The Uniform Power of Attorney Act ("UPOAA" or "the Act") was reenacted by the 2010 Session of the General Assembly. The 2009 legislation mandated this before it could become effective. The Act is now waiting the Governor's signature. Once signed into law it will apply both to powers of attorney ("POA") signed prior to and after the Act's effective date. The UPOAA will not apply, however, (1) to powers to make arrangements for burial or disposition of remains, (2) powers created on forms prescribed by governmental agencies for a governmental purpose (the IRS form POA, for example), (3) powers coupled with an interest in the property subject to the power, or (4) powers to make health care decisions.

UPOAA is divided into four parts: (1) general provisions containing rules, duties and sanctions; (2) powers; (3) forms; and (4) miscellaneous and administrative provisions.

One item deleted in the 2010 version of UPOAA was the optional statutory short form POA that was in the 2009 version. However, under the 2010 version of UPOAA, a POA can be significantly shortened since many powers can be incorporated by simply making a reference to the statutory provisions in the Act (a reference, for example, to §26-72.04 of the Code would incorporate all the general powers dealing with real estate) or by making a reference to general authority with respect to the descriptive term (a reference in the POA indicating that the agent has general powers with respect to real estate would be deemed to include all the powers dealing with real estate that are enumerated in the UPOAA). Powers covered by these provisions deal with real estate, tangible personal property, stocks and bonds, commodities and options, banks and other financial institutions, operation of a business or entity, insurance and annuities, estates, trusts, and other beneficial interests, claims and litigation, personal and family maintenance, benefits from government programs or civil or military service, retirement plans, taxes, and gifts. There are limitations on gifts and absent specific authority spelled out in the POA, gifts for a donee may not exceed the annual federal gift tax exclusion amount.

In addition to these general powers, there are some "hot powers" that must be spelled out in the POA in order for the agent to have them. These include (1) the agent's ability to make gifts in excess of the annual exclusion amount; (2) the ability to create or change rights of survivorship; (3) the ability to create or change beneficiary designations; (4) the right to create, amend, revoke, or terminate a living trust; (5) the ability to delegate authority granted under the POA; and (6) the ability to exercise fiduciary powers that the principal has the authority to delegate.

UPOAA contains many default rules that can be modified as the principal wishes. For example, powers of attorney will be presumed to be durable in the event of disability. Also, a spouse-agent's authority under a POA will terminate upon a legal separation of the agent and the principal or upon the filing by either party of an action for divorce or annulment. There is a default rule that the agent is entitled to reasonable compensation and reimbursement of expenses reasonably incurred on the principal's behalf. The drafter of the POA might want to spell out in detail the method by which the compensation is to be calculated or, if no compensation is planned, indicate that fact in the document. Any of these default rules can be overridden by the terms of the POA itself.
Although not required to be notarized, a notarized POA carries with it the presumption of validity and the genuineness of the principal’s signature. This provision is designed to make a POA more readily acceptable by third parties since a person who in “good faith” accepts the POA without actual knowledge of the invalidity of the POA or the termination of the agent’s authority to act is protected from the agent’s wrongdoing. This represents a shift in Virginia law by placing the risk of loss on the principal rather than on the third party who in “good faith” accepts the POA.

A third party can refuse to accept an unacknowledged POA. Also, under UPOAA witnesses to the principal’s signature are not required. Because some states such as Florida do require two witnesses, it is probably wise to have a POA not only acknowledged by a notary public but also to have it witnessed by two people. Although not spelled out in the Act itself, the drafter of the POA should also consider whether or not there might ever be a need to have the POA recorded. For example, quite often in real estate transactions where an agent is signing for the principal, there will be a requirement for the POA to be recorded. Here or in any other situation where there is any possibility of the need to record the POA, it should be drafted in such a way that it meets the recordation requirements under the Code. This not only requires acknowledgement of the principal’s signature but also the following: (1) an indication on page one of the POA of the name of the person who drafted the document; (2) underscoring or capitalizing the surname of the principal and the agent whose names should appear on the first page; (3) numbering of each page; and (4) indicating that the principal is “the Grantor” and that the agent is “the Grantee” on page one of the POA.

The Act provides that photocopies as well as electronically transmitted copies of a POA have the same effect as the original. Delivery of the POA to the agent is not required and as long as the agent has a copy that is otherwise valid, the agent is presumed to possess the power and authority granted by the POA. The Act provides that the POA is effective when it is executed unless there is a provision in the POA that provides it becomes effective at a later date or upon the occurrence of a particular event.

Under UPOAA, someone being asked to rely upon a POA may now request (1) the agent’s certification under oath of any factual matters concerning the principal, the agent, or the POA or (2) an opinion of counsel as to matters of law concerning the POA if they spell out in writing the reason for the request or (3) an English translation of any portion of the POA that is in a language other than English. Except in certain limited circumstances, the person being asked to rely on the POA must either request the certification, opinion, or translation or else accept the POA within seven business days of its being presented for acceptance. A person requesting one of these three items must accept the POA within five business days after receipt of the translation, certification, or opinion unless the person (1) has actual knowledge that the POA or the agent’s authority has been terminated; (2) the person in “good faith” believes that the POA is not valid or that the agent does not have the authority to perform the act requested; (3) the person is not otherwise required to engage in the transaction (for example, the agent wants to open a bank account in an institution where neither the agent nor the principal have an existing relationship); or (4) a report has been made to the local adult protective services department stating a good faith belief that the principal may be subject to physical or financial abuse by the agent or a person acting for or with the agent. A person refusing to accept the POA in violation of these rules is subject to a court order mandating acceptance of the POA and liability for reasonable legal fees and costs incurred in an action or proceeding that confirms the validity of the POA and mandates its acceptance. These provisions will hopefully stop the practice of some institutions arbitrarily insisting that a POA be on its special form before being accepted.

UPOAA will affect most everyone in the financial industry, brokers, and the insurance industry. Because there is much more in UPOAA than what is covered in this newsletter, it is important for those industries who are asked to rely on an agent’s use of a POA to become very familiar with all of the new Act’s provisions.
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