



Uniform Law Commission

The National Conference of Commissioners on Uniform State Laws



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Power of Attorney Summary

The concept of a "power of attorney" was first incorporated into the Uniform Probate Code in 1969 to offer an inexpensive method of surrogate decision making to those whose modest assets did not justify pre-incapacity planning with a trust or post-incapacity property management with a guardianship. After more than three decades, the durable power of attorney is now used by both the wealthy and the non-wealthy for incapacity planning as well as convenience. The Uniform Power of Attorney Act (2006) (UPOAA) is necessary because over the years many states adopted non-uniform provisions to deal with issues on which the Uniform Probate Code and the original Uniform Durable Power of Attorney Act are silent. The UPOAA, which provides uniformity on these issues, enhances the usefulness of durable powers while protecting the principal, the agent, and those who deal with the agent.

A national study of durable powers of attorney, conducted in 2002, revealed the need to address numerous issues not contemplated in the original Uniform Durable Power of Attorney Act such as the authority of multiple agents, the authority of later-appointed guardians, and the impact of dissolution or annulment of the principal's marriage to the agent. The study also revealed other topics about which the states had legislated, although not necessarily in a divergent manner, including: successor agents, execution requirements, portability, sanctions for dishonor of a power of attorney, and restrictions on powers that alter a principal's estate plan. In a national survey, trust and estate lawyers' responses demonstrated a high degree of consensus about the need to improve portability and acceptance of powers of attorneys as well as the need to better protect incapacitated principals.

The UPOAA, which supersedes the Uniform Durable Power of Attorney Act, the Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code, consists of four articles. The first contains all of the general provisions that pertain to creation and use of a power of attorney. While most of these provisions are default rules that can be altered by the power of attorney, certain mandatory provisions in Article 1 serve as safeguards for the protection of the principal, the agent, and persons who are asked to rely on the agent's authority. Article 2 provides default definitions for the various areas of authority that can be granted to an agent. The genesis for most of these definitions is the Uniform Statutory Form Power of Attorney Act (1988); however, the language is updated where necessary to reflect modern day transactions. Article 2 also identifies certain areas of authority that must be granted with express language because of the propensity of such authority to dissipate the principal's property or alter the principal's estate plan. Article 3 contains an optional statutory form that is designed for use by lawyers as well as lay persons. Step-by-step prompts are given for designation of the agent, successor agents, and the grant of authority. Article 3 also contains a sample agent certification form. Article 4 contains miscellaneous provisions concerning the relationship of the Act to other law and pre-existing powers of attorney.

The UPOAA seeks to preserve the durable power of attorney as a low-cost, flexible, and private form of surrogate decision making while deterring use of the power of attorney as a tool for financial abuse of incapacitated individuals. It contains provisions that encourage acceptance of powers of attorney by third persons, safeguard incapacitated principals, and provide clearer guidelines for agents.

The UPOAA provides broad protection for good faith acceptance or refusal of an acknowledged power of attorney, consequences for unreasonable refusal of an acknowledged power of attorney and recognition of the portability of powers of attorney validly created under other law. The Act seeks to address the problem of arbitrary refusals of powers of attorney by entities such as banks, brokerage houses, and insurance companies. With respect to liability for refusal of a power of attorney, the Act provides adopting states with two choices: Section 120, Alternative A, sets out liability parameters for refusal of any acknowledged power of attorney not excluded by the statutory safe harbors. Section 120, Alternative B, applies only to refusals of acknowledged statutory form powers of attorney. As an

additional protective measure for the principal, both alternative Sections 120 allow refusal of an otherwise valid power of attorney if the person believes 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" and makes or knows that another person has made a report to Adult Protective Services (or the equivalent governmental agency).

Protections for the principal under the UPOAA are multi-faceted and include: mandatory as well as default fiduciary duties for the agent; liability for agent misconduct; broad standing provisions for judicial review of the agent's conduct; and the requirement of express language to grant certain authority that could dissipate the principal's property or alter the principal's estate plan. Mandatory duties include acting in good faith, within the scope of the authority granted and according to the principal's reasonable expectations (or, if unknown, the principal's best interest). Default duties that can be varied in the power of attorney include the duty to preserve the principal's estate plan (subject to certain qualifications) and the duty to cooperate with the person who has the principal's health-care decision making authority.

The UPOAA recognizes that many agents are family members who have inherent conflicts of interest, but that these conflicts may not, in and of themselves, prevent an agent from acting competently for the principal's benefit. While it is well-accepted that an agent under a power of attorney is a fiduciary, most state statutes do not specify what that means. The UPOAA addresses this dilemma in a default provision which recognizes that an agent who acts with care, competence and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has conflicting interests. Furthermore, the Act permits the principal to include in the power of attorney an exoneration clause for the benefit of the agent. Another provision that operates to the benefit of both the principal and the agent is one requiring notice of an agent's resignation. If the agent cannot effectively notify the principal because the principal is incapacitated, the provision gives a hierarchy of persons to whom the agent may give notice, including a governmental agency having authority to protect the welfare of the principal.

In the final analysis, there may be no perfect solution to meet the surrogate decision making needs of our aging society, but the UPOAA balances the competing interests at stake with legislative reforms that enhance the usefulness of durable powers while at the same time protecting the principal, the agent, and those who deal with the agent.

[Home](#) | [Acts](#) | [Committees](#) | [Legislation](#) | [Meetings](#) | [News](#) | [About ULC](#)

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Why States Should Adopt UPOAA

The Uniform Law Commission first incorporated the concept of a "power of attorney" in the 1969 Uniform Probate Code, revising it again in 1987. Originally viewed as an inexpensive method of surrogate decision making for people of modest means, the durable power of attorney is now widely used by Americans for incapacity planning as well as convenience. The **Uniform Power of Attorney Act (2006) (UPOAA)**, if widely enacted, will clarify and modernize this now largely divergent law. Every state should adopt UPOAA because it:

- Preserves the effectiveness of durable powers as a low-cost, flexible, and private form of surrogate decision-making.
- Provides mandatory provisions that provide safeguards for the protection of the principal, the agent, and persons who are asked to rely on the agent's authority.
- Modernizes the various areas of authority that can be granted to an agent and requires express language authorization by the principal where certain authority could dissipate the principal's property or alter the principal's estate plan.
- Provides step by step prompts are given for designation of agent, successor agents, and the grant of authority through an optional statutory form.
- Offers clearer guidelines for the Agent, who is often a trusted family members such as:
 - Recognizes that an agent who acts with care, competence and diligence for the best interest of the principal is not liable solely because he or she also benefits from the act or has conflicting interests
 - Permits a Principal to include in the power of attorney an exoneration provision for the benefit of the agent.
 - Provides ways for the Agent to give notice of resignation if the Principal is incapacitated.
- Encourages acceptance of a power of attorney by third parties by:
 - Provides broad protections for the good faith acceptance or refusal of an acknowledged power of attorney.
 - Recognizes portability of powers of attorney validly created in other states.
 - Offers an additional protective measure for the Principal by providing that third persons may refuse the power if they have the belief that "the principal may be subject to physical or financial abuse, neglect, exploitation or abandonment by the Agent or person acting for or with the agent, make a report to the appropriate adult protective service agency."

The **Uniform Power of Attorney Act (2006)** will enhance the usefulness of durable powers while at the same time protecting the principal, the agent, and those who deal with the agent. It should be enacted in every jurisdiction as quickly as possible.

[Home](#)[Acts](#)[Committees](#)[Legislation](#)[Meetings](#)[News](#)[About
ULC](#)