons. Stat. Ann. § 5604(d) (West 2005); Vt. Stat. Ann. tit.14, § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228). *See generally* Donna J. Rabiner, David Brown & Janet O'Keeffe, *Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them*, 16 J. Elder Abuse & Neglect 65 (2004). As an additional protective countermeasure to the narrow categories of persons who may request an agent to account, the Act contains a broad standing provision for seeking judicial review of an agent's conduct. *See* Section 116 and Comment.

**SECTION 115. EXONERATION OF AGENT.** A provision in a power of attorney relieving an agent of liability for breach of duty is binding on the principal and the principal's successors in interest except to the extent the provision:

- (1) relieves the agent of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or
- (2) was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

#### **Comment**

This section permits a principal to exonerate an agent from liability for breach of fiduciary duty, but prohibits exoneration for a breach committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal. The mandatory minimum standard of conduct required of an agent is equivalent to the good faith standard applicable to trustees. A trustee's failure to adhere to that standard cannot be excused by language in the trust instrument. *See* Unif. Trust Code § 1008 cmt. (2003) (noting that "a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries"). *See also* Section 102(4) (defining good faith for purposes of the Act as "honesty in fact"). Section 115 provides, as an additional

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measure of protection for the principal, that an exoneration provision is not binding if it was inserted as the result of abuse of a confidential or fiduciary relationship with the principal. While as a matter of good practice an exoneration provision should be the exception rather than the rule, its inclusion in a power of attorney may be useful in meeting particular objectives of the principal. For example, if the principal is concerned that contentious family members will attack the agent's conduct in order to gain control of the principal's assets, an exoneration provision may deter such action or minimize the likelihood of success on the merits.

**SECTION 116. JUDICIAL RELIEF.**

(a) The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief:

- (1) the principal or the agent;
- (2) a guardian, conservator, or other fiduciary acting for the principal;
- (3) a person authorized to make health-care decisions for the principal;
- (4) the principal's spouse, parent, or descendant;
- (5) an individual who would qualify as a presumptive heir of the principal;
- (6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;
- (7) a governmental agency having regulatory authority to protect the welfare of the principal;
- (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.

(b) Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

**Comment**

The primary purpose of this section is to protect vulnerable or incapacitated principals against financial abuse. Subsection (a) sets forth broad categories of persons who have standing to petition the court for construction of the power of attorney or review of the agent's conduct, including in the list a "person that demonstrates sufficient interest in the principal's welfare" (subsection (a)(8)). Allowing any person with sufficient interest to petition the court is the approach taken by the majority of states that have standing provisions. *See* Cal. Prob. Code § 4540 (West Supp. 2006); Colo. Rev. Stat. Ann. § 15-14-609 (West 2005); 755 Ill. Comp. Stat. Ann. 45/2-10 (West 1992); Ind. Code Ann. § 30-5-3-5 (West 1994); Kan. Stat. Ann. § 58-662 (2005); Mo. Ann. Stat. § 404.727 (West 2001); N.H. Rev. Stat. Ann. § 506:7 (LexisNexis 1997 & Supp. 2005); Wash. Rev. Code Ann.

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§ 11.94.100 (Supp. 2006); Wis. Stat. Ann. § 243.07(6r) (West 2001). *But cf.* 20 Pa. Cons. Stat. Ann. § 5604 (West 2005) (limiting standing to an agency acting pursuant to the Older Adults Protective Services Act); Vt. Stat. Ann. tit.14, § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228) (limiting standing to the commissioner of disabilities, aging, and independent living).

In addition to providing a means for detecting and redressing financial abuse by agents, this section protects the self-determination rights of principals. Subsection (b) states that the court must dismiss a petition upon the principal's motion unless the court finds that the principal lacks the capacity to revoke the agent's authority or the power of attorney. Contrasted with the breadth of Section 116 is Section 114(h) which narrowly limits the persons who can request an agent to account for transactions conducted on the principal's behalf. The rationale for narrowly restricting who may request an agent to account is the preservation of the principal's financial privacy. *See* Section 114 Comment. Section 116 operates as a check-and-balance on the narrow scope of Section 114(h) and provides what, in many circumstances, may be the only means to detect and stop agent abuse of an incapacitated principal.

**SECTION 117. AGENT'S LIABILITY.** An agent that violates this [act] is liable to the principal or the principal's successors in interest for the amount required to:

- (1) restore the value of the principal's property to what it would have been had the violation not occurred; and
- (2) reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.

**Comment**

This section provides that an agent's liability for violating the Act includes not only the amount necessary to restore the principal's property to what it would have been had the violation not occurred, but also any amounts for attorney's fees and costs advanced from the principal's property on the agent's behalf. This section does not, however, limit the agent's liability exposure to these amounts. Pursuant to Section 123, remedies under the Act are not exclusive. If a jurisdiction has enacted separate statutes to deal with financial abuse, an agent may face additional civil or criminal liability. For a discussion of state statutory responses to financial abuse, see Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 McGeorge L. Rev. 267 (2003).

**SECTION 118. AGENT'S RESIGNATION; NOTICE.** Unless the power of attorney provides a different method for an agent's resignation, an agent may resign by giving notice to the principal and, if the principal is incapacitated:

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- (1) to the [conservator or guardian], if one has been appointed for the principal, and a coagent or successor agent; or
- (2) if there is no person described in paragraph (1), to:
- (A) the principal's caregiver;
  - (B) another person reasonably believed by the agent to have sufficient interest in the principal's welfare; or
  - (C) a governmental agency having authority to protect the welfare of the principal.

***Legislative Note:** The brackets in this section indicate where the enacting jurisdiction should review its respective guardianship, conservatorship, or other protective proceedings statutes and amend, if necessary for consistency, the bracketed language.*

**Comment**

Section 118 provides a default procedure for an agent's resignation. An agent who no longer wishes to serve should formally resign in order to establish a clear demarcation of the end of the agent's authority and to minimize gaps in fiduciary responsibility before a successor accepts the office. If the principal still has capacity when the agent wishes to resign, this section requires only that the agent give notice to the principal. If, however, the principal is incapacitated, the agent must, in addition to giving notice to the principal, give notice as set forth in paragraphs (1) or (2).

Paragraph (1) provides that notice must be given to a fiduciary, if one has been appointed, and to a coagent or successor agent, if any. If the principal does not have an appointed fiduciary and no coagent or successor agent is named in the power of attorney, then the agent may choose among the notice options in paragraph (2). Paragraph (2) permits the resigning agent to give notice to the principal's caregiver, a person reasonably believed to have sufficient interest in the principal's welfare, or a governmental agency having authority to protect the welfare of the principal. The choice among these options is intentionally left to the agent's discretion and is governed by the same standards as apply to other agent conduct. *See* Section 114(a) (requiring the agent to act in accordance with the principal's reasonable expectations, if known, and otherwise in the principal's best interest).

**SECTION 119. ACCEPTANCE OF AND RELIANCE UPON  
ACKNOWLEDGED POWER OF ATTORNEY.**

(a) For purposes of this section and Section 120, "acknowledged" means purportedly verified before a notary public or other individual authorized to take acknowledgements.

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(b) A person that in good faith accepts an acknowledged power of attorney without actual knowledge that the signature is not genuine may rely upon the presumption under Section 105 that the signature is genuine.

(c) A person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely upon the power of attorney as if the power of attorney were genuine, valid and still in effect, the agent's authority were genuine, valid and still in effect, and the agent had not exceeded and had properly exercised the authority.

(d) A person that is asked to accept an acknowledged power of attorney may request, and rely upon, without further investigation:

(1) an agent's certification under penalty of perjury of any factual matter concerning the principal, agent, or power of attorney;

(2) an English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English; and

(3) an opinion of counsel as to any matter of law concerning the power of attorney if the person making the request provides in a writing or other record the reason for the request.

(e) An English translation or an opinion of counsel requested under this section must be provided at the principal's expense unless the request is made more than seven business days after the power of attorney is presented for acceptance.

(f) For purposes of this section and Section 120, a person that conducts activities through employees is without actual knowledge of a fact relating to a power of attorney, a principal, or an agent if the employee conducting the transaction involving the power of attorney is without actual knowledge of the fact.

#### **Comment**

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This section protects persons who in good faith accept an acknowledged power of attorney. Section 119 does not apply to unacknowledged powers of attorney. *See* Section 105 (providing that the signature on a power of attorney is presumed genuine if acknowledged). Subsection (a) states that for purposes of this section and Section 120 “acknowledged” means “purportedly” verified before an individual authorized to take acknowledgments. The purpose of this definition is to protect a person that in good faith accepts an acknowledged power of attorney without knowledge that it contains a forged signature or a latent defect in the acknowledgment. *See, e.g.*, Cal. Prob. Code § 4303(a)(2) (West Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/2-8 (Supp. 2006); Ind. Code Ann. § 30-5-8-2 (West 1994); N.C. Gen. Stat. § 32A-40 (2005). The Act places the risk that a power of attorney is invalid upon the principal rather than the person that accepts the power of attorney. This approach promotes acceptance of powers of attorney, which is essential to their effectiveness as an alternative to guardianship. The national survey conducted by the Joint Editorial Board for Uniform Trust and Estate Acts (*see* Prefatory Note) found that a majority of respondents had difficulty obtaining acceptance of powers of attorney. Sixty-three percent reported occasional difficulty and seventeen percent reported frequent difficulty. Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis*, National Conference of Commissioners on Uniform State Laws 12-13 (2002), *available at* <http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm>.

Section 119 permits a person to rely in good faith on the validity of the power of attorney, the validity of the agent’s authority, and the propriety of the agent’s exercise of authority, unless the person has actual knowledge to the contrary (subsection (c)). Although a person is not required to investigate whether a power of attorney is valid or the agent’s exercise of authority proper, subsection (d) permits a person to request an agent’s certification of any factual matter (*see* Section 302 for a sample certification form) and an opinion of counsel as to any matter of law. If the power of attorney contains, in whole or part, language other than English, an English translation may also be requested. Further protection is provided in subsection (f) for persons that conduct activities through employees. Subsection (f) states that for purposes of Sections 119 and 120, a person is without actual knowledge of a fact if the employee conducting the transaction is without actual knowledge of the fact.

**Alternative A****SECTION 120. LIABILITY FOR REFUSAL TO ACCEPT  
ACKNOWLEDGED POWER OF ATTORNEY.**

(a) Except as otherwise provided in subsection (b):

(1) a person shall either accept an acknowledged power of attorney or request a certification, a translation, or an opinion of counsel under Section 119(d) no later than seven business days after presentation of the power of attorney for acceptance;

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(2) if a person requests a certification, a translation, or an opinion of counsel under Section 119(d), the person shall accept the power of attorney no later than five business days after receipt of the certification, translation, or opinion of counsel; and

(3) a person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented.

(b) A person is not required to accept an acknowledged power of attorney if:

(1) the person is not otherwise required to engage in a transaction with the principal in the same circumstances;

(2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;

(3) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;

(4) a request for a certification, a translation, or an opinion of counsel under Section 119(d) is refused;

(5) the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under Section 119(d) has been requested or provided; or

(6) the person makes, or has actual knowledge that another person has made, a report to the [local adult protective services office] stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

(c) A person that refuses in violation of this section to accept an acknowledged power of attorney is subject to:

(1) a court order mandating acceptance of the power of attorney; and

(2) liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

**Legislative Note:** Section 120 enumerates the bases for legitimate refusals of a power of attorney as well as sanctions for refusals that violate the Act. Alternatives A and B are identical except that Alternative B applies only to acknowledged

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*statutory form powers of attorney while Alternative A applies to all acknowledged powers of attorney.*

*Under both alternatives, the phrase “local adult protective services office” is bracketed to indicate where an enacting jurisdiction should insert the appropriate designation for the governmental agency with regulatory authority to protect the welfare of the principal.*

**Comment to Alternative A**

As a complement to Section 119, Section 120 enumerates the bases for legitimate refusals of a power of attorney as well as sanctions for refusals that violate the Act. Like Section 119, Section 120 does not apply to unacknowledged powers of attorney. Enacting jurisdictions are provided a choice between alternative Sections 120. Alternatives A and B are identical except that Alternative B applies only to acknowledged statutory form powers of attorney while Alternative A applies to all acknowledged powers of attorney.

Subsection (b) of Alternative A provides the bases upon which an acknowledged power of attorney may be refused without liability. The last paragraph of subsection (b) permits refusal of an otherwise valid acknowledged power of attorney that does not meet any of the other bases for refusal if the person in good faith believes that the principal is subject to abuse by the agent or someone acting in concert with the agent (paragraph (6)). A refusal under this paragraph is protected if the person makes, or knows another person has made, a report to the governmental agency authorized to protect the welfare of the principal. Pennsylvania has a similar provision. *See* 20 Pa. Cons. Stat. Ann. § 5608(a) (West 2005).

Unless a basis exists in subsection (b) for refusing an acknowledged power of attorney, subsection (a) requires that, within seven business days after the power of attorney is presented, a person must either accept the power of attorney or request a certification, a translation, or an opinion of counsel pursuant to Section 119. If a request under Section 119 is made, the person must decide to accept or reject the power of attorney no later than five business days after receipt of the requested document (subsection (a)(2)). Provided no basis exists for refusing the power of attorney, subsection (a)(3) prohibits a person from requesting an additional or different form of power of attorney for authority granted in the power of attorney presented.

Subsection (c) of Alternative A provides that a person that refuses an acknowledged power of attorney in violation of Section 120 is subject to a court order mandating acceptance and to reasonable attorney’s fees and costs incurred in the action to confirm the validity of the power of attorney or to mandate acceptance. Statutory liability for unreasonable refusal of a power of attorney is based on a growing state legislative trend. *See, e.g.*, Alaska Stat. § 13.26.353(c) (2004); Cal. Prob. Code § 4306(a) (West Supp. 2006); Fla. Stat. Ann. § 709.08(11) (West 2000 & Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/ 2-8 (West 1992); Ind. Code Ann. § 30-5-9-9 (West Supp. 2005); Minn. Stat. Ann. § 523.20 (West 2006); N.Y. Gen. Oblig. Law § 5-1504 (McKinney 2001); N.C. Gen. Stat. § 32A-41 (2005); 20 Pa. Cons. Stat. Ann. § 5608 (West 2005); S.C. Code Ann. § 62-5-501(F)(1) (Supp. 2005).

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**Alternative B**

**SECTION 120. LIABILITY FOR REFUSAL TO ACCEPT  
ACKNOWLEDGED STATUTORY FORM POWER OF ATTORNEY.**

(a) In this section, “statutory form power of attorney” means a power of attorney substantially in the form provided in Section 301 or that meets the requirements for a military power of attorney pursuant to 10 U.S.C. Section 1044b [, as amended].

(b) Except as otherwise provided in subsection (c):

(1) a person shall either accept an acknowledged statutory form power of attorney or request a certification, a translation, or an opinion of counsel under Section 119(d) no later than seven business days after presentation of the power of attorney for acceptance;

(2) if a person requests a certification, a translation, or an opinion of counsel under Section 119(d), the person shall accept the statutory form power of attorney no later than five business days after receipt of the certification, translation, or opinion of counsel; and

(3) a person may not require an additional or different form of power of attorney for authority granted in the statutory form power of attorney presented.

(c) A person is not required to accept an acknowledged statutory form power of attorney if:

(1) the person is not otherwise required to engage in a transaction with the principal in the same circumstances;

(2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;

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(3) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;

(4) a request for a certification, a translation, or an opinion of counsel under Section 119(d) is refused;

(5) the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under Section 119(d) has been requested or provided; or

(6) the person makes, or has actual knowledge that another person has made, a report to the [local adult protective services office] stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

(d) A person that refuses in violation of this section to accept an acknowledged statutory form power of attorney is subject to:

(1) a court order mandating acceptance of the power of attorney; and

(2) liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

**Legislative Note:** Section 120 enumerates the bases for legitimate refusals of a power of attorney as well as sanctions for refusals that violate the Act. Alternatives A and B are identical except that Alternative B applies only to acknowledged statutory form powers of attorney while Alternative A applies to all acknowledged powers of attorney.

Under both alternatives, the phrase "local adult protective services office" is bracketed to indicate where an enacting jurisdiction should insert the appropriate designation for the governmental agency with regulatory authority to protect the welfare of the principal.

**Comment to Alternative B**

As a complement to Section 119, Section 120 enumerates the bases for legitimate refusals of a power of attorney as well as sanctions for refusals that violate the Act. Like Section 119, Section 120 does not apply to unacknowledged powers of attorney. Enacting jurisdictions are provided a choice between alternative Sections

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120. Alternatives A and B are identical except that Alternative B applies only to acknowledged statutory form powers of attorney while Alternative A applies to all acknowledged powers of attorney.

Subsection (a) of Alternative B defines “statutory form power of attorney” as a power of attorney substantially in the form provided in Section 301 or one that meets the requirements for a military power of attorney.

Subsection (c) of Alternative B provides the bases upon which an acknowledged statutory form power of attorney may be refused without liability. The last paragraph of subsection (c) permits refusal of an otherwise valid acknowledged statutory form power of attorney that does not meet any of the other bases for refusal if the person in good faith believes that the principal is subject to abuse by the agent or someone acting in concert with the agent (paragraph (6)). A refusal under this paragraph is protected if the person makes, or knows another person has made, a report to the governmental agency authorized to protect the welfare of the principal. Pennsylvania has a similar provision. *See* 20 Pa. Cons. Stat. Ann. § 5608(a) (West 2005).

Unless a basis exists in subsection (c) for refusing an acknowledged statutory form power of attorney, subsection (b) requires that, within seven business days after the power of attorney is presented, a person must either accept the power of attorney or request a certification, a translation, or an opinion of counsel pursuant to Section 119. If a request under Section 119 is made, the person must decide to accept or reject the power of attorney no later than five business days after receipt of the requested document (subsection (b)(2)). Provided no basis exists for refusing the power of attorney, subsection (b)(3) prohibits a person from requesting an additional or different form of power of attorney for authority granted in the power of attorney presented.

Subsection (d) of Alternative B provides that a person that refuses an acknowledged statutory form power of attorney in violation of Section 120 is subject to a court order mandating acceptance and to reasonable attorney’s fees and costs incurred in the action to confirm the validity of the power of attorney or to mandate acceptance. Statutory liability for unreasonable refusal of a power of attorney is based on a growing state legislative trend. *See, e.g.*, Alaska Stat. § 13.26.353(c) (2004); Cal. Prob. Code § 4306(a) (West Supp. 2006); Fla. Stat. Ann. § 709.08(11) (West 2000 & Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/ 2-8 (West 1992); Ind. Code Ann. § 30-5-9-9 (West Supp. 2005); Minn. Stat. Ann. § 523.20 (West 2006); N.Y. Gen. Oblig. Law § 5-1504 (McKinney 2001); N.C. Gen. Stat. § 32A-41 (2005); 20 Pa. Cons. Stat. Ann. § 5608 (West 2005); S.C. Code Ann. § 62-5-501(F)(1) (Supp. 2005).

#### **End of Alternatives**

**SECTION 121. PRINCIPLES OF LAW AND EQUITY.** Unless displaced by a provision of this [act], the principles of law and equity supplement this [act].

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**Comment**

The Act is supplemented by common law, including the common law of agency, where provisions of the Act do not displace relevant common law principles. The common law of agency is articulated in the Restatement of Agency and includes contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. The common law also includes the traditional and broad equitable jurisdiction of the court, which this Act in no way restricts.

The statutory text of the Uniform Power of Attorney Act is also supplemented by these comments, which, like the comments to any Uniform Act, may be relied on as a guide for interpretation. *See* *Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code); *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); 2B Norman Singer, *Southerland Statutory Construction* § 52.5 (6th ed. 2000).

**SECTION 122. LAWS APPLICABLE TO FINANCIAL INSTITUTIONS AND ENTITIES.** This [act] does not supersede any other law applicable to financial institutions or other entities, and the other law controls if inconsistent with this [act].

**Comment**

This section addresses concerns of representatives from the banking and insurance industries that there may be regulations which govern those entities that conflict with provisions of this Act. Although no specific conflicts were identified during the drafting process, Section 122 provides that in the event a law applicable to a financial institution or other entity is inconsistent with this Act, the other law will supersede this Act to the extent of the inconsistency. This concern about inconsistency with the requirements of other law is already substantially addressed in Section 120, which provides, in pertinent part, that a person is not required to accept a power of attorney if, “the person is not otherwise required to engage in a transaction with the principal in the same circumstances,” or “engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law.”

**SECTION 123. REMEDIES UNDER OTHER LAW.** The remedies under this [act] are not exclusive and do not abrogate any right or remedy under the law of this state other than this [act].

**Comment**

The remedies under the Act are not intended to be exclusive with respect to causes of action that may accrue in relation to a power of attorney. The Act applies to many persons, individual and entity (*see* Section 102(6) (defining “person” for

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purposes of the Act)), that may serve as agents or that may be asked to accept a power of attorney. Likewise, the Act applies to many subject areas (*see* Article 2) over which principals may delegate authority to agents. Remedies under other laws which govern such persons and subject matters should be considered by aggrieved parties in addition to remedies available under this Act. *See, e.g.*, Section 117 Comment.

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**[ARTICLE] 2****AUTHORITY****General Comment**

Article 2 is based in part on the predecessor Uniform Statutory Form Power of Attorney Act, approved in 1988. It provides the default statutory construction for authority granted in a power of attorney. Sections 204 through 217 describe authority with respect to various subject matters. These descriptions may be incorporated by reference in the optional statutory form (Section 301) or in an individually drafted power of attorney. Incorporation is accomplished either by referring to the descriptive term for the subject or by providing a citation to the section in which the authority is described (Section 202). A principal may also modify any authority incorporated by reference (Section 202(c)). Section 203 supplements Sections 204 through 217 by providing general terms of construction that apply to all grants of authority under those sections unless otherwise indicated in the power of attorney.

Most of the language in Sections 204 through 216 of Article 2 comes directly from the Uniform Statutory Form Power of Attorney Act. The language has been revised where necessary to reflect modern custom and practice. Where significant changes have been made, they are noted in a comment to the relevant section. In general, there are two important differences between the statutory treatment of authority in this Act and in the Uniform Statutory Form Power of Attorney Act. First, this Act includes a section that provides a default rule for the parameters of gift making authority (Section 217). Second, this Act identifies specific acts that may be authorized only by an express grant in the power of attorney (Section 201(a)). Express authorization for the acts listed in Section 201(a) is required because of the risk those acts pose to the principal's property and estate plan. The purpose of Section 201(a) is to make clear that authority for these acts may not be inferred from a grant of general authority.

**SECTION 201. AUTHORITY THAT REQUIRES SPECIFIC GRANT;  
GRANT OF GENERAL AUTHORITY.**

(a) An agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:

- (1) create, amend, revoke, or terminate an inter vivos trust;

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- (2) make a gift;
  - (3) create or change rights of survivorship;
  - (4) create or change a beneficiary designation;
  - (5) delegate authority granted under the power of attorney;
  - (6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; [or]
  - (7) exercise fiduciary powers that the principal has authority to delegate[;
- or
- (8) disclaim property, including a power of appointment].

(b) Notwithstanding a grant of authority to do an act described in subsection (a), unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or descendant of the principal, may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

(c) Subject to subsections (a), (b), (d), and (e), if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in Sections 204 through 216.

(d) Unless the power of attorney otherwise provides, a grant of authority to make a gift is subject to Section 217.

(e) Subject to subsections (a), (b), and (d), if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.

(f) Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires

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later, whether or not the property is located in this state and whether or not the authority is exercised or the power of attorney is executed in this state.

(g) An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act.

**Legislative Note:** *The phrase "or disclaim property, including a power of appointment" is in brackets in subsection (a) and should be deleted if under the law of the enacting jurisdiction a fiduciary has authority to disclaim an interest in, or power over, property and the jurisdiction does not wish to restrict that authority by the Uniform Power of Attorney Act. See Unif. Disclaimer of Property Interests Acts § 5(b) (2006) (providing, "[e]xcept 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 part, any interest in or power over property, including a power of appointment . . ."). See also Section 301 Legislative Note.*

#### **Comment**

This section distinguishes between grants of specific authority that require express language in a power of attorney and grants of general authority. Section 201(a) enumerates the acts that require an express grant of specific authority and which may not be inferred from a grant of general authority. This approach follows a growing trend among states to require express specific authority for such actions as making a gift, creating or revoking a trust, and using other non-probate estate planning devices such as survivorship interests and beneficiary designations. *See, e.g.,* Cal. Prob. Code § 4264 (West Supp. 2006); Kan. Stat. Ann. § 58-654(f) (2005); Mo. Ann. Stat. § 404.710 (West 2001); Wash. Rev. Code Ann. § 11.94.050 (West Supp. 2006). The rationale for requiring a grant of specific authority to perform the acts enumerated in subsection (a) is the risk those acts pose to the principal's property and estate plan. Although risky, such authority may nevertheless be necessary to effectuate the principal's property management and estate planning objectives. Ideally, these are matters about which the principal will seek advise before granting authority to an agent.

The Act does not contain statutory construction language for any of the acts enumerated in subsection (a) other than the making of gifts (*see* Section 217). Because a gift of the principal's property reduces the principal's estate, the Act, like a number of state statutes, sets default per-donee limits on gift amounts. *See, e.g.,* N.Y. Gen. Oblig. Law § 5-1502M (McKinney 2001); 20 Pa. Cons. Stat. Ann. § 5603(a)(2)(ii) (West 2005). However, as with any authority incorporated by reference in a power of attorney, the principal may enlarge or restrict the default parameters set by the Act.

With respect to other acts listed in Section 201(a), the Act contemplates that the principal will specify any special instructions in the power of attorney to further define or limit the authority granted. For example, if a principal grants authority to

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create or change rights of survivorship (subsection (a)(3)) or beneficiary designations (subsection (a)(4)) the principal may choose to restrict that authority to specifically identified property interests, accounts, or contracts. Principals should carefully consider not only whether to authorize any of the acts listed in Section 201(a), but also whether to limit the scope of such actions.

Subsection (b) contains an additional safeguard for the principal. It establishes as a default rule that an agent who is not an ancestor, spouse, or descendant of the principal may not exercise authority to create in the agent or in an individual the agent is legally obligated to support, an interest in the principal's property. For example, a non-relative agent with gift making authority could not make a gift to the agent or a dependant of the agent without the principal's express authority in the power of attorney. In contrast, a spouse-agent with express gift-making authority could implement the principal's expectation that annual family gifts be continued without additional authority in the power of attorney.

Notwithstanding a grant of authority to perform any of the enumerated acts in subsection (a), an agent is bound by the mandatory fiduciary duties set forth in Section 114(a) as well as the default duties that the principal has not modified. For a list of these default rules, see Section 301 Comment. If the principal's expectations for the performance of authorized acts potentially conflict with those duties, then clarification of the principal's expectations, modification of the default duties, or both, may be advisable. *See* Section 114 Comment.

Authority for acts and subject matters other than those listed in Section 201(a) may be granted either through incorporation by reference (*see* Section 202) or, if the principal wishes to grant comprehensive general authority, by a grant of authority to do all the acts that a principal could do. A broad grant of general authority is interpreted under the Act as including all of the subject matters and authority described in Sections 204 through 216 (*see* subsection (c)).

#### **SECTION 202. INCORPORATION OF AUTHORITY.**

(a) An agent has authority described in this [article] if the power of attorney refers to general authority with respect to the descriptive term for the subjects stated in Sections 204 through 217 or cites the section in which the authority is described.

(b) A reference in a power of attorney to general authority with respect to the descriptive term for a subject in Sections 204 through 217 or a citation to a section of Sections 204 through 217 incorporates the entire section as if it were set out in full in the power of attorney.

(c) A principal may modify authority incorporated by reference.

#### **Comment**

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This section provides two methods for incorporating into a power of attorney the Act's statutory construction for authority over various subject matters. A reference in a power of attorney to the descriptive term for a subject in Sections 204 through 217, or to the section number, incorporates the entire statutory section as if it were set out in full in the power of attorney. Subsection (c) provides that a principal may modify any authority incorporated by reference. The optional statutory form power of attorney provided in Section 301 uses the descriptive terms in Sections 204 through 217 to incorporate statutory construction for authority granted on the form and provides a "Special Instructions" section where the principal may modify any authority incorporated by reference.

**SECTION 203. CONSTRUCTION OF AUTHORITY GENERALLY.**

Except as otherwise provided in the power of attorney, by executing a power of attorney that incorporates by reference a subject described in Sections 204 through 217 or that grants to an agent authority to do all acts that a principal could do pursuant to Section 201(c), a principal authorizes the agent, with respect to that subject, to:

(1) demand, receive, and obtain by litigation or otherwise, money or another thing of value to which the principal is, may become, or claims to be entitled, and conserve, invest, disburse, or use anything so received or obtained for the purposes intended;

(2) contract in any manner with any person, on terms agreeable to the agent, to accomplish a purpose of a transaction and perform, rescind, cancel, terminate, reform, restate, release, or modify the contract or another contract made by or on behalf of the principal;

(3) execute, acknowledge, seal, deliver, file, or record any instrument or communication the agent considers desirable to accomplish a purpose of a transaction, including creating at any time a schedule listing some or all of the principal's property and attaching it to the power of attorney;

(4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to a claim existing in favor of or against the principal or intervene in litigation relating to the claim;

(5) seek on the principal's behalf the assistance of a court or other governmental agency to carry out an act authorized in the power of attorney;

(6) engage, compensate, and discharge an attorney, accountant, discretionary investment manager, expert witness, or other advisor;

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(7) prepare, execute, and file a record, report, or other document to safeguard or promote the principal's interest under a statute or regulation;

(8) communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality, on behalf of the principal;

(9) access communications intended for, and communicate on behalf of the principal, whether by mail, electronic transmission, telephone, or other means; and

(10) do any lawful act with respect to the subject and all property related to the subject.

#### **Comment**

This section is based on Section 3 of the Uniform Statutory Form Power of Attorney Act. It describes incidental types of authority that accompany all authority granted to an agent under each of Sections 204 through 217, unless this incidental authority is modified in the power of attorney. The actions authorized in Section 203 are of the type often necessary for the exercise or implementation of authority over the subjects described in Sections 204 through 217. *See* Unif. Statutory Form Power of Atty. Act prefatory note (1988). Paragraph (10), which states that an agent is authorized to "do any lawful act with respect to the subject and all property related to the subject," emphasizes that a grant of general authority is intended to be comprehensive unless otherwise limited by the Act or the power of attorney. Paragraphs (8) and (9) were added to the section to clarify that this comprehensive authority includes authorization to communicate with government employees on behalf of the principal, to access communications intended for the principal, and to communicate on behalf of the principal using all modern means of communication.

**SECTION 204. REAL PROPERTY.** Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to real property authorizes the agent to:

(1) demand, buy, lease, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject an interest in real property or a right incident to real property;

(2) sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; retain title for security; encumber; partition; consent to partitioning; subject to an easement or covenant; subdivide; apply for zoning or other governmental permits; plat or consent to platting; develop; grant an option concerning; lease; sublease; contribute to an entity in exchange for

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an interest in that entity; or otherwise grant or dispose of an interest in real property or a right incident to real property;

(3) pledge or mortgage an interest in real property or right incident to real property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(4) release, assign, satisfy, or enforce by litigation or otherwise a mortgage, deed of trust, conditional sale contract, encumbrance, lien, or other claim to real property which exists or is asserted;

(5) manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the principal, including:

(A) insuring against liability or casualty or other loss;

(B) obtaining or regaining possession of or protecting the interest or right by litigation or otherwise;

(C) paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with them; and

(D) purchasing supplies, hiring assistance or labor, and making repairs or alterations to the real property;

(6) use, develop, alter, replace, remove, erect, or install structures or other improvements upon real property in or incident to which the principal has, or claims to have, an interest or right;

(7) participate in a reorganization with respect to real property or an entity that owns an interest in or right incident to real property and receive, and hold, and act with respect to stocks and bonds or other property received in a plan of reorganization, including:

(A) selling or otherwise disposing of them;

(B) exercising or selling an option, right of conversion, or similar right with respect to them; and

(C) exercising any voting rights in person or by proxy;

(8) change the form of title of an interest in or right incident to real property; and

(9) dedicate to public use, with or without consideration, easements or other real property in which the principal has, or claims to have, an interest.

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**SECTION 205. TANGIBLE PERSONAL PROPERTY.** Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to tangible personal property authorizes the agent to:

(1) demand, buy, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject ownership or possession of tangible personal property or an interest in tangible personal property;

(2) sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; create a security interest in; grant options concerning; lease; sublease; or, otherwise dispose of tangible personal property or an interest in tangible personal property;

(3) grant a security interest in tangible personal property or an interest in tangible personal property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(4) release, assign, satisfy, or enforce by litigation or otherwise, a security interest, lien, or other claim on behalf of the principal, with respect to tangible personal property or an interest in tangible personal property;

(5) manage or conserve tangible personal property or an interest in tangible personal property on behalf of the principal, including:

(A) insuring against liability or casualty or other loss;

(B) obtaining or regaining possession of or protecting the property or interest, by litigation or otherwise;

(C) paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments;

(D) moving the property from place to place;

(E) storing the property for hire or on a gratuitous bailment; and

(F) using and making repairs, alterations, or improvements to the property;

and

(6) change the form of title of an interest in tangible personal property.

**SECTION 206. STOCKS AND BONDS.** Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to stocks and bonds authorizes the agent to:

(1) buy, sell, and exchange stocks and bonds;

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(2) establish, continue, modify, or terminate an account with respect to stocks and bonds;

(3) pledge stocks and bonds as security to borrow, pay, renew, or extend the time of payment of a debt of the principal;

(4) receive certificates and other evidences of ownership with respect to stocks and bonds; and

(5) exercise voting rights with respect to stocks and bonds in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

**Comment**

The substance of this section remains unchanged from Section 6 the Uniform Statutory Form Power of Attorney Act; however, the wording is revised to reflect that “stocks and bonds” is now a defined term in the Act. *See* Section 102(14).

**SECTION 207. COMMODITIES AND OPTIONS.** Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to commodities and options authorizes the agent to:

(1) buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call or put options on stocks or stock indexes traded on a regulated option exchange; and

(2) establish, continue, modify, and terminate option accounts.

**SECTION 208. BANKS AND OTHER FINANCIAL INSTITUTIONS.** Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to banks and other financial institutions authorizes the agent to:

(1) continue, modify, and terminate an account or other banking arrangement made by or on behalf of the principal;

(2) establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, or other financial institution selected by the agent;

(3) contract for services available from a financial institution, including renting a safe deposit box or space in a vault;

(4) withdraw, by check, order, electronic funds transfer, or otherwise, money or property of the principal deposited with or left in the custody of a financial institution;

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(5) receive statements of account, vouchers, notices, and similar documents from a financial institution and act with respect to them;

(6) enter a safe deposit box or vault and withdraw or add to the contents;

(7) borrow money and pledge as security personal property of the principal necessary to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(8) make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or nonnegotiable paper of the principal or payable to the principal or the principal's order, transfer money, receive the cash or other proceeds of those transactions, and accept a draft drawn by a person upon the principal and pay it when due;

(9) receive for the principal and act upon a sight draft, warehouse receipt, or other document of title whether tangible or electronic, or other negotiable or nonnegotiable instrument;

(10) apply for, receive, and use letters of credit, credit and debit cards, electronic transaction authorizations, and traveler's checks from a financial institution and give an indemnity or other agreement in connection with letters of credit; and

(11) consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

**SECTION 209. OPERATION OF ENTITY OR BUSINESS.** Subject to the terms of a document or an agreement governing an entity or an entity ownership interest, and unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to operation of an entity or business authorizes the agent to:

(1) operate, buy, sell, enlarge, reduce, or terminate an ownership interest;

(2) perform a duty or discharge a liability and exercise in person or by proxy a right, power, privilege, or option that the principal has, may have, or claims to have;

(3) enforce the terms of an ownership agreement;

(4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party because of an ownership interest;

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(5) exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds;

(6) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party concerning stocks and bonds;

(7) with respect to an entity or business owned solely by the principal:

(A) continue, modify, renegotiate, extend, and terminate a contract made by or on behalf of the principal with respect to the entity or business before execution of the power of attorney;

(B) determine:

(i) the location of its operation;

(ii) the nature and extent of its business;

(iii) the methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation;

(iv) the amount and types of insurance carried; and

(v) the mode of engaging, compensating, and dealing with its employees and accountants, attorneys, or other advisors;

(C) change the name or form of organization under which the entity or business is operated and enter into an ownership agreement with other persons to take over all or part of the operation of the entity or business; and

(D) demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the entity or business and control and disburse the money in the operation of the entity or business;

(8) put additional capital into an entity or business in which the principal has an interest;

(9) join in a plan of reorganization, consolidation, conversion, domestication, or merger of the entity or business;

(10) sell or liquidate all or part of an entity or business;

(11) establish the value of an entity or business under a buy-out agreement to which the principal is a party;

(12) prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to an entity or business and make related payments; and

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(13) pay, compromise, or contest taxes, assessments, fines, or penalties and perform any other act to protect the principal from illegal or unnecessary taxation, assessments, fines, or penalties, with respect to an entity or business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

**Comment**

The substance of this section remains unchanged from Section 9 of the Uniform Statutory Form Power of Attorney Act; however, the wording is updated to encompass all modern business and entity forms, including limited liability companies, limited liability partnerships, and entities that may be organized other than for a business purpose.

**SECTION 210. INSURANCE AND ANNUITIES.** Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to insurance and annuities authorizes the agent to:

(1) continue, pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract procured by or on behalf of the principal which insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract;

(2) procure new, different, and additional contracts of insurance and annuities for the principal and the principal's spouse, children, and other dependents, and select the amount, type of insurance or annuity, and mode of payment;

(3) pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract of insurance or annuity procured by the agent;

(4) apply for and receive a loan secured by a contract of insurance or annuity;

(5) surrender and receive the cash surrender value on a contract of insurance or annuity;

(6) exercise an election;

(7) exercise investment powers available under a contract of insurance or annuity;

(8) change the manner of paying premiums on a contract of insurance or annuity;

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(9) change or convert the type of insurance or annuity with respect to which the principal has or claims to have authority described in this section;

(10) apply for and procure a benefit or assistance under a statute or regulation to guarantee or pay premiums of a contract of insurance on the life of the principal;

(11) collect, sell, assign, hypothecate, borrow against, or pledge the interest of the principal in a contract of insurance or annuity;

(12) select the form and timing of the payment of proceeds from a contract of insurance or annuity; and

(13) pay, from proceeds or otherwise, compromise or contest, and apply for refunds in connection with, a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

**Comment**

This section contains a significant change from Section 10 of the Uniform Statutory Form Power of Attorney Act. The default language in the Uniform Statutory Form Power of Attorney Act permitted an agent to designate the beneficiary of an insurance contract. *See* Unif. Statutory Form Power of Atty. Act § 10(4) (1988). However, under Section 210 of this Act, an agent does not have authority to “create or change a beneficiary designation” unless that authority is specifically granted to the agent pursuant to Section 201(a). The authority granted under Paragraph (2) of Section 210 is more limited, allowing an agent to only “procure new, different, and additional contracts of insurance and annuities for the principal and the principal’s spouse, children, and other dependents.” A principal who grants authority to an agent under Section 210 should therefore carefully consider whether a specific grant of authority to create or change beneficiary designations is also desirable.

**SECTION 211. ESTATES, TRUSTS, AND OTHER BENEFICIAL INTERESTS.**

(a) In this section, “estates, trusts, and other beneficial interests” means a trust, probate estate, guardianship, conservatorship, escrow, or custodianship or a fund from which the principal is, may become, or claims to be, entitled to a share or payment.

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to estates, trusts, and other beneficial interests authorizes the agent to:

(1) accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from the fund;

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(2) demand or obtain money or another thing of value to which the principal is, may become, or claims to be, entitled by reason of the fund, by litigation or otherwise;

(3) exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal;

(4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal;

(5) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to remove, substitute, or surcharge a fiduciary;

(6) conserve, invest, disburse, or use anything received for an authorized purpose; [and]

(7) transfer an interest of the principal in real property, stocks and bonds, accounts with financial institutions or securities intermediaries, insurance, annuities, and other property to the trustee of a revocable trust created by the principal as settlor [; and]

(8) reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from the fund].

**Legislative Note:** *The bracketed language in paragraph (8) of subsection (b), which grants an agent a power to “reject, renounce, disclaim [or] release,” should be omitted by an enacting jurisdiction if that jurisdiction elects to include bracketed paragraph (8) in Section 201(a), which authorizes an agent to disclaim property, including a power of appointment, only if specifically authorized in the power of attorney. If, however, other law of the enacting jurisdiction, such as the state’s disclaimer statute, authorizes an agent to disclaim an interest in, or power over, property even without specific authority and the jurisdiction does not wish to restrict that general authority, the jurisdiction should not adopt Section 201(a)(8), but should enact the bracketed language in Section 211(b)(8). See Unif. Disclaimer of Property Interests Acts § 5(b) (2006) (providing, “[e]xcept 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 part, any interest in or power over property, including a power of appointment . . .”).*

#### Comment

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**UNIFORM POWER OF ATTORNEY ACT**

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This section, which corresponds to Section 11 of the Uniform Statutory Form Power of Attorney Act, has been revised to clarify that an agent's authority includes authority to exercise, for the benefit of the principal, a presently exercisable general power of appointment held by the principal (subsection (b)(3)). "Presently exercisable general power of appointment" is defined for purposes of the Act in Section 102(8).

**SECTION 212. CLAIMS AND LITIGATION.** Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to claims and litigation authorizes the agent to:

(1) assert and maintain before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, offset, recoupment, or defense, including an action to recover property or other thing of value, recover damages sustained by the principal, eliminate or modify tax liability, or seek an injunction, specific performance, or other relief;

(2) bring an action to determine adverse claims or intervene or otherwise participate in litigation;

(3) seek an attachment, garnishment, order of arrest, or other preliminary, provisional, or intermediate relief and use an available procedure to effect or satisfy a judgment, order, or decree;

(4) make or accept a tender, offer of judgment, or admission of facts, submit a controversy on an agreed statement of facts, consent to examination, and bind the principal in litigation;

(5) submit to alternative dispute resolution, settle, and propose or accept a compromise;

(6) waive the issuance and service of process upon the principal, accept service of process, appear for the principal, designate persons upon which process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, receive, execute, and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation;

(7) act for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal or some other person, or with respect to a reorganization, receivership, or application for the appointment of a

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receiver or trustee which affects an interest of the principal in property or other thing of value;

(8) pay a judgment, award, or order against the principal or a settlement made in connection with a claim or litigation; and

(9) receive money or other thing of value paid in settlement of or as proceeds of a claim or litigation.

**SECTION 213. PERSONAL AND FAMILY MAINTENANCE.**

(a) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to personal and family maintenance authorizes the agent to:

(1) perform the acts necessary to maintain the customary standard of living of the principal, the principal's spouse, and the following individuals, whether living when the power of attorney is executed or later born:

(A) the principal's children;

(B) other individuals legally entitled to be supported by the principal; and

(C) the individuals whom the principal has customarily supported or indicated the intent to support;

(2) make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which the principal is a party;

(3) provide living quarters for the individuals described in paragraph (1) by:

(A) purchase, lease, or other contract; or

(B) paying the operating costs, including interest, amortization payments, repairs, improvements, and taxes, for premises owned by the principal or occupied by those individuals;

(4) provide normal domestic help, usual vacations and travel expenses, and funds for shelter, clothing, food, appropriate education, including postsecondary and vocational education, and other current living costs for the individuals described in paragraph (1);

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(5) pay expenses for necessary health care and custodial care on behalf of the individuals described in paragraph (1);

(6) act as the principal's personal representative pursuant to the Health Insurance Portability and Accountability Act, Sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, [as amended,] and applicable regulations, in making decisions related to the past, present, or future payment for the provision of health care consented to by the principal or anyone authorized under the law of this state to consent to health care on behalf of the principal;

(7) continue any provision made by the principal for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them, for the individuals described in paragraph (1);

(8) maintain credit and debit accounts for the convenience of the individuals described in paragraph (1) and open new accounts; and

(9) continue payments incidental to the membership or affiliation of the principal in a religious institution, club, society, order, or other organization or to continue contributions to those organizations.

(b) Authority with respect to personal and family maintenance is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to gifts under this [act].

**Comment**

This section, based on Section 13 of the Uniform Statutory Form Power of Attorney Act, contains three important changes. The first is clarification in subsection (a)(1) of who qualifies to benefit from payments for personal and family maintenance. Paragraph (1) states that the individuals who may benefit include not only the principal's children and other individuals legally entitled to be supported by the principal, but also "individuals whom the principal has customarily supported or indicated the intent to support," "whether living when the power of attorney is executed or later born." This definition is broad enough to include common recipients of family support such as parents and later-born grandchildren if such support is intended by the principal.

The second important addition to Section 213 is the inclusion of paragraph (6) in subsection (a) which qualifies the agent to act as the principal's "personal representative" for purposes of the Health Insurance Portability and Accountability Act (HIPAA) so that the agent can communicate with health care providers in order to pay medical bills. See 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that for purposes of disclosing an individual's protected health information, "a covered entity must . . . treat a personal representative as the individual"). Section 213 does not, however, empower the agent to make health-care decisions for the principal.

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*See* Section 103 and comment (discussing exclusion from this Act of powers to make health-care decisions).

The third important addition to this section is subsection (b) which provides that authority under Section 213 is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to making gifts. Although payments made for the benefit of persons under Section 213 may in fact be subject to gift tax treatment, subsection (b) clarifies that the authority for personal and family maintenance payments by an agent emanates from this section rather than Section 217. This is an important distinction because the Act requires a grant of specific authority under Section 201(a) to authorize gift making, and the default provisions of Section 217 limit the amounts of those gifts. The authority to make payments under Section 213 is not constrained by either of these provisions.

**SECTION 214. BENEFITS FROM GOVERNMENTAL PROGRAMS OR CIVIL OR MILITARY SERVICE.**

(a) In this section, “benefits from governmental programs or civil or military service” means any benefit, program or assistance provided under a statute or regulation including Social Security, Medicare, and Medicaid.

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to benefits from governmental programs or civil or military service authorizes the agent to:

(1) execute vouchers in the name of the principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state to the principal, including allowances and reimbursements for transportation of the individuals described in Section 213(a)(1), and for shipment of their household effects;

(2) take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose;

(3) enroll in, apply for, select, reject, change, amend, or discontinue, on the principal’s behalf, a benefit or program;

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(4) prepare, file, and maintain a claim of the principal for a benefit or assistance, financial or otherwise, to which the principal may be entitled under a statute or regulation;

(5) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation concerning any benefit or assistance the principal may be entitled to receive under a statute or regulation; and

(6) receive the financial proceeds of a claim described in paragraph (4) and conserve, invest, disburse, or use for a lawful purpose anything so received.

**SECTION 215. RETIREMENT PLANS.**

(a) In this section, “retirement plan” means a plan or account created by an employer, the principal, or another individual to provide retirement benefits or deferred compensation of which the principal is a participant, beneficiary, or owner, including a plan or account under the following sections of the Internal Revenue Code:

(1) an individual retirement account under Internal Revenue Code Section 408, 26 U.S.C. Section 408 [, as amended];

(2) a Roth individual retirement account under Internal Revenue Code Section 408A, 26 U.S.C. Section 408A [, as amended];

(3) a deemed individual retirement account under Internal Revenue Code Section 408(q), 26 U.S.C. Section 408(q) [, as amended];

(4) an annuity or mutual fund custodial account under Internal Revenue Code Section 403(b), 26 U.S.C. Section 403(b) [, as amended];

(5) a pension, profit-sharing, stock bonus, or other retirement plan qualified under Internal Revenue Code Section 401(a), 26 U.S.C. Section 401(a) [, as amended];

(6) a plan under Internal Revenue Code Section 457(b), 26 U.S.C. Section 457(b) [, as amended]; and

(7) a nonqualified deferred compensation plan under Internal Revenue Code Section 409A, 26 U.S.C. Section 409A [, as amended].

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to retirement plans authorizes the agent to:

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- (1) select the form and timing of payments under a retirement plan and withdraw benefits from a plan;
  - (2) make a rollover, including a direct trustee-to-trustee rollover, of benefits from one retirement plan to another;
  - (3) establish a retirement plan in the principal's name;
  - (4) make contributions to a retirement plan;
  - (5) exercise investment powers available under a retirement plan; and
  - (6) borrow from, sell assets to, or purchase assets from a retirement plan.

**Comment**

This section, based on Section 15 of the Uniform Statutory Form Power of Attorney Act, has been substantially updated to reflect changes in the laws governing retirement plans. A significant departure from the Uniform Statutory Form Power of Attorney Act is the deletion of default authority in the agent to waive the right of the principal to be a beneficiary of a joint or survivor annuity (*see* Unif. Statutory Form Power of Atty. Act § 15 (1988)). Under this Act, the authority to waive the principal's right to be a beneficiary of a joint and survivor annuity must be given by a specific grant pursuant to Section 201(a).

**SECTION 216. TAXES.** Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to taxes authorizes the agent to:

- (1) prepare, sign, and file federal, state, local, and foreign income, gift, payroll, property, Federal Insurance Contributions Act, and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents, including receipts, offers, waivers, consents, including consents and agreements under Internal Revenue Code Section 2032A, 26 U.S.C. Section 2032A, [as amended,] closing agreements, and any power of attorney required by the Internal Revenue Service or other taxing authority with respect to a tax year upon which the statute of limitations has not run and the following 25 tax years;
- (2) pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the Internal Revenue Service or other taxing authority;

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(3) exercise any election available to the principal under federal, state, local, or foreign tax law; and

(4) act for the principal in all tax matters for all periods before the Internal Revenue Service, or other taxing authority.

**SECTION 217. GIFTS.**

(a) In this section, a gift “for the benefit of” a person includes a gift to a trust, an account under the Uniform Transfers to Minors Act, and a tuition savings account or prepaid tuition plan as defined under Internal Revenue Code Section 529, 26 U.S.C. Section 529 [, as amended].

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to gifts authorizes the agent only to:

(1) make outright to, or for the benefit of, a person, a gift of any of the principal’s property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code Section 2503(b), 26 U.S.C. Section 2503(b), [as amended,] without regard to whether the federal gift tax exclusion applies to the gift, or if the principal’s spouse agrees to consent to a split gift pursuant to Internal Revenue Code Section 2513, 26 U.S.C. 2513, [as amended,] in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and

(2) consent, pursuant to Internal Revenue Code Section 2513, 26 U.S.C. Section 2513, [as amended,] to the splitting of a gift made by the principal’s spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.

(c) An agent may make a gift of the principal’s property only as the agent determines is consistent with the principal’s objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal’s best interest based on all relevant factors, including:

(1) the value and nature of the principal’s property;

(2) the principal’s foreseeable obligations and need for maintenance;

(3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;

(4) eligibility for a benefit, a program, or assistance under a statute or regulation; and

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- (5) the principal's personal history of making or joining in making gifts.

**Comment**

This section provides default limitations on an agent's authority to make a gift of the principal's property. Authority to make a gift must be made by a specific grant in a power of attorney (*see* Section 201(a)(2); *see also* Section 301). The mere granting to an agent of authority to make gifts does not, however, grant an agent unlimited authority. The agent's authority is subject to this section unless enlarged or further limited by an express modification in the power of attorney. Without modification, the authority of an agent under this section is limited to gifts in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion, or twice that amount if the principal and the principal's spouse consent to make a split gift.

Subsection (a) of this section clarifies the fact that a gift includes not only outright gifts, but also gifts for the benefit of a person. Subsection (a) provides examples of gifts made for the benefit of a person, but these examples are not intended to be exclusive.

Subsection (c) emphasizes that exercise of authority to make a gift, as with exercise of all authority under a power of attorney, must be consistent with the principal's objectives. If these objectives are not known, then gifts must be consistent with the principal's best interest based on all relevant factors. Subsection (c) provides examples of factors relevant to the principal's best interest, but these examples are illustrative rather than exclusive.

To the extent that a principal's objectives with respect to the making of gifts may potentially conflict with an agent's default duties under the Act, the principal should carefully consider stating those objectives in the power of attorney, or altering the default rules to accommodate the objectives, or both. *See* Section 114 Comment.

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**[ARTICLE] 3****STATUTORY FORMS**

***Legislative Note:** An enacting jurisdiction should review its respective statutory requirements for acknowledgments and for the recording of documents and amend, where necessary for conformity with those requirements, the statutory forms provided in Sections 301 and 302.*

**General Comment**

Article 3 provides a concise, optional statutory form for creating a power of attorney under this Act (Section 301). With the proliferation of power of attorney forms in the public domain, the advantage of a statutorily-sanctioned form is the promotion of uniformity in power of attorney practice. In states such as Illinois and New York, where state-sanctioned statutory forms have existed for many years, the statutory form is widely used by both lawyers and lay persons. The familiarity and common understanding achieved with the use of one statutory form also facilitates acceptance of powers of attorney. In the twenty years preceding this Act, the number of states with statutory forms has increased from only a few to eighteen.

In addition to the statutory form power of attorney, Article 3 provides an optional form for agent certification of facts pertaining to a power of attorney (Section 302). Pursuant to Section 119, a person may request an agent to certify any factual matter concerning the principal, agent, or power of attorney. The form in Section 302 is intended to facilitate agent compliance with these requests. The form lists factual matters about which persons commonly request certification (*e.g.*, the principal is alive and has not revoked the power of attorney or the agent's authority), and provides a designated space for certification of additional factual statements. Both the statutory form power of attorney and the agent certification form may be tailored to accommodate individual circumstances and objectives.

**SECTION 301. STATUTORY FORM POWER OF ATTORNEY.** A document substantially in the following form may be used to create a statutory form power of attorney that has the meaning and effect prescribed by this [act].

**[INSERT NAME OF JURISDICTION]**

**STATUTORY FORM POWER OF ATTORNEY****IMPORTANT INFORMATION**

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the Uniform Power of Attorney Act [insert citation].

This power of attorney does not authorize the agent to make health-care decisions for you.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you.

Your agent is entitled to reasonable compensation unless you state otherwise in the Special Instructions.

This form provides for designation of one agent. If you wish to name more than one agent you may name a coagent in the Special Instructions. Coagents are not required to act together unless you include that requirement in the Special Instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney becomes effective immediately unless you state otherwise in the Special Instructions.

**If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.**

#### DESIGNATION OF AGENT

I \_\_\_\_\_ name the following  
(Name of Principal)  
person as my agent:

Name of Agent: \_\_\_\_\_  
Agent's Address: \_\_\_\_\_  
Agent's Telephone Number: \_\_\_\_\_

#### DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of Successor Agent: \_\_\_\_\_  
Successor Agent's Address: \_\_\_\_\_  
Successor Agent's Telephone Number: \_\_\_\_\_

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If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

Name of Second Successor Agent: \_\_\_\_\_  
 Second Successor Agent's Address: \_\_\_\_\_  
 Second Successor Agent's Telephone Number: \_\_\_\_\_

**GRANT OF GENERAL AUTHORITY**

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the Uniform Power of Attorney Act [insert citation]:

(INITIAL each subject you want to include in the agent's general authority. If you wish to grant general authority over all of the subjects you may initial "All Preceding Subjects" instead of initialing each subject.)

- 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 or Civil or Military Service
- Retirement Plans
- Taxes
  
- All Preceding Subjects

**GRANT OF SPECIFIC AUTHORITY (OPTIONAL)**

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent.)

- Create, amend, revoke, or terminate an inter vivos trust
  
- Make a gift, subject to the limitations of the Uniform Power of Attorney Act [insert citation to Section 217 of the act] and any special instructions in this power of attorney
- Create or change rights of survivorship
- Create or change a beneficiary designation
- Authorize another person to exercise the authority granted under this power of attorney

- Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
- Exercise fiduciary powers that the principal has authority to delegate
- Disclaim or refuse an interest in property, including a power of appointment]

**LIMITATION ON AGENT'S AUTHORITY**

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions.

**SPECIAL INSTRUCTIONS (OPTIONAL)**

You may give special instructions on the following lines:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**EFFECTIVE DATE**

This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions.

**NOMINATION OF [CONSERVATOR OR GUARDIAN] (OPTIONAL)**

If it becomes necessary for a court to appoint a [conservator or guardian] of my estate or [guardian] of my person, I nominate the following person(s) for appointment:

Name of Nominee for [conservator or guardian] of my estate:

\_\_\_\_\_  
Nominee's Address:

\_\_\_\_\_  
Nominee's Telephone Number:

\_\_\_\_\_  
Name of Nominee for [guardian] of my person:

\_\_\_\_\_  
Nominee's Address:

\_\_\_\_\_  
Nominee's Telephone Number:

**RELIANCE ON THIS POWER OF ATTORNEY**

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Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.

**SIGNATURE AND ACKNOWLEDGMENT**

\_\_\_\_\_  
Your Signature \_\_\_\_\_  
Date

\_\_\_\_\_  
Your Name Printed

\_\_\_\_\_  
Your Address

\_\_\_\_\_  
Your Telephone Number

State of \_\_\_\_\_

[County] of \_\_\_\_\_

This document was acknowledged before me on \_\_\_\_\_,  
(Date)

by \_\_\_\_\_.  
(Name of Principal)

\_\_\_\_\_  
Signature of Notary (Seal, if any)  
My commission expires: \_\_\_\_\_

[This document prepared by:

\_\_\_\_\_ ]

**IMPORTANT INFORMATION FOR AGENT**

**Agent's Duties**

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

- (1) do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;
- (2) act in good faith;
- (3) do nothing beyond the authority granted in this power of attorney; and
- (4) disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

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(Principal's Name) by (Your Signature) as Agent

Unless the Special Instructions in this power of attorney state otherwise, you must also:

- (1) act loyally for the principal's benefit;
- (2) avoid conflicts that would impair your ability to act in the principal's best interest;
- (3) act with care, competence, and diligence;
- (4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
- (5) cooperate with any person that has authority to make health-care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest; and
- (6) attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest.

#### **Termination of Agent's Authority**

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

- (1) death of the principal;
- (2) the principal's revocation of the power of attorney or your authority;
- (3) the occurrence of a termination event stated in the power of attorney;
- (4) the purpose of the power of attorney is fully accomplished; or
- (5) if you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the Special Instructions in this power of attorney state that such an action will not terminate your authority.

#### **Liability of Agent**

The meaning of the authority granted to you is defined in the Uniform Power of Attorney Act [insert citation]. If you violate the Uniform Power of Attorney Act [insert citation] or act outside the authority granted, you may be liable for any damages caused by your violation.

**If there is anything about this document or your duties that you do not understand, you should seek legal advice.**

***Legislative Note:** The brackets which precede the words "Statutory Form Power of Attorney" indicate where the enacting jurisdiction should insert the name of the jurisdiction. An indication of the jurisdiction in a power of attorney is important to*

## UNIFORM POWER OF ATTORNEY ACT

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*establish what law supplies the default rules and statutory definitions for interpretation of the power of attorney (see Section 107 and Comment). Likewise, the brackets in the first paragraph of the “Important Information” section of the form indicate where the enacting jurisdiction should insert the citation for its codification of the Uniform Power of Attorney Act.*

*In the “Grant of Specific Authority” section of the form, the phrase “Disclaim or refuse an interest in property, including a power of appointment” is in brackets and should be deleted if under the law of the enacting jurisdiction a fiduciary has authority to disclaim an interest in, or power over, property and the jurisdiction does not wish to restrict that authority by the Uniform Power of Attorney Act. See Unif. Disclaimer of Property Interests Acts § 5(b) (2006) (providing, “[e]xcept 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 part, any interest in or power over property, including a power of appointment . . .”). See also Section 201 Legislative Note.*

*The brackets in the “Nomination of Conservator or Guardian” section of the form indicate areas where an enacting jurisdiction should review its respective guardianship, conservatorship, or other protective proceedings statutes and amend, if necessary for consistency, the terminology and substance of the bracketed language.*

*The bracketed language “This document prepared by:” at the conclusion of the “Signature and Acknowledgment” section of the form may be omitted or amended as necessary to conform to the jurisdiction’s statutory requirements for acknowledgments or the recording of documents.*

### Comment

This section provides an optional form for creating a power of attorney. Any power of attorney that substantially complies with the form in Section 301 constitutes a statutory form power of attorney with the meaning and effect prescribed by the Act.

The form begins with an “Important Information” section that contains instructions for the principal and concludes with an “Important Information for Agent” section that contains general information for the agent about agent duties, events that terminate an agent’s authority, and agent liability. The form is constructed to guide the principal through designation of an agent, optional designation of one or more successor agents, and selection of subject areas and acts with respect to which the principal wishes to grant the agent authority. The form also contains an option for nomination of a conservator or guardian in the event later court-appointment of a fiduciary becomes necessary (*see* Section 108 and Comment).

The grant of authority provisions in the form are divided into two sections: “Grant of General Authority,” which corresponds to the subject areas defined in Sections 204 through 216 of the Act, and “Grant of Specific Authority,” which corresponds to the actions for which Section 201(a) requires an express grant of authority in a power of attorney. Article 2 of the Act provides statutory construction

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with respect to all of the subject matters in the Grant of General Authority section and for the authority to make a gift listed in the Grant of Specific Authority section. The principal may modify any authority granted in the form by using the “Special Instructions” section of the form. For example, the scope of authority to make a gift is defined by the default provisions of Section 217 unless the principal expands or narrows that authority in the Special Instructions.

Cautionary language in the Grant of Specific Authority section alerts the principal to the increased risks associated with a grant of authority that could significantly reduce the principal’s property or alter the principal’s estate plan. The form is constructed to require that the principal initial each action over which the principal grants specific authority. The separate authorization of acts covered by Section 201(a) is intended to emphasize to the principal the significance of granting such specific authority and to minimize the risk that those actions might be authorized inadvertently.

Many principals may wish to grant an agent comprehensive authority over their day-to-day affairs. If this is the case, the principal may grant authority over all of the subject areas in the Grant of General Authority section by initialing “All Preceding Subjects.” Otherwise, the principal may authorize fewer than all of the subjects listed in the Grant of General Authority section by initialing only those particular subjects.

The statutory form is drafted to follow the Act’s default provisions, but it does not preclude alteration of the default rules or the exercise of other options available under the Act. For example, if not altered by the Special Instructions, the default rules embodied in a statutory form power of attorney include:

- (1) the power of attorney is durable (Section 104);
- (2) the power of attorney is effective when executed (Section 109);
- (3) a spouse-agent’s authority terminates upon the filing of an action for dissolution, annulment, or legal separation (Section 110(b)(3));
- (4) lapse of time does not affect an agent’s authority (Section 110(c));
- (5) a successor agent has the same authority as the original agent (Section 111(b));
- (6) a successor agent may not act until all predecessors have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve (Section 111(b));
- (7) an agent is entitled to reimbursement of expenses reasonably incurred (Section 112);
- (8) an agent is entitled to reasonable compensation (Section 112);
- (9) the agent accepts appointment by exercising authority or performing duties, or by any assertion or conduct indicating acceptance (Section 113);

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- (10) an agent has a duty to act loyally for the principal’s benefit; to act so as not to create a conflict of interest that impairs the ability to act impartially in the principal’s best interest; to act with care, competence, and diligence; to keep a record of receipts, disbursements, and transactions; to cooperate with the principal’s health-care agent; to attempt to preserve the principal’s estate plan to the extent the plan is known to the agent and if preservation is consistent with the principal’s best interest; and to account if ordered by a court or requested by the principal, a fiduciary acting for the principal, a governmental agency with authority to protect the principal, or the personal representative or successor in interest of the principal’s estate (Section 114);
- (11) an agent must give notice of resignation as specified in Section 118; and
- (12) an agent that is not the principal’s ancestor, spouse, or descendant may not exercise authority to create in the agent, or an individual to whom the agent owes support, an interest in the principal’s property (Section 201(b)).

Although the statutory form does not include express prompts for deviating from the foregoing default rules, any statutorily-sanctioned deviation from the statutory form may be indicated in, or on an addendum to, the Special Instructions.

**SECTION 302. AGENT’S CERTIFICATION.** The following optional form may be used by an agent to certify facts concerning a power of attorney.

**AGENT’S CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT’S AUTHORITY**

State of \_\_\_\_\_  
[County] of \_\_\_\_\_]

I, \_\_\_\_\_ (Name of Agent), [certify] under penalty of perjury that \_\_\_\_\_ (Name of Principal) granted me authority as an agent or successor agent in a power of attorney dated \_\_\_\_\_.

I further [certify] that to my knowledge:

(1) the Principal is alive and has not revoked the Power of Attorney or my authority to act under the Power of Attorney and the Power of Attorney and my authority to act under the Power of Attorney have not terminated;

(2) if the Power of Attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;

(3) if I was named as a successor agent, the prior agent is no longer able or willing to serve; and

(4) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Insert other relevant statements)

**SIGNATURE AND ACKNOWLEDGMENT**

\_\_\_\_\_  
Agent's Signature \_\_\_\_\_  
Date

\_\_\_\_\_  
Agent's Name Printed

\_\_\_\_\_  
Agent's Address

\_\_\_\_\_  
Agent's Telephone Number

This document was acknowledged before me on \_\_\_\_\_,  
(Date)

by \_\_\_\_\_.  
(Name of Agent)

\_\_\_\_\_  
Signature of Notary (Seal, if any)  
My commission expires: \_\_\_\_\_

[This document prepared by:  
\_\_\_\_\_]

***Legislative Note:** The phrase "certify" is bracketed in this section to indicate where an enacting jurisdiction should review its respective statutory requirements for acknowledgments and the recording of documents and amend, if necessary for consistency, the terminology and substance of the bracketed language. Likewise, the bracketed language "This document prepared by:" at the conclusion of the Agent's certification form may be omitted or amended as necessary to conform with the jurisdiction's statutory requirements for acknowledgments or the recording of documents.*

**Comment**

This section provides an optional form that may be used by an agent to certify facts concerning a power of attorney. Although the form contains statements of fact about which persons commonly request certification, other factual statements may be added to the form for the purpose of providing an agent certification pursuant to Section 119.

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**[ARTICLE] 4****MISCELLANEOUS PROVISIONS**

**SECTION 401. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** 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.

**SECTION 402. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

**SECTION 403. EFFECT ON EXISTING POWERS OF ATTORNEY.** Except as otherwise provided in this [act], on [the effective date of this [act]]:

(1) this [act] applies to a power of attorney created before, on, or after [the effective date of this [act]];

(2) this [act] applies to a judicial proceeding concerning a power of attorney commenced on or after [the effective date of this [act]];

(3) this [act] applies to a judicial proceeding concerning a power of attorney commenced before [the effective date of this [act]] unless the court finds that application of a provision of this [act] would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case that provision does not apply and the superseded law applies; and

(4) an act done before [the effective date of this [act]] is not affected by this [act].

**SECTION 404. REPEAL.** The following are repealed:

(1) [Uniform Durable Power of Attorney Act]

(2) [Uniform Statutory Form Power of Attorney Act]

(3) [Article 5, Part 5 of the Uniform Probate Code]

**SECTION 405. EFFECTIVE DATE.** This [act] takes effect \_\_\_\_\_.