

Power of Attorney Abuse: What States Can Do About It

A Comparison of Current State Laws with the New Uniform Power of Attorney Act

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EXECUTIVE SUMMARY

A power of attorney (POA) is a legal document used by individuals to allow someone else to act on their behalf, commonly recommended by elder law and estate planning attorneys as a tool for planning for incapacity. In most cases when used for this purpose, the POA specifies that it will continue if incapacity occurs, and it is known as a durable power of attorney.

Powers of attorney are regulated by state law. In 2006, the Uniform Law Commissioners (ULC), who draft and propose specific statutes in areas of the law where uniformity among the states is desirable, approved the Uniform Power of Attorney Act (UPOAA or Act). Among other goals, the UPOAA aims to promote autonomy and prevent, detect, and redress power of attorney abuse. The Act defines a POA as durable unless otherwise indicated by the person who creates it, and this report will use the term POA to include durable powers (unless that would be inconsistent with a title or text of a referenced document).

The primary goal of this report is to inform state legislators, policymakers, practitioners, and advocates about the UPOAA provisions that protect against POA abuse and promote autonomy, and to support enactment efforts within the states. The report provides background on POAs and their use and misuse. In addition, it gives readers—including legal professionals—information about their own state’s laws and the laws of other states, explains why the UPOAA was developed, and identifies and discusses the relevant UPOAA provisions.

The report provides a series of charts that compares the state POA laws in effect on December 31, 2007, to each relevant provision of the UPOAA. A master chart of all provisions allows readers to assess (1) whether their state law has provisions related to protecting against POA abuse or preserving autonomy similar to the UPOAA provisions and (2) how their state law compares to those of other states. Finally, the report includes materials aimed at helping advocates to promote adoption of the UPOAA provisions in their state.

Through the charts, this report highlights key provisions of the UPOAA that benefit and protect people who execute powers of attorney, such as the following:

- The clear statement of an agent’s duties, including the agent’s responsibility to act in good faith, within the scope of authority granted, and according to the principal’s known expectations or best interests—as well as more specific duties such as preserving the principal’s estate plan, keeping careful records, and cooperating with the principal’s health care proxy (sections 114(a) and (b));
- The mandate that express language is required to give the agent “hot powers,” which authorize actions with a particularly high propensity for dissipating the principal’s property or altering the estate plan, such as creating a trust, making a gift, or changing a beneficiary designation (sections 201 and 301);
- The provision that a third party may refuse to honor a POA when there is good faith belief that the principal may be subject to abuse, and the requirement that the third

person make a report to adult protective services (section 114(h); Alternative A, section 120(b); and Alternative B, section 120(c))

- The provision that an agent found liable for violating the Act must restore the value of the principal's property to what it would have been had the agent not breached his or her duties and reimburse any attorney's fees and costs advanced from the principal's property to defend the agent (section 117); and
- The imposition of sanctions for an unlawful refusal by a third party to accept a POA (Alternative A, section 120(c) and Alternative B, section 120(d)).

These and other provisions of the UPOAA enhance the effectiveness of a POA as a planning tool and help to prevent, detect, or remedy abuse of this legal instrument.

The analysis in this report's narrative and the detailed charts within the report serve as a yardstick for each state's current law and a guide for improving protections through legislative reform and drafting stronger individual documents. Advocacy tips and a fact sheet for states (developed by the ULC) will aid in efforts to enact the UPOAA.

INTRODUCTION

“Ronald Slomski is described as a man who married a woman with two daughters, whom he helped raise to adulthood. Slomski named his step-daughters as the successor beneficiaries of both his pension plan and will. Because he and his wife both became ill, Slomski gave his mother broad authority under a general power of attorney to handle his affairs. Slomski’s wife predeceased him by six months. Two weeks before Slomski’s own death, his mother instructed his employer to change the beneficiaries on his pension plan to his siblings. The office manager, who was described as uneasy about the change, consulted the company’s lawyer, but then permitted Slomski’s mother to make the beneficiary changes because she had the authority under Slomski’s power of attorney to ‘exercise all powers with respect to retirement plans that the principal could if present.’ As stated in the newspaper account, by the time Slomski died, ‘[e]verything he had saved had been moved beyond the reach of the heirs designated in his will.’

“Sadly, there may be no recourse under Pennsylvania law for Slomski’s step-daughters because Slomski’s mother had actual authority to change the beneficiary designations and these changes did not amount to self dealing in the technical sense.”²

A power of attorney (POA) is a type of legal document used by individuals to allow someone else to act on their behalf temporarily for purposes of convenience or, as often recommended by elder law and estate planning attorneys, for purposes of planning for incapacity. In most states, the latter purpose necessitates the use of a POA that specifies that it will continue if incapacity occurs, and such a POA is known as a durable power of attorney (DPA). The Slomski case offers an example of the problems increasingly associated with POAs, durable or otherwise. At the same time, the case demonstrates the benefits of the new Uniform Power of Attorney Act (UPOAA or Act), which contains a number of provisions related to (1) preventing, detecting, and remedying POA abuse and (2) promoting the autonomy of the individual who makes the POA. The Slomski stepdaughters might have been able to successfully challenge the agent’s actions had the UPOAA been in effect in their jurisdiction.

In keeping with the UPOAA’s new definition of a POA as durable unless otherwise indicated by the person who is authorizing someone else to act on his or her behalf,³ this report will use the term POA rather than DPA unless doing so would be inconsistent with the terminology used in the title or text of a document discussed in the report. Furthermore, this report will generally use “protect against POA abuse and promote autonomy” as shorthand for the concepts of (1) preventing, detecting, and remedying POA abuse and (2) promoting the autonomy of the individual who makes the POA.

2 The description of this case and how it might have been redressed had the Uniform Power of Attorney Act been law in Pennsylvania is quoted directly from Linda S. Whitton, “The Uniform Power of Attorney Act. Striking a Balance Between Autonomy and Protection,” *Phoenix L. Rev. Symposium*, 10-13 (Jan. 25, 2008). The quotations within Professor Whitton’s description are from Dennis P. Roddy, “Courting Trouble: The document granting ‘power of attorney’ often leads to abuse,” *Pitt. Post-Gazette*, Sept. 2, 2007, <http://www.post-gazette.com/pg/07245/814095-84.stm>.

3 Unif. Power of Atty Act, § 104 (2006).

The primary goal of this report is to inform state legislators, policymakers, practitioners, and advocates about the UPOAA provisions that protect against POA abuse and promote autonomy, and to support enactment efforts within the states. The secondary goal is to offer legal professionals information about their own state's law and the laws of other states. The latter information may foster inclusion of additional protections in the POA those professionals draft for clients, as well as inform advocacy efforts by the state bar association or other organizations.

Toward those goals, this report highlights the problem of POA abuse, explains why the UPOAA was developed, and identifies and discusses the UPOAA provisions related to protecting against POA abuse and promoting autonomy. It provides a series of charts that compare the state POA laws in effect on December 31, 2007, to each relevant provision of the UPOAA, as well as a master chart for all provisions. Finally, the report's appendixes include tips for advocates who desire to promote adoption of the UPOAA provisions in their state, a document titled "Why States Should Adopt the Uniform Power of Attorney Act (2006)," and a chart of citations to state POA laws.

The UPOAA with Prefatory Note and Comments is available on the Internet at www.law.upenn.edu/bll/archives/ulc/dpoaa/2006final.htm. Background information, including drafts, memoranda, and an analysis of statutory research and survey results, is available at www.law.upenn.edu/bll/archives/ulc/ulc.htm#dpoaa.

Terminology

This report uses a number of terms that require definition. Some of these definitions are taken from the UPOAA, because it provides a clear and current statement of the meaning of these terms.

- The "principal" is "an individual who grants authority to an agent in a power of attorney."⁴
- The "agent" is "a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated."⁵
- A "power of attorney" (POA) is a "writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used."⁶ An agent's authority ends if the principal revokes that authority or if the principal dies. Under most state statutes, the agent's authority also ends if the principal becomes incapacitated and cannot revoke the agent's authority unless

(continued)

4 Unif. Power of Atty Act, § 102(9) (2006).

5 Unif. Power of Atty Act, § 102(1) (2006).

6 Unif. Power of Atty Act, § 102(7) (2006).

the principal indicates that the POA is durable. The law does this to protect incapacitated principals who are no longer able to monitor their agents and take action if the agents abuse their authority. However, the UPOAA makes a significant change by providing that a POA is durable “unless it expressly provides that it is terminated by the incapacity of the principal.”⁷

- “‘Durable,’ with respect to a power of attorney, means not terminated by the principal’s incapacity.”⁸ A “durable power of attorney” (DPA) is a POA that remains valid even if the principal becomes incapacitated and unable to revoke the agent’s authority. State laws established the DPA as an inexpensive, accessible legal tool for people who wanted to plan for the possibility of incapacity. Many people plan for incapacity to avoid the appointment of a guardian or conservator, which occurs when a court declares that a person lacks decision-making capacity and then appoints someone to make personal or property decisions on behalf of the incapacitated person.
- “Springing power of attorney” is a POA that does not become effective when the principal signs it (unlike the immediate POA, which does become effective upon signing). Instead, it springs into effect at a later time or when a certain event specified in the POA, such as a determination of the principal’s incapacity, occurs. A springing POA may also be known as a “contingent” POA.
- “‘Incapacity’ means inability of an individual to manage property or business affairs because the individual:
 - (A) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance....”⁹

NOTE: This report addresses powers concerning the principal’s finances and property. It does not address health care POAs (also known as health care proxies) that authorize an agent to make health care decisions on the principal’s behalf. A few states still have provisions authorizing health care POAs embedded in their financial power of attorney law, but the recent trend has been to have separate laws on those issues.¹⁰

7 Unif. Power of Atty Act, § 104 (2006).

8 Unif. Power of Atty Act, § 102(2) (2006).

9 Unif. Power of Atty Act, § 102(5) (2006). The definition also contains a second part that is not relevant to the purpose of this report. That part adds the following to the definition: “or (B) is (i) missing; (ii) detained, including incarcerated in a penal system; or (iii) outside the United States and unable to return.”

10 Charles P. Sabatino, Health Care Power of Attorney and Combined Advance Directive Legislation. January 2008 (2008), <http://www.abanet.org/aging/legislativeupdates/docs/HCPA-CHT08-Final.pdf>.