



SPECIAL REPORT

The Virginia Uniform Power of Attorney Act

by

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SCOPE NOTE

The laws related to Durable Powers of Attorney (“DPA”) have largely evolved from the common law of agency and are steadily moving toward a statutory framework. The statutory law is moving from relatively short statutes amending the common law of agency to a comprehensive statutory framework supplemented by the common law.¹ The driving force behind this trend is the desire for increased acceptance and use of DPAs. However, DPAs are still relatively new legal tools. Case law and statutory laws regarding their interpretation and construction continue to develop and vary from state to state. The Uniform Power of Attorney Act (“UPOAA”) was promulgated in 2006 by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in an attempt to bring uniformity to this area of the law which is rapidly emerging as a significant, if not vital, estate planning tool. A UPOAA bill was introduced into the Virginia General Assembly in January 2009 and was enacted with a re-enactment provision that requires the UPOAA to be re-enacted in the 2010 session in order to become effective. The UPOAA was reintroduced during the 2010 Session of the General Assembly in both the House of Delegates (House Bill 719; “HB 719”) and the Senate (Senate Bill 159; “SB 159” and Senate Bill 204; “SB 204”). As of the date of this outline, HB 719 has passed in both the House of Delegates and the Senate has been signed by the Speaker of the House and the President of the Senate. The Governor is expected to sign the bill within the next few weeks.

This outline is based upon the article, “The Virginia Uniform Power of Attorney Act,” published in the University of Richmond Law Review, 44 U. Rich. L. Rev. (2009).

¹ Andrew H. Hook and Thomas D. Begley Jr., *The New Uniform Power of Attorney Act: From Infancy to Adolescence*, Estate Planning Journal, Vol. 34 No. 10 (Oct. 2007).

II. INTRODUCTION

People are living longer. Due to medical advances, the fastest growing segment of the U.S. population is individuals over the age of 65. However, with increased age comes the increased likelihood that an individual will suffer some sort of disability or incapacity during which they will require assistance with the management of their affairs. Almost everyone will eventually face a situation where they will have to assist an aging parent with the management of his or her affairs. Most attorneys advise their clients of the importance of planning for the management of their own affairs if they become disabled or incapacitated. A durable power of attorney (“DPA”) is an essential disability and incapacity planning tool which allows a principal to appoint an agent to manage the principal’s property, finances, and personal affairs. DPAs are considered an inexpensive and easy-to-create alternative to guardianship or conservatorship. DPAs have become a standard tool in estate planning and elder law.

There is no single appropriate DPA form. DPAs are extremely complex, powerful, and flexible legal instruments that create significant legal authority, duties, and obligations.² While forms may make creating a DPA easier, a single form often does not take into account that substantial differences exist among individual clients.³ Therefore, attorneys should spend time educating themselves, as well as their clients, about the various drafting options available in order to customize the DPA to meet specific client needs.⁴ This is especially important in today’s society with ever-changing family dynamics.⁵

² Andrew H. Hook, 859-2nd T.M., *Durable Powers of Attorney* (2008).

³ Andrew H. Hook and Thomas D. Begley Jr., *The New Uniform Power of Attorney Act: From Infancy to Adolescence*, *Estate Planning Journal*, Vol. 34 No. 10 (Oct. 2007).

⁴ *Id.*

⁵ *Id.*

A. Early History. Under the common law, a power of attorney became ineffective upon the principal's incapacity. Therefore, it was not a useful tool to manage the affairs of an incapacitated principal since the principal's loss of capacity terminated the agent's actual authority.⁶ In 1954 states began to change this common law rule by statute. Virginia became the first state to provide for the continuation of the agency relationship if the instrument expressly stated that it survived the principal's incapacity.⁷ With the promulgation of the Uniform Probate Code ("UPC") in 1969 and later the Uniform Durable Power of Attorney Act ("UDPAA") in 1979, the adoption of DPA statutes became widespread.

B. Recent Developments. There has been an explosion in the use of DPAs and resulting litigation. States have responded by revising their state DPA statutes to address perceived problem areas. In 2005, the American Law Institute adopted and promulgated the Restatement (Third) of Agency which recognizes DPAs.⁸ Today, all 50 states and the District of Columbia have enacted DPA statutes. However, most of these statutes are brief and rely heavily on the common law of agency for the construction and interpretation of DPAs.

In 2002, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") conducted a national study comparing state DPA statutes.⁹ The study revealed that despite initial uniformity among state DPA statutes, there was a growing divergence.¹⁰ Specifically, the study found that a majority of states had begun to enact non-uniform provisions to deal with specific matters upon which the UDPAA was silent.¹¹ These matters included execution requirements,

⁶ Restatement (Third) of Agency § 3.08 (2005).

⁷ Va. Code § 11-9.1 (1954).

⁸ Restatement (Third) of Agency §3.08 (2); §3.08 (comment b, c) (2005).

⁹ Linda Whitton, *National Durable Power of Attorney Survey Results and Analysis*, National Conference of Commissioners on Uniform State Laws (2002), available at <www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm>

¹⁰ UPOAA Prefatory Note (2006).

¹¹ *Id.*

successor agents, portability provisions, and sanctions for third-party refusal to accept DPAs.¹² Responses to the NCCUSL survey demonstrated a high degree of consensus about many needs that should be addressed by DPAs such as: (1) improving portability, (2) including safeguards, remedies, and sanctions for abuse by an agent, (3) protecting the reliance of other persons on a power of attorney, and (4) including remedies and sanctions for third-party refusal to honor a DPA.¹³

As a result of the survey, NCCUSL adopted and promulgated the Uniform Power of Attorney Act (“UPOAA”) in 2006. The UPOAA codifies both state legislative trends and collective best practices, and strikes a balance between (1) the need for flexibility and acceptance of an agent’s authority by third parties and (2) the need to prevent and redress financial abuse.¹⁴ The UPOAA is basically a set of default rules that preserve a principal’s freedom to choose both the extent of an agent’s authority and the rules that govern the agent’s conduct.¹⁵ Where the UPOAA is silent the common law rules of agency apply.¹⁶ The UPOAA is similar to the Uniform Trust Code (“UTC”) in that it is a comprehensive statute providing a few mandatory rules and many default rules which can be altered by the draftsman. One significant feature of the UPOAA is the inclusion of an optional statutory form DPA, an attempt to add simplicity to the process for creating a DPA.¹⁷

As of 2010, Idaho, New Mexico, Colorado, Maine, Nevada, and the U.S. Virgin Islands have adopted the UPOAA. However, Maryland and Minnesota, along with Virginia, have all introduced bills into their state legislatures in 2010. Additionally, bar associations in Alabama, Ohio, and

¹² Linda Whitton, *National Durable Power of Attorney Survey*, *supra*.

¹³ UPOAA Prefatory Note (2006).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ UPOAA § 121 (comment).

¹⁷ UPOAA § 301.

Massachusetts are currently studying the UPOAA. The AARP and the Financial Planners Association support the enactment of the UPOAA.

C. History of UPOAA in Virginia. Shortly after the UPOAA was developed, the Virginia Bar Association (VBA) Trust and Estate Section formed a sub-committee to study the UPOAA and assess the impact its enactment would have on current Virginia law. The sub-committee met regularly to discuss the UPOAA and made revisions to the Act where it felt that Virginia law was superior. Additionally, the sub-committee consulted with various organizations such as the Virginia Bankers Association and the AARP to solicit feedback on the UPOAA. The modified UPOAA was introduced into the House of Delegates ("HB 950") in the 2008 session to give notice of the VBA's intention to seek enactment. This bill was not pursued and was left in the House Commerce and Labor Committee. In the fall of 2008, the sub-committee again recommended the modified version of the UPOAA to the Virginia General Assembly for enactment. The act was introduced in early 2009 into the Senate as Senate Bill 855 ("SB 855"). The Virginia Bankers Association and the AARP joined the VBA in recommending enactment of the UPOAA. The General Assembly enacted the bill with amendments made by the House of Delegates and with a re-enactment provision which provides: "The provisions of this Act shall not become effective unless reenacted by the 2010 Session of the General Assembly."

The UPOAA was reintroduced during the 2010 Session of the General Assembly in both the House of Delegates (House Bill 719; "HB 719") and the Senate (Senate Bill 159; "SB 159" and Senate Bill 204; "SB 204"). As of the date of this outline, HB 719 has passed in both the House of Delegates and the Senate, has received signatures from the Speaker of the House and the President of the Senate, and is awaiting approval from the Governor.

III. OVERVIEW OF VIRGINIA UPOAA

- A. Article 1: General Provisions
- B. § 26-71.01 (UPOAA § 101). Short Title.

1. The title “Uniform Power of Attorney Act” (UPOAA) does not contain the word “durable” in the title.¹⁸

q The UPOAA governs both durable and nondurable powers of attorney.

2. § 26-71.02 (UPOAA § 102). Definitions.

a In the UPOAA, the term “Agent” replaces “Attorney-in-Fact.” This was done to address confusion in the lay public about the difference between an attorney-in-fact and an attorney at law.¹⁹ Va. Code § 11-9.1 *et seq.* uses both terms.

¹⁸ See Va. Code § 26-71.04 (UPOAA § 104).

¹⁹ Linda S. Whitton, *Navigating the Uniform Power of Attorney Act*, NAELA Journal, Vol. III, No. 1 (National Academy of Elder Law Attorneys 2007)

b The term “Incapacity” is used in the UPOAA instead of “Disability.” A disability does not necessarily render an individual incapable of managing his or her property or business affairs.²⁰

c Virginia eliminated individuals “who are detained, including incarcerated in the penal system,” from the list of those persons deemed to have an “incapacity.” This change complies with existing Va. Code § 53.1-221 (D), which provides that, unless a committee has been appointed, an individual who has been convicted of a felony and sentenced to confinement in a state correctional facility continues to have the same capacity, rights, powers, and authority over his property and affairs that he had prior to the conviction and sentencing.

d In addition, the UPOAA defines the following terms: 1) Durable, 2) Electronic, 3) Good Faith, 4) Person, 5) Power of Attorney, 6) Presently exercisable general power of appointment, 7) Principal, 8) Property, 9) Record, 10) Sign, 11) State, and 12) Stocks and bonds.

²⁰Maine further defined “incapacity” in their UPOAA stating that incapacity means the inability of an individual to effectively manage property or business affairs because the individual “is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause to the extent that the individual lacks sufficient understanding, capacity or ability to receive and evaluate information or make or communicate decisions regarding the individual’s property or business affairs.” *See* Maine UPOAA §5-902. Colorado added language to its UPOAA which states “It shall not be inferred from the portion of the definition of ‘incapacity’ in section 15-14-702 (5)(b) that an individual who is either incarcerated in a penal system or otherwise detained or outside of the United States and unable to return lacks the capacity to execute a power of attorney as a consequence of such detention or inability to return. *See* Colorado UPOAA §15-14-706 (2.5).

e *Practice Tip.* The UPOAA does not require that a power of attorney be in paper form. The UPOAA defines a “Power of Attorney” as a writing or other record that grants an agent authority to act for the principal. The term “Record” is defined as information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.²¹ Therefore, a power of attorney may be in electronic form.

3. § 26-71.03 (UPOAA § 103). Applicability.

a The UPOAA does not apply to powers coupled with an interest in the subject of the power, medical powers of attorney, proxy or voting rights for an entity, or powers created on a government form for a government purpose.

b The UPOAA should not apply to a designation of a person to make arrangements for disposition of remains.²² The authors recommend that § 26-71.03 be amended to expressly provide that the UPOAA does not apply to these designations.

4. § 26-71.04 (UPOAA § 104). Power of Attorney is Durable.

²¹ See Virginia Code Sections §§ 26.1-1.02 (7) and (10).

²² See Virginia Code § 54.1-2825.

a Under the UPOAA, a power of attorney is durable unless it expressly states otherwise. This is a major change from the common law where a power of attorney had to contain the following provision or words of similar intent: "This power of attorney (or his authority) shall not terminate on disability of the principal."²³

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

5. § 26-71.05 (UPOAA § 105). Execution of Power of Attorney.

a A power of attorney must be signed by the principal or in the principal's conscious presence by another individual at the principal's direction.²⁴

²³ See Virginia. Code § 11-9.1(A).

²⁴ Maine's UPOAA requires the inclusion of certain notices, substantially in the form provided by the statute, for a power of attorney to be valid. See Maine UPOAA §5-905. The Nevada UPOAA imposes the additional requirement that if the principal resides in a hospital, assisted living facility, or skilled nursing facility at the time the power of attorney is executed, then a certification of the principal's competency from a physician, psychologist, or psychiatrist must be attached to the power of attorney. See Nevada UPOAA§20.

b A signature is presumed to be genuine if acknowledged before a notary public.²⁵ Although acknowledgment of the principal's signature is not mandatory under the UPOAA, only an acknowledged signature carries the statutory presumption of validity.²⁶

c Virginia added the language "A power of attorney in order to be recordable shall satisfy the requirements of Section 55-106." Virginia Code Section 55-106 generally provides that you can record a document only if it has been (1) acknowledged and notarized or (2) proved by the signer or two witnesses in front of the court or the clerk. This addition makes it clear that only certain powers of attorney can be recorded, but that you can record a power of attorney that is not notarized.

d *Practice Tip:* To help insure that a durable power of attorney will be recognized in a state that has not enacted the UPOAA, the principal's signature should be witnessed by two unrelated, disinterested witnesses. Some states require that powers of attorney be witnessed or executed in the same manner as a will or a deed.²⁷ Witnesses can also testify to the capacity of the principal at the time the power of attorney is executed if the power of attorney is ever challenged based on the principal's lack of capacity.

²⁵ See Va. Code § 26-71.19 (UPOAA § 119) and Va. Code § 26-71.20 (UPOAA § 120), which do not apply to unacknowledged powers of attorney.

²⁶ Linda S. Whitton, *Navigating the Uniform Power of Attorney Act*, *supra*.

²⁷ See Arizona Rev. Stat. § 14-5501, Fla. Stat. § 709.08, S.C. Code Ann. § 62-5-501(C), Okla Stat. § 1072.2

e *Practice Tip:* Any power of attorney that may have to be recorded in the office of a clerk of court should be 1) acknowledged, 2) each individual's surname only, where it first appears, is underscored or capitalized, 3) each page numbered, 4) names of all grantors and grantees listed, and 5) the first page showing the name of the draftsman.²⁸ It should also comply with the requirements of the State Library Board for the creation, storage, and filing of public records.²⁹ These requirements provide that the power of attorney must be on white paper, no less than 8 ½ by 11 nor larger than 8 ½ by 14, with a paper weight of at least 20 pounds. The writing must be black and signatures in black or dark blue ink. The printing must be at least nine points and the margins one inch on the left, top and bottom margin and one-half inch on the right margin.

6. § 26-71.06 (UPOAA § 106). Validity of Power of Attorney.

a This section recognizes the validity of powers of attorney created under other law and encourages their portability. The UPOAA does not affect the validity of pre-existing powers of attorney executed under prior law, powers of attorney validly created under the law of another jurisdiction, or military powers of attorney. Virginia added the statement that powers of attorney created according to "the laws of this state" are valid if the power of attorney was executed outside of Virginia.

²⁸ See Va. Code § 17.1-227 for the rules relating to the recordation of documents and Va. Code § 55-107 which provides that a power of attorney may be admitted to record in any county or city. The author is not aware of any problems recording DPAs. However, the author recommends compliance with recordation rules to avoid potential problems which may arise.

²⁹ Va. Code § 17.1-239 and Va. Administrative Code 17 VAC15-70

b Except as otherwise provided by statute other than the UPOAA,³⁰ photocopies and electronically transmitted copies have the same force and effect as the original.³¹ Practice Tip: This provision will make it more difficult to effectively revoke the authority granted an agent under a power of attorney if photo or electronic copies have been made. Although the principal may have revoked the agent's actual authority, copies of the power of attorney will give rise to apparent authority.

³⁰ An example of another law that will require presentation of the original power of attorney is the Virginia recordation statute.

³¹ While retaining the statutory provision providing that a copy of the power of attorney has the same effect as the original, the Nevada UPOAA also requires that, upon demand by a third party, the agent must provide an affidavit stating that the copy is a true and accurate copy of the original. The requested affidavit must also assert that, to the best of the agent's knowledge, the principal is still alive and that the agent's relevant powers have not been altered or terminated. *See* Nevada UPOAA §21.

c The UPOAA is silent on the issue of whether a power of attorney must be delivered to the agent in order for it to be valid. Linda S. Whitton, Reporter for the Drafting Committee of the UPOAA, advised the authors that the omission of a delivery requirement from the UPOAA means that delivery by the principal to the agent is not necessary for the validity of a power of attorney. However, where the UPOAA is silent, the common law applies. The case law from various common law jurisdictions varies as to whether delivery of the power of attorney to the agent is required for validity.³² Virginia common law is silent but current Virginia statutory law addresses this concern by a statute that eliminates the delivery requirement.³³ If the UPOAA is adopted, current Va. Code §11-9.7 will be repealed. To specifically address this issue and to avoid confusion, the authors feel that the Virginia UPOAA should be amended to retain this Virginia statute.

7. § 26-71.07 (UPOAA § 107). Meaning and Effect of Power of Attorney.

³² See for example *Kountouris v. Varvaris*, 476 So.2d 599, 604 (Miss. 1985) where the Mississippi Supreme Court stated as follows: “As between the parties, the principal and the purported attorney-in-fact, all that is requisite to the enforceability of the power of attorney is execution and delivery in the same sense that, as between grantor and grantee, all that is necessary for a deed to be valid and enforceable is that the grantor execute it and deliver it.”

³³ Va. Code § 11-9.7 provides as follows:

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

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

8. § 26-71.08 (UPOAA § 108). Nomination of Conservator or Guardian: Relation of Agent to Court-Appointed Fiduciary.

a The UPOAA allows a principal to nominate a conservator or guardian for consideration by the court in the event that protective proceedings are begun after the principal executes a power of attorney.³⁴ The Virginia version of the UPOAA eliminated the optional statement which directs the court to appoint a guardian or conservator in accordance with the principal's most recent nomination.

b The UPOAA gives deference to the principal's choice of agent by providing that the agent's authority continues despite the appointment of a guardian or conservator, unless the court decides to limit or terminate the agent's authority.³⁵

9. § 26-71.09 (UPOAA § 109). When Power of Attorney is Effective.

³⁴New Mexico added language to its UPOAA which requires that, following the court appointment of a conservator, notice and the opportunity to be heard be afforded to the agent and the principal prior to the limitation, suspension, or termination of the power of attorney. *See* New Mexico UPOAA §108

³⁵Nevada added language to its UPOAA that terminates a power of attorney when the court appoints a guardian for the principal's estate. *See* Nevada UPOAA §23.

a The UPOAA establishes a default rule that a power of attorney is immediately effective unless the principal chooses to create a “springing” power of attorney. This default rule is consistent with existing Virginia law.

b Under the UPOAA, if the principal creates a springing power of attorney and has not designated an individual to make the determination that the principal is incapacitated, then a physician, licensed psychologist, attorney, judge, or appropriate governmental official is authorized to make the determination.³⁶ The Virginia version of the UPOAA narrowed the term “physician” in the UPOAA by stating that the capacity evaluation should be made by the “the principal’s attending physician and a second physician or licensed clinical psychologist after personal examination of the principal...”

c Under the UPOAA, a person authorized to verify the incapacity of the principal is the principal’s representative for purposes of the Health Insurance Portability and Accountability Act (HIPAA) to obtain access to the principal’s health-care information and communicate with the principal’s health-care provider.³⁷

³⁶ An attorney, judge, or appropriate governmental official operates as a default arbiter of “incapacity” only as that term is defined in UPOAA §102(5)(B). Nevada eliminated this provision from its UPOAA. *See* Nevada UPOAA §24

³⁷ Since the person authorized to verify the principal’s incapacity will likely need access to the principal’s health records, the UPOAA qualifies the person to act as the principal’s representative for the purposes of HIPAA. It does not authorize the agent to make health-care decisions for the principal, nor does it prevent the principal’s authorized health-care agent from also qualifying as a representative under HIPAA. *See* 45 C.F.R. § 164.502(g)(1)-(2) (2006).

10. § 26-71.10 (UPOAA § 110). Termination of Power of Attorney or Agent's Authority.

a The UPOAA expressly provides a list of events that will terminate the power of attorney³⁸ or the agent's authority.³⁹ A power of attorney will not become ineffective due to a lapse of time since its execution.

b To effectively revoke a power of attorney, a subsequently executed power of attorney must expressly provide for the revocation of a previously created power of attorney or state that all other powers of attorney are revoked.⁴⁰

³⁸ Events that terminate the power of attorney include: 1) death of principal, 2) principal's incapacity, if the power of attorney is not durable, 3) principal revokes the power of attorney, 4) the power of attorney provides that it terminates, 5) the purpose of the power of attorney is accomplished, and 6) the principal revokes the agent's authority or the agent dies, resigns or becomes incapacitated and the power of attorney does not name a successor agent.

³⁹ Events that terminate the agent's authority include: 1) the principal revokes the authority, 2) the agent dies, resigns or becomes incapacitated, 3) an action is filed for divorce or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney provides otherwise, or 4) the power of attorney terminates.

⁴⁰ This conforms to existing Virginia case law, see *Whitley v. Lewis*, 55 Va. Cir. 485 (2000).

c A terminating event is not effective as to an agent or other individual who does not have actual knowledge that the power of attorney or the agent's authority is terminated and who acts in good faith under the power of attorney.

d A spouse-agent's authority is terminated if an action is filed for divorce or annulment of the marriage or legal separation from the principal. This is a default rule which may be overridden in the power of attorney.

11. § 26-71.11 (UPOAA § 111). Co-agents and Successor Agents.

a The UPOAA allows for co-agents to exercise their authority independently. This is a default position intended to discourage the execution of multiple co-extensive powers of attorney naming different agents. However, the UPOAA does not encourage naming co-agents due to the potential for disagreements between agents and the possibility of agents taking inconsistent actions.⁴¹

⁴¹ UPOAA § 111 comment.

b Unless the power of attorney expressly provides otherwise, successor agents have the same power and authority as the original agent had. However, there may be circumstances where the principal may not want the successor agent to have the same authority as the original agent. For example, a principal may wish to give a spouse the power to change beneficiary designations on insurance policies. However, if the principal designates one of his four children as successor agent, he may not wish to grant his successor agent-child that same authority, especially if the children do not get along. Under these types of circumstances, additional language may be warranted in the power of attorney to alter the default rule.⁴²

c An agent is not liable for the actions of another agent unless the agent participates in or conceals the breach of the fiduciary duty. If an agent with actual knowledge of a breach of a fiduciary duty by another agent fails to notify the principal or take reasonable action to safeguard the principal's interests, he will be liable for foreseeable damages which might have been avoided had the agent acted.⁴³

12. § 26-71.12 (UPOAA § 112). Reimbursement and Compensation of Agent.

⁴² Linda Whitton, *Navigating the Uniform Power of Attorney Act*, *supra*.

⁴³ UPOAA § 111 comment.

a The UPOAA establishes a default rule that an agent is entitled to reasonable compensation and to reimbursement of expenses reasonably incurred on behalf of the principal.⁴⁴

b *Practice Tip:* While it is unlikely that the principal will alter the default rule concerning expenses, it will be frequently appropriate to limit or define the terms of the agent's compensation. For example: "My agent is authorized to pay compensation for his services to himself from my funds at the rate of \$_____ per month."

13. § 26-71.13 (UPOAA § 113). Agent's Acceptance.

a This section creates a default rule that a person accepts his appointment as an agent under a power of attorney when he begins exercising authority, performing duties, or evidences any other conduct or assertion which indicates that he has accepted.⁴⁵

b The UPOAA does not make delivery of the power of attorney a requirement for the agent to act on the principal's behalf. Prior to the enactment of the UPOAA, Virginia power of attorney statutes specifically state that the principal's failure to deliver the power of attorney to the agent will not affect its validity.⁴⁶

⁴⁴ Under the Nevada UPOAA, an agent is only entitled to the reimbursement of expenses, not compensation, unless otherwise provided by the power of attorney. *See* Nevada UPOAA §27.

⁴⁵ See UPOAA § 110(b)(2), which creates a default method for agent resignation.

⁴⁶ Va. Code § 11-9.7.

c Acceptance is the point for commencement of the agency relationship and imposition of fiduciary duties.⁴⁷

14. § 26-71.14 (UPOAA § 114) Agent's Duties.

a Although it was well-settled law that an agent under a power of attorney was a fiduciary, the extent of the fiduciary duties imposed on the agent by Virginia law was previously unclear.

b The UPOAA lists certain duties of the agent that are mandatory and may not be altered by the power of attorney. The mandatory duties provide that all agents must act in good faith; within the scope of authority granted; and in accordance with the principal's reasonable expectations, if known, or in the principal's best interest if the principal's expectations are unknown.⁴⁸

c The remaining duties are default rules which can be modified by the principal. These duties include:

- (i) act loyally,
- (ii) avoid conflicts of interests,

⁴⁷ This is similar to the provisions of the Uniform Trust Code which provides that the acceptance of the trust by the Trustee is the point at which fiduciary duties are imposed on the Trustee. *See* Virginia Code § 55-548.01

⁴⁸ The mandatory duties of an agent in the UPOAA are similar to those imposed on a trustee in the UTC, i.e. "to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries; . . ." Virginia Code § 55-541.05 B. 2.

- (iii) act with care, competence, and diligence,
- (iv) keep records,⁴⁹
- (v) cooperate with the health-care agent, and
- (vi) 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 interests based on all relevant factors.⁵⁰

d An agent who acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

e An agent who acts with care for the best interests of the principal is not liable solely because the agent also benefits from the act or has a conflicting interest.

⁴⁹ The UPOAA does not create a default affirmative duty of periodic accounting. Additionally, the agent is not required to disclose records unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal.

⁵⁰ The default duties to cooperate with the principal's health-care agent and to preserve the principal's estate plan were included to protect the principal's previously-expressed choices.

f 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 of those skills or expertise, the special skills or expertise shall be considered in determining whether the agent has acted with care under the circumstances.

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

h An agent who exercises authority to delegate the authority granted by the power of attorney is not liable for any error of that person provided the agent exercises care in the delegation.⁵¹

i This section was amended to import existing Virginia rules (Va. Code § 11-9.6 and § 37.2-1018) requiring the agent to disclose information to certain individuals.

⁵¹ The UPOAA was amended by Virginia to provide expressly that the power to delegate does not abrogate the agent's duties under the Virginia Uniform Prudent Investor Act. Va. Code § 26-45.13 expressly includes agents under powers of attorneys within the definition of "trustee." Va. Code § 26-45.10 of this Act provides:

- A. A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in: 1. Selecting an agent; 2. Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and 3. Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.
- B. In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.
- C. A trustee who complies with the requirements of subsection A is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.
- D. By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this Commonwealth, an agent submits to the jurisdiction of the courts of this Commonwealth.

j *Practice Tip:* When the agent has accepted appointment as the agent, the fiduciary duties imposed by this section are imposed. Is the agent liable if he subsequently fails to act after having accepted the appointment as agent under §113? The answer is potentially yes, since unless the power of attorney provides otherwise, an agent must act with “... diligence ordinarily exercised by agents in similar circumstances.” If this potential liability is a concern, consider the following provision: “My agent shall not be liable to me or my estate for the failure to exercise any of the authority granted by this power of attorney.”

15. § 26-71.15 (UPOAA § 115). Exoneration of Agent.

a Under the UPOAA, the inclusion of an exoneration provision in a power of attorney relieving the agent of liability for breach of fiduciary duties is binding on the principal and the principal’s successors in interest unless the agent’s breach is committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal.

b As an additional protection for the principal, an exoneration provision will also not be binding if it was inserted in the power of attorney as the result of abuse of a confidential relationship with the principal.

16. § 26-71.16 (UPOAA § 116). Judicial Relief.

a The purpose of this section is to protect vulnerable or incapacitated individuals against financial abuse and to protect the self-determination rights of principals.⁵²

b In addition to the remedies in § 26-71.23 (UPOAA §123), the following persons are authorized to petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief:

- (i) Principal or agent;
- (ii) a guardian, conservator, personal representative of the estate of a deceased principal, or other fiduciary acting for the principal;
- (iii) the principal's health-care agent;
- (iv) The principal's spouse, parent, or descendant;
- (v) an adult brother, sister, niece, or nephew of the principal;
- (vi) a beneficiary under the principal's estate plan;
- (vii) Adult protective services;

⁵² UPOAA § 116 comment.

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

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

c Virginia added paragraph b to this section to provide judicial relief for an agent's violation of discovery requests.

d Virginia also added paragraph (c) with a goal of preserving Virginia's so-called anti-Casey statute.⁵³ In *Casey v. Commissioner of Internal Revenue*, the Court held that gifts of a decedent's assets made during the decedent's lifetime by her attorney-in-fact were not authorized by a durable power of attorney held by the attorney-in-fact, hence were revocable at the time of the decedent's death, and therefore were includible in her gross estate for federal estate tax purposes. The Virginia General Assembly responded to this decision by enacting Va. Code § 11-9.5 which grants an agent under a general DPA the "power and authority to make gifts in any amount of the principal's property to any individuals or organizations described in §§ 170 (c) and 2522 (a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both, in accordance with the principal's personal history of making or joining in the making of lifetime gifts."

⁵³ Va. Code § 11-9.5; *Casey v. C.I.R.*, 948 F.2d 895 (4th Cir. 1991).

e Upon motion by the principal, the court shall dismiss a petition filed under §26-71.16 (UPOAA §116) unless it finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.⁵⁴

17. § 26-71.17. (UPOAA § 117). Agent's Liability.

a If an agent violates the UPOAA, he is liable to the principal for the restoration value of the principal's property and for reimbursement to the principal or the principal's successors in interest for attorneys' fees and costs paid from the principal's property on the agent's behalf.

b An agent who violates the UPOAA will be subject to liability as provided in the Act but may also be subject to civil or criminal liability under separate state statutes dealing with financial abuse.⁵⁵

18. § 26-71.18 (UPOAA § 118). Agent's Resignation; Notice.

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

⁵⁴ Idaho added a provision in its UPOAA that allows the court, in its discretion, to award reasonable attorney's fees and costs to the prevailing party in a proceeding to construe the power of attorney or review the agent's conduct. *See* Idaho UPOAA §15-12-116(3).

⁵⁵ UPOAA § 117 comment.

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(i) Conservator or guardian, if one has been appointed, and a co-agent or successor agent, or, if none, then

(ii) Any adult spouse, child or other descendant, parent, or sibling of the principal, or, if none, then

(iii) Another person reasonably believed by the agent to have sufficient interest in the principal's welfare, or, if none, then

(iv) Adult protective services.

b Virginia modified the hierarchy of persons to whom the agent may give notice to include the adult protective services unit of the local department of social services for the city or county where the principal resides or is located.

19. § 26-71.19 (UPOAA § 119). Acceptance and Reliance Upon Acknowledged Power of Attorney.

a This section provides broad protections for persons who in good faith (*i.e.* with “honesty in fact”)⁵⁶ accept an acknowledged power of attorney without actual knowledge that the power of attorney is forged,⁵⁷ 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.

(i) Acknowledged means *purportedly* verified before a notary public or other individual authorized to take acknowledgments (emphasis added).⁵⁸

(ii) This section protects third parties who in good faith accept a purportedly acknowledged power of attorney. To promote the acceptance of powers of attorney, the UPOAA places the risk that a power of attorney is invalid upon the principal rather than the third party.

⁵⁶ The definition of “good faith” is found in § 26-71.02 (UPOAA §102)

⁵⁷ *See* UPOAA § 105.

⁵⁸ UPOAA § 119 (a).

(iii) This is a change in Virginia's common law. The Virginia Supreme Court has held that "One who deals with an agent does so at his own peril and has the duty of ascertaining the agent's authority. If the agent exceeds his authority, the principal is not bound by the agent's act."⁵⁹ However, protection for third parties against liability for good faith acceptance of acknowledged powers of attorney is a new trend in the law aimed at facilitating greater acceptance of powers of attorney by third parties.⁶⁰ Of the twelve states that currently consider it unlawful to unreasonably refuse a power of attorney, Colorado, Idaho, Illinois,⁶¹ Indiana, New Mexico and North Carolina use the term *purports* or *purporting* to clarify that good faith reliance on a power of attorney will be protected absent actual knowledge that the power of attorney was not validly executed.⁶²

⁵⁹ *Kern v. Barksdale Furniture Corporation*, 224 Va. 683 (1983).

⁶⁰ 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). However the 2009 revision of the New York Power of Attorney Statute requires that a power of attorney "be signed and dated by a principal with capacity, with the signature of the principal duly acknowledged..." See N.Y. GOB 5-1501B(1)(c).

⁶¹ See Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We have Learned*, Stetson Law Review, vol. 37 (2007 Linda S. Whitton) citing *Estate of Davis v. Citicorp Savings*, 632 N.E. 2d 64 (Ill. App. 1st Dist. 1994) where a third party bank relied on a forged power of attorney ostensibly executed by one of their customers. The court placed the risk of accepting an invalid power of attorney on the third party presented with the power, rather than the principal. Illinois has since revised its power of attorney statutes to provide that "any person who acts in good faith reliance on a copy of a document purporting to establish an agency will be fully protected..." 755 Ill. Comp. Stat. Ann. 45/2-8.

⁶² Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We have Learned*, *supra*.

(iv) This section of the UPOAA protects good faith acceptances of *purportedly* acknowledged powers of attorney which could include protection for a forged power of attorney.⁶³ According to the Reporter on the UPOAA Drafting Committee, this section was “arguably one of the most difficult intersections of public policy that had to be addressed in the Act.”⁶⁴ According to the Committee’s research and considerable anecdotal evidence, the problem of power of attorney abuse appears to be small compared to the volume of powers of attorney that are used legitimately.⁶⁵ Where abuse occurs, the problem is typically abuse of a valid power of attorney or a power of attorney obtained through duress, not the problem of a forged durable power of attorney.⁶⁶ The threshold question which essentially must be addressed is “Who should bear the risk that

⁶³ Email from Linda S. Whitton, Professor of Law, Valparaiso University School of Law and Reporter for the Uniform Power of Attorney Act, to Andrew H. Hook, Attorney at Law, Oast & Hook, P.C., *UPOAA and the Issue of Forgeries* (Feb. 29, 2009).

⁶⁴ *Id.*

⁶⁵ *Id.* After extensive research, the Ohio State Bar Association POA committee found that cases dealing with forged powers of attorney are extremely rare. A few cases that have addressed forged powers of attorney have come down on both sides of the liability issue. In a 1996 opinion, the United States Court Appeals for the Third Circuit held that a law firm that disbursed funds out of its trust account based upon instructions given to it by an agent under a forged POA was not liable. *Villanueva v. Brown*, 103 F.3d 1128 (1/8/1997). In another case, the Appellate Court of Illinois held a bank liable for amounts paid out pursuant to a forged POA. *Davis. V. Citicorp*, 632 N.E.2d 64 (3/17/1994). In response to this decision, the Illinois legislature amended its POA statute to protect any person who acts in good faith in reliance on a document purporting to establish an agency. 755 ILCS 45/2-8. In the case of *Baxter v. Baxter*, 320 B.R. 30 (10/6/2004), the United States Bankruptcy Court, District of Columbia, held that a deed of trust executed pursuant to a forged POA is ineffective. In a fourth case, the California Court of Appeal held that a bank was not protected from liability by a purported agent falsely representing authority by use of a forged power of attorney since the conduct did not constitute impersonation within the meaning of the California Commercial Code. *Title Ins. Co. Of Minnesota v. Comerica*, 27 Cal.App.4th 800 (8/17/1994). Email message from Richard E. Davis, Krugliak, Wilkins, Griffiths & Dougherty Co., LPA, to Andrew H. Hook, Oast & Hook, P.C., OSBA UPOAA Cmte (May 11, 2009).

⁶⁶ *Id.*

a power of attorney is not valid?”⁶⁷ Placing the risk upon the principal enhances the likelihood of acceptance by a third party and also strengthens the justification for sanctioning an unreasonable refusal.⁶⁸ However, placing the risk upon the principal may reduce due diligence by third parties and increase the number of cases involving forged powers of attorney.

(v) Virginia has addressed the forgery issue by amending §26-71.19(B) to provide that the risk of loss for acceptance of a forged power of attorney will rest with the third party who accepted it rather than with the purported principal.

b While the UPOAA does not require a person to investigate whether a power of attorney or an agent’s authority is valid, the Act allows a person to request an agent’s certification under oath as to any factual matter, an English translation of the power of attorney, and/or an opinion of counsel as to any matter of law concerning the power of attorney if the person making the request provides in writing the reason for the request.

c Virginia added language which clarifies that the third party may request a legal opinion from the principal’s, agent’s or the third party’s counsel. An English translation or the opinion of the agent’s or principal’s counsel must be provided at the principal’s expense. Virginia eliminated the exception to this rule for requests made more than seven business days after the power of attorney is presented for acceptance.

⁶⁷Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We have Learned*, *supra*

⁶⁸ Id. citing UPOAA §119 comment.

d Virginia added language that requires an agent's certification, an English translation, or an opinion of counsel be in recordable form if the exercise of the power requires recordation of any instrument under the laws of the Commonwealth of Virginia.

e The UPOAA rejects an imputed knowledge standard for those individuals who conduct activities through employees. Third persons who conduct activities through employees are held to be without actual knowledge of a fact "if the employee conducting the transaction involving the power of attorney is without actual knowledge of the fact."⁶⁹ For example, if an employee who accepts a forged, invalid, or revoked power of attorney did so honestly and without actual knowledge that it was forged, invalid, or revoked, then the employer is protected against liability.

⁶⁹ Linda S. Whitton, *The Uniform Power of Attorney Act and Financial Institutions* (2008), citing UPOAA §119 (f).

f There were concerns in Virginia that third parties may remain willfully uninformed in order to hide behind the protections provided in this section of the UPOAA. The Virginia Bar Association and the Virginia Bankers Association recommended amending §26-71.19(f) to state that “For purposes of this section and §26-71.20, a person who conducts activities through employees and has implemented commercially reasonable standards to communicate information regarding powers of attorney among its 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 has followed such procedures and is nonetheless without actual knowledge of the fact.” Thus, third parties will be held to a reasonable negligence standard meaning they must use reasonable systems to disseminate information among employees in order to receive protection under the UPOAA.

20. § 26-71.20 (UPOAA § 120). Liability for Refusal to Accept Acknowledged Power of Attorney.

a The UPOAA provides enacting jurisdictions with a choice between alternative liability provisions. The VBA chose to recommend UPOAA §120 Alternative A, which applies to all acknowledged powers of attorney. It rejected alternative B, which addresses only statutory form powers of attorney.⁷⁰ The goal of this recommendation was to facilitate the acceptance of all acknowledged powers of attorney rather than only statutory form powers of attorney.

b Generally, a third party must:

⁷⁰ Of the states that have adopted the UPOAA, New Mexico is the only state to have chosen Alternative B.

(i) Either accept an acknowledged power of attorney or request a certification, translation, or an opinion of counsel within seven business days of presentment of the power of attorney;

(ii) If the third party requests a certification, translation or an opinion of counsel, the third party shall accept the power of attorney within five business days after receipt of the requested document; and

(iii) Not require an additional or different form of power of attorney.

c This section provides significant protection for third parties against liability for rejecting a power of attorney by providing clear safe harbors for legitimate refusals.⁷¹ These safe harbors include:

(i) The third party is not required to engage in the transaction with the principal in the same circumstances or the principal has otherwise relieved the third party from the obligation to engage in the transaction with an agent under a power of attorney,⁷²

⁷¹ Linda S. Whitton, *The Uniform Power of Attorney Act and Financial Institutions* (2008). Colorado amended this section in their UPOAA to include a safe harbor for individuals who refuse to accept a power of attorney based on their “good faith belief” that the agent was acting “either unlawfully or not in good faith.” However, under the Colorado UPOAA, in order to escape liability for refusing to accept a power of attorney, the person must perform a “good faith” investigation of the situation before refusing to accept a power of attorney. See Colorado UPOAA §15-14-720.

⁷² Financial institutions and third parties can insert in their agreements with principals a provision that the financial institution or other party is not required to accept a power of attorney. This is a departure from the UPOAA.

(ii) Engaging in the transaction with the agent or the principal in the same circumstances would be inconsistent with federal law,

(iii) The third party has actual knowledge of the termination of the agent's authority or of the power of attorney,

(iv) A request for a certification, a translation, or an opinion of counsel has been refused,

(v) The third party believes in good faith that the power of attorney is not valid or that the agent does not have the authority to perform the act requested, or

(vi) The third party makes, or has actual knowledge that another person has made, a report to the local adult protective services department or adult protective services hotline stating 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 Only when a refusal does not meet one of the safe harbors will an individual be subject to a court order mandating acceptance and to liability for the costs and attorneys' fees incurred to obtain the mandate.

⁷³ The imposition of attorneys' fees is a departure from the existing Virginia common law.

⁷³ *Id.*; UPOAA § 120(c) Alternative A.

e While the UPOAA does not require third parties, including financial institutions, to operate as watchdogs for financial abuse, the Act permits third parties to do so when there is a good faith belief that the principal may be subject to some type of abuse by the agent or someone acting in concert with the agent.⁷⁴ If a third person has such a belief and is willing to make a report to the local adult protective services department or adult protective services hotline, or knows that someone else has made such a report, then an otherwise valid power of attorney may legitimately be refused.⁷⁵

f Virginia added language which clarifies that the term “business day,” as used in this section, excludes Saturdays, Sundays, and any day designated as a holiday in the Commonwealth of Virginia.

g *Practice Tip.* When counseling clients about powers of attorney, you should recommend that the client ask the financial institutions with whom they do business whether or not their account agreements have “opted out” of accepting powers of attorney.

21. § 26-71.21 (UPOAA § 121). Principals of Law and Equity.

⁷⁴ Linda S. Whitton, *Hot Button Issues on the New Uniforms: The Controversial Provisions of the UTC, UPOAA, and UPMIFA, Balancing the Buttons on the Uniform Power of Attorney Act* (Linda S. Whitton 2007).

⁷⁵ *Id.*

a Where the UPOAA is silent, the common law of agency applies.⁷⁶

b Although the UPOAA is a lengthy statute, the common law of agency remains relevant. For example, the following matters are not covered by the UPOAA:

(i) What authority a principal can not delegate to an agent;⁷⁷

(ii) The agent's liability and duties to third parties;⁷⁸

(iii) The principal's duty to deal fairly and in good faith with the agent;⁷⁹

⁷⁶ See Restatement (Third) of Agency (2005).

⁷⁷ Generally a principal can delegate to an agent any acts that the principal could do for himself unless public policy or contractual obligations require personal performance. See Restatement (Third) of Agency (2005) § 6.08 (comment c) "In the few reported cases dealing specifically with durable powers of attorney, the courts have defined non-delegability rather narrowly." *First Union National Bank v. Thomas*, 37 Va. Cir. 35 (1995). However, certain acts has been held by some judicial decisions to be non-delegable, including: 1) marriage, 2) divorce, 3) voting, 4) executing, amending or revoking a will, 5) representing the principal in court, and 6) initiating bankruptcy proceedings. Additionally, it is doubtful that an agent in Virginia may make an augmented estate election against the estate of a deceased spouse of the principal. The Virginia conservatorship statute, Va. Code § 37.1-137.4(A)(6)(iii), requires a conservator to obtain court approval for the election and there is no similar authority for agents.

⁷⁸ Restatement (Third) of Agency (2005) §§ 7.01, 7.02.

⁷⁹ Restatement (Third) of Agency (2005) § 8.15.

(iv) Actual and apparent authority;⁸⁰

(v) Capacity of agent;⁸¹ and

22. § 26-71.22 (UPOAA § 122). Laws Applicable to Financial Institutions and Entities.

a This section addresses the concerns of the banking and insurance industries that there may be laws which govern those entities that conflict with provisions of the UPOAA. Although no specific conflicts were identified while drafting the UPOAA, § 26-71.22 (UPOAA§ 122) provides that in the event that laws applicable to financial institutions, insurance companies, or other entities conflict with the UPOAA, the other law will supercede the UPOAA to the extent of the inconsistency.

23. § 26-71.23 (UPOAA § 123). Remedies Under Other Law.

a Remedies under the UPOAA are not exclusive and should not prevent aggrieved parties from seeking additional remedies under other laws.

b Virginia added a provision to make clear that the available additional remedies include a court-supervised accounting.

⁸⁰ Restatement (Third) of Agency (2005) §§ 2.01 *et seq.*

⁸¹ Restatement (Third) of Agency (2005) § 3.05.

C. Article 2: Authority

1. § 26-72.01 (UPOAA § 201). Authority That Requires Specific Grant; Grant of General Authority.

a This section requires that an express, specific grant of authority be given to an agent for certain acts due (herein referred to as the “Hot Powers”) to the risk those acts pose to the principal’s property and estate plan.⁸² These acts include:

(i) create,⁸³ amend, revoke, or terminate⁸⁴ an *intervivos* trust;

(ii) Make a gift,⁸⁵

⁸² UPOAA § 201 comment; The powers requiring a specific grant of authority are often referred to as the “hot powers.” The draftsman should pay particular attention to drafting provisions granting this authority.

⁸³ Virginia is recommending the revision of §§ 55-544.01 and 55-544.02 of the Virginia Uniform Trust Code to expressly permit an agent under a power of attorney to create a trust where specifically authorized by the terms of the power of attorney. It is further recommending revision of Va. Code § 55-546.02(E) to provide that the settlor’s powers of revocation, amendment or distribution of trust property may be exercised by an agent acting under a power of attorney that expressly authorizes such action.

⁸⁴ Virginia Code § 55-546.02 (E) provides: “A settlor’s powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent (i) expressly authorized by the terms of the trust or (ii) authorized by the court for good cause shown.” If the client wishes for his agent under his power of attorney to exercise his powers of revocation, amendment or distribution, include language similar to the following in the trust agreement: “My agent under a general durable power of attorney may exercise my powers to revoke, amend or direct distributions of trust property by a writing signed by agent and delivered to my trustee during my lifetime.”

⁸⁵ However, see Virginia Code § 26-72.01(h).

- (iii) create or change rights of survivorship,
- (iv) create or change a beneficiary designation,
- (v) delegate authority granted under the power of attorney,
- (vi) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or
- (vii) Exercise fiduciary powers that the principal has authority to delegate.

b Virginia eliminated disclaiming property, including a power of appointment, from the list of those acts requiring a specific grant of authority since the Virginia Uniform Disclaimer of Property Interests Act authorizes an agent to make a disclaimer .⁸⁶

⁸⁶ See Va. Code § 64.1-196.4 B. Virginia should consider reinstating a disclaimer as a “hot power” since this code section reads in part: “Except to the extent a fiduciary's right to disclaim is expressly restricted or limited by another statute of this state ..., a fiduciary may disclaim ...”

c *Practice Tip:* Powers of attorney were previously strictly construed in Virginia. Therefore, it was extremely important to clearly state in the instrument what authority an agent has. The authority granted in a power of attorney is never considered to be greater than that warranted by its language, or indispensable to the effective operation of the authority granted.⁸⁷ The authority granted is not extended beyond the terms in which it is expressed.⁸⁸ The general rule of construction with regard to powers of attorney essentially provides that expansive language should be interpreted as intending only to confer those incidental powers necessary to accomplish objectives as to which express authority has been given to the attorney-in-fact.⁸⁹ The UPOAA makes defining the agent's authority easier because it spells out the authority which requires a specific grant and allows authority to be incorporated into the power of attorney by reference.

d A grant of general authority under the UPOAA permits an agent to do all acts enumerated in Virginia Code §§ 26-72.04 through § 26-72.16 (UPOAA §§ 204 - 216).⁹⁰

⁸⁷ *Jones v. Brandt*, 645 S.E. 2d 312 (Va. 2007) citing *Hotchkiss v. Middlekauf*, 96 Va. 649,653, 32 S.E. 36,37-38 (1899).

⁸⁸ *Id.*

⁸⁹ *Id.*; However, see *Jones v. Brandt*, *supra* where the court held that an agent acting pursuant to a power of attorney had the authority to change the beneficiary designation on a certificate of deposit even though the power of attorney did not expressly grant the agent the power to do so.

⁹⁰ See II (B)(4), *infra*.

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

f Virginia added subsection (h) with a goal of preserving Virginia’s so called “anti-Casey” statute⁹¹ and laws related to gifting under pre- and post- UPOAA law.

2. § 26-72.02 (UPOAA § 202). Incorporation of Authority.

a The statutory definitions for authority over various subject areas⁹² may be incorporated by reference using the optional statutory form provided in Article 3 or by referring in the power of attorney to the descriptive term or specific statute section in which the authority is described.⁹³

⁹¹ See Va. Code § 11-9.5; *Casey v. C.I.R.*, 948 F.2d 895 (4th Cir. 1991). See also II (A)(16)(c), *supra*.

⁹² Va. Code §§ 26-72.04 through 217.

⁹³ UPOAA § 202 comment. Colorado added a provision to its UPOAA that allows a power of attorney to incorporate by reference a writing or any other record in existence at the time the power of attorney is executed. The language of the power of attorney must manifest the intent to incorporate the writing or record, and must describe the writing or other record “sufficiently to permit its identification.” See Colorado UPOAA §15-14-725

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

c If a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has authority with respect to all of the enumerated subject areas in Article 2 that do not require an express grant of authority.⁹⁴ A principal may modify any authority incorporated by reference.⁹⁵

3. § 26-72.03 (UPOAA § 203). Construction of Authority Generally.

a This section describes incidental authority which accompanies all authority granted to an agent under Virginia Code § 26-72.04 through § 26-72.17 (UPOAA §§ 204 - 217), unless modified by the principal.⁹⁶ These acts are often necessary to carry out the authority over the subjects described in § 26-72.04 through § 26-72.17 (UPOAA §§ 204 - 217).⁹⁷

b Incidental authority includes the power to:

⁹⁴ Linda Whitton, *Navigating the Uniform Power of Attorney Act, supra*; UPOAA § 202.

⁹⁵ *Id.*

⁹⁶ UPOAA § 203 comment.

⁹⁷ *Id.*

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- (i) recover money or another thing of value to which the principal is due and to conserve, invest, disburse, or use anything so obtained;
- (ii) contract on terms acceptable to the agent and perform, rescind, cancel, or modify the contract or another contract made by the principal;
- (iii) execute, acknowledge, deliver, file or record any instrument;
- (iv) initiate, participate in, or settle a claim in favor or against the principal;
- (v) seek on the principal's behalf the assistance of a court or governmental agency;
- (vi) engage, compensate, and discharge an attorney, accountant, investment advisor, expert witness, or other advisor;
- (vii) prepare, execute and file reports;
- (viii) communicate with any representative or employee of a government or governmental agency on behalf of the principal;
- (ix) access communications intended for and communicate on behalf of the principal; and

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

4. §§ 26-72.04 through 26-72.16 (UPOAA §§ 204 through 216).

a A power of attorney may grant to an agent authority with respect to a particular subject by using the descriptive term for the subject or by citing to the section in the UPOAA where the authority is described. For example, if a power of attorney grants an agent authority over the principal's "real property," the agent will have the authority described in § 26-72.04 (UPOAA § 204).

b The UPOAA defines the authority granted by the following descriptive terms:

(i) Real Property. § 26-74.04 (UPOAA § 204).⁹⁸

(ii) Tangible Personal Property. § 26-74.05 (UPOAA § 205).

(iii) Stocks and Bonds. § 26-74.06 (UPOAA § 206).

(iv) Commodities and Options. § 26-74.07 (UPOAA § 207).

⁹⁸Nevada added an additional provision to its UPOAA requiring that, when the power of attorney grants specific or general authority for the agent to convey the principal's real property (or any other real property which the principal has the power to convey), the power of attorney must be recorded in the office or place where such conveyances are recorded. Furthermore, Nevada's UPOAA makes clear that when the power of attorney has been properly recorded, it is not terminated by any act of the principal until an instrument containing a revocation is "deposited for record in the same office in which the instrument containing the power is recorded." *See* Nevada UPOAA §42.

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(v) Banks and Other Financial Institutions. § 26-74.08 (UPOAA § 208).⁹⁹

(vi) Operation of Entity or Business. § 26-74.09 (UPOAA § 209).

(vii) Insurance and Annuities. § 26-74.10 (UPOAA § 210).

(viii) Estates, Trusts, and Other Beneficial Interests. § 26-74.11 (UPOAA § 204).

(ix) Claims and Litigation. § 26-74.12 (UPOAA § 212).

⁹⁹Nevada added a provision to this section of their UPOAA stating that an agent who is not the spouse of the principal must not be listed on any account as a cosigner with the right of survivorship. The agent must solely be listed on the as agent under the power of attorney. *See* Nevada UPOAA §46.

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(x) Personal and Family Maintenance. § 26-74.13 (UPOAA § 213).¹⁰⁰

(xi) Benefits From Governmental Programs or Civil or Military Service. § 26-74.14 (UPOAA § 214).

(xii) Retirement Plans. § 26-74.15 (UPOAA § 215).

(xiii) Taxes. § 26-74.16 (UPOAA § 216).

¹⁰⁰Maine's UPOAA omits the provision providing the general authority for an agent to perform the acts necessary to maintain the customary standard of living for the principal's children. *See* Maine UPOAA §5-943.

c *Practice Tip.* If the principal creates a general power of attorney and the principal's will makes a specific gift of property, the power of attorney or will should expressly address whether the gift is extinguished if the agent sells the property while the principal is incapacitated. The Virginia Code provides for a default nonademption rule.¹⁰¹ If the principal wishes to provide for ademption, consider adding the following provision to both the will and power of attorney: "I direct that any gift of specific property made in my will shall be extinguished by ademption if my agent under my general power of attorney shall sell the property. I expressly release my agent from any liability to my estate or to any beneficiary of my estate as a consequence of such sale."

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

¹⁰¹ See Va. Code § 64.1-62.3 (B), which provides:

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

5. § 26-72.17 (UPOAA § 217). Gifts.

a A specific grant of authority to make a gift under § 26-72.01 (a) (UPOAA § 201(a)) is subject to the default limitations of this section unless expressly modified by the principal in the power of attorney.

b Because a gift of the principal's property reduces the principal's estate, the UPOAA sets default per-donee limits on gift amounts.¹⁰² However, the principal may expressly grant the agent greater authority to make gifts of his property.

c For example, the principal may wish to grant greater authority to the agent to make a gift of his or her assets to qualify for Medicaid Long Term Care assistance.¹⁰³

d *Practice Tip.* There is no one gift authority provision that is appropriate for every client. This authority should be carefully discussed with the client and drafted to meet the clients needs and desires.

D. Article 3: Statutory Forms.

1. § 26-73.01 (UPOAA § 301). Statutory Form Power of Attorney.

¹⁰² UPOAA § 201 comment; UPOAA § 217.

¹⁰³ See Virginia Medicaid Manual M1450.400 C and D for the rules relating to transfers that are exempt from the Medicaid transfer of asset rules.

a Article 3 of the UPOAA includes a concise, optional statutory form.¹⁰⁴ The availability of legal forms is widespread.¹⁰⁵ Eighteen other states have statutory power of attorney forms. The goal of these statutory forms is to promote familiarity and thereby facilitate acceptance of powers of attorney.

b The statutory form is designed to be understandable to lay persons while still providing attorneys a foundation upon which any drafting option under the UPOAA can be implemented.¹⁰⁶ The purpose of including a statutory form is to achieve familiarity and a common understanding of powers of attorney through the use of one form with a goal of facilitating acceptance by third parties.¹⁰⁷

¹⁰⁴Of those states that have adopted the UPOAA, Maine is the only state that chose not to include a statutory form. However, Maine did include the Agent’s Certification for the statutory form, which is used by the agent to certify facts concerning a power of attorney.

¹⁰⁵ A Google search for “power of attorney form” resulted in about 5,300,000 hits with some power of attorney forms free to download and others costing as little as \$9.99. The same search on the Amazon website resulted in 1,082 hits. LegalZoom.com sells a customized power of attorney for \$35 with a “LegalZoom Peace of Mind Review” and rush 2 business day delivery. Without the assistance of an attorney, a consumer may obtain a power of attorney form without any difficulty.

¹⁰⁶ Linda S. Whitton, *Navigating the Uniform Power of Attorney Act*, *supra*..

¹⁰⁷ UPOAA Article 3 General Comment.

c The inclusion of the “Hot Powers”¹⁰⁸ in the statutory form is an option granted in the UPOAA. However, fiduciaries generally do not have these powers and agents under a POA are fiduciaries with the least supervision. The Virginia Elder Law bar has expressed concern that the inclusion of these optional Hot Powers in the statutory form would increase the likelihood of financial elder abuse using POA’s. They believe that many elderly persons using the statutory form with out the assistance of an attorney will simply check all of the boxes granting authority without giving sufficient consideration to the extraordinary authority they are granting to their agent.

d There are also concerns that the statutory short form as a whole is too powerful; that it may be used by consumers without adequate representation by counsel. However, millions of form powers of attorney are already circulating in the consumer market place.

e The Virginia Bar Association addressed concerns that the statutory short form may be susceptible to abuse and recommended its deletion from the UPOAA. Although the statutory short form has been deleted, the General Assembly reserved a code section for its potential incorporation at a later date. The authors recommend that the General Assembly add a statutory short form to Virginia’s UPOAA that is user friendly. The authors do not recommend including the hot powers in the statutory short form. However, any version of the statutory short form incorporated into Virginia’s UPOAA should be accompanied by adequate warnings to the principal about the nature and breadth of the form they are signing. The warning should include a recommendation to obtain competent legal advice before executing the form.

¹⁰⁸See §26-72.01 for a list of the authority that must be specifically granted, i.e. the Hot Powers.

f *Practice Tip.* Will attorneys draft comprehensive powers of attorneys or statutory short form powers of attorney for their clients? In other states with statutory short form powers of attorney, the authors have been informed that two practices have developed. The first practice is for the attorney to draft (i) a statutory short form power of attorney for routine transactions with financial institutions and (ii) a comprehensive power of attorney to define the full scope of the authority granted and the terms of the relationship. The second practice is for the attorney to draft only a comprehensive power of attorney. However, even in those states which use the statutory short form, the majority of attorneys still utilize addenda (or, in the case of the UPOAA, the “Special Instructions” section) to tailor the form as needed for individual client circumstances. If the statutory short form is added to Virginia’s UPOAA, the authors will probably adopt the first practice of drafting both a short form and a comprehensive power of attorney.

g *Practice Tip:* The statutory short form power of attorney has an excellent “plain English set of instructions for agents. If the stutory short form is later added to Virginia’s UPOAA, attorneys should consider adopting the instructions for the powers of attorney they draft.

2. § 26-73.02 (UPOAA § 302). Agent’s Certification.

a This section is optional for an agent certification of facts pertaining to a power of attorney.¹⁰⁹

¹⁰⁹ UPOAA Article 3 General Comment

b The statements of fact in the form are those for which third persons commonly request certification, but the agent may add any other factual statements to the form as needed to satisfy a particular certification request under §26.1-1.19.¹¹⁰

E. Article 4: Miscellaneous Provisions

1. § 26-74.01 (UPOAA § 401). Uniformity of Application and Construction.

a UPOAA § 401 provides: “In applying and construing this uniform act, consideration should be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.”

b The Virginia General Assembly deleted UPOAA §401 in the 2009 Session. However, it was restored to the Virginia UPOAA in the 2010 session. The Virginia Uniform Trust Code, Uniform Principal and Income Act, and Uniform Simultaneous Death Act contain this same provision.¹¹¹

2. § 26-84.02 (UPOAA § 402). Relation to Electronic Signatures in Global and National Commerce Act.

¹¹⁰ Linda S. Whitton, *Navigating the Uniform Power of Attorney Act, supra*; UPOAA § 302 comment.

¹¹¹ UPOAA § 401 is similar to Va. Code § 55-551.01 of the Virginia Uniform Trust Code, § 55-277.32 of the Virginia Uniform Principal and Income Act., the Virginia Simultaneous Death Act § 64.1 - 104.9 and other uniform laws enacted in Virginia.

a The UPOAA modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (“ESGNCA”) (15 U.S.C. § 7001 *et seq.*). However, the UPOAA does not modify, limit, or supersede § 101(c) or § 103(b) of that Act.

b § 101(c) of the ESGNCA provides that if a statute, regulation, or law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, that writing may be in electronic form only if the requirements in section 101(c) are met.¹¹² Furthermore, § 103(b) prohibits electronic delivery of certain notices.¹¹³

c This section, which is being inserted in all Uniform Acts approved in 2000 or later, preempts the ESGNCA. Section 102(a)(2)(B) of that Act provides that the federal law can be preempted by a later statute of the state that specifically refers to the federal law.

¹¹² Therefore, an agent acting for a principle under the UPOAA is subject to the requirements in section 101(c) of the ESGNCA only when each of the following elements is met:

1. the agent is selling or leasing real or personal property, products, goods, or services for the principle;
2. the recipient of the property, products, goods, or services will use them primarily for personal, family, or household purposes;
3. the transaction is in or affects interstate or foreign commerce; and
4. there is a statute, regulation, or law requiring information relating to the transaction to be in writing.

¹¹³ This provision prohibits the electronic delivery of the following notices:

- (A) the cancellation or termination of utility services (including water, heat, and power);
- (B) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by , or a rental agreement for, a primary residence of an individual;
- (C) the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); or
- (D) recall of a product, or material failure of a product that risks endangering health or safety.

15 U.S.C. 7003(b)(2)(A)-(D) (2000).

d For all other purposes, the effect of this section is to leave to state law the procedures for obtaining and validating an electronic signature. The Virginia Electronic Transactions Act provides: “If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.”

e This provision is similar to § 55-551.02 of the Virginia Uniform Trust Code.

3. § 26-74.03 (UPOAA §403). Effect on Existing Powers of Attorney.

a The UPOAA applies to a power of attorney created before, on, or after July 1, 2010.

b The UPOAA applies to a judicial proceeding concerning a power of attorney commenced on or after July 1, 2010.

c The UPOAA applies to a judicial proceeding concerning a power of attorney commenced before July 1, 2010, unless:

(i) The court finds that the application of a provision of the UPOAA would substantially interfere with the effective conduct of the judicial proceeding; or

(ii) prejudice the rights of a party.

d The UPOAA does not affect any action taken by an agent or third party before July 1, 2010.

IV. CONCLUSION

Powers of attorney are evolving from the common law of agency and are steadily moving toward becoming creatures of statutory law. Powers of attorney have always been popular, primarily because they are considered an inexpensive, easy alternative to guardianships and conservatorships. However, the common law was developed for supervised agency relationships where the principal was still competent to supervise his agent's actions. The common law does not take into account that most powers of attorney are now durable and last beyond a principal's incapacity. Therefore, the common law has become inappropriate to address powers of attorney. A comprehensive statutory framework is warranted in every state to ensure that default rules are in place when a principal is incapacitated and unable to supervise his agent and to protect third parties.

A. The UPOAA was reintroduced into the 2010 Session of the General Assembly.

B. When enacted, the Virginia UPOAA will vastly improve the laws related to powers of attorney in Virginia for the following reasons:¹¹⁴

1. The UPOAA seeks to preserve powers of attorney as a low-cost, flexible and private form of surrogate decision-making.

¹¹⁴ *Summary of the Uniform Power of Attorney Act* (2006), The National Conference of Commissioners on Uniform State Laws, www.nccusl.org.

2. The UPOAA encourages acceptance of powers of attorney by third parties by providing broad protection for good faith acceptance or refusal of an acknowledged power of attorney by third parties.

3. The UPOAA provides sanctions for unreasonable refusal of an acknowledged power of attorney.

4. The UPOAA provides protection for principals with:
 - a mandatory and default fiduciary duties for the agent;

 - b liability for agent misconduct;

 - c broad standing for judicial review; and

 - d the requirement for express language to grant certain authority that could dissipate the principal's property or alter the principal's estate plan.

5. The UPOAA recognizes that an agent who acts with care, competence, and diligence for the benefit of a principal should not be liable solely because the agent also benefits from the act or has conflicting interests.

6. The UPOAA assists in the drafting of powers of attorney by providing:
 - a modern definitions of authority that can be granted to an agent by incorporation by reference to descriptive terms; and

- b Default provisions that can be customized to suit the principal.
7. The VBA has modified the UPOAA to retain popular existing Virginia rules concerning:
- a Discovery by third parties of the acts of the agent, and
 - b Anti-Casey gift rules.¹¹⁵
- C. The VBA further modified the UPOAA to add more protections for consumers.
- 1. The statutory short form was deleted from the UPOAA because it was viewed by many as being too powerful. There was fear that consumers may execute the short form without receiving appropriate legal counsel.
 - 2. The UPOAA was modified to provide that the risk of loss for acceptance of a forged power of attorney will rest with the third party who accepted it rather than with the purported principal.
 - 3. The UPOAA was modified to mandate that third parties use commercially reasonable systems to disseminate information among employees concerning powers of attorney in order to receive protection under the UPOAA. Third parties will be held to a reasonable negligence standard in this regard.

¹¹⁵ See II (A)(16)(c), *supra*.

V. ADDITIONAL UPOAA RESOURCES

- A. Attachment A consisting of the Virginia UPOAA.
- B. Andrew H. Hook, 859-2nd T. M., *Durable Powers of Attorney*, (2008).
- C. Virginia General Assembly, Legislative Information System, 2009 Session, SB 855, <http://leg1.state.va.us/>
- D. Restatement of the Law of Agency (Third), The American Law Institute (2005).
- E. Stiegel and Klem, *Power of Attorney Abuse: What the States Can Do About It*, American Bar Association Commission on Law and Aging, AARP Public Policy Institute (2008), www.aarp.org/ppi
- F. *Summary of the Uniform Power of Attorney Act* (2006), The National Conference of Commissioners on Uniform State Laws, www.nccusl.org