

**POWERS OF ATTORNEY:  
PROPOSED AMENDMENTS to the  
PROBATE, ESTATES and FIDUCIARIES CODE**

**REPORT of the ADVISORY COMMITTEE on  
DECEDENTS' ESTATES LAWS**

**MARCH 2010**



General Assembly of the Commonwealth of Pennsylvania  
JOINT STATE GOVERNMENT COMMISSION  
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# INTRODUCTION

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## *The Advisory Committee Process*

House Resolution No. 484 (Session of 2007) directed the Joint State Government Commission to have its Advisory Committee on Decedents' Estates Laws ("Advisory Committee") study the Uniform Power of Attorney Act ("UPAA")<sup>1</sup> and Pennsylvania's current power of attorney statute<sup>2</sup> to determine whether to recommend statutory amendments.<sup>3</sup> This report is directly responsive to the resolution.

The Advisory Committee is a standing group of attorneys and judges from across the Commonwealth who assist the General Assembly by recommending improvements to Pennsylvania's Probate, Estates and Fiduciaries Code and related statutes. Since 1945, the Advisory Committee has provided expertise and advice to formulate legislation aimed at modernizing Pennsylvania law.

In 1995, the Advisory Committee formed a subcommittee to recurrently review the law regarding guardianships and powers of attorney. The Subcommittee on Guardianships and Powers of Attorney<sup>4</sup> provided the initial review of the UPAA and Pennsylvania's current power of attorney statute. Throughout 2009 and 2010, the Subcommittee held numerous teleconferences to discuss the subject of powers of attorney

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<sup>1</sup> The UPAA, © 2006 by the National Conference of Commissioners on Uniform State Laws (NCCUSL), includes comments to the statutory provisions and is reprinted with permission in this report, *infra* pp. 135-206. At its annual conference in July 2006, NCCUSL approved and recommended that states enact the UPAA. Because the UPAA is referenced and quoted throughout this report, the uniform statutory provisions and comments are replicated in their entirety.

<sup>2</sup> 20 Pa.C.S. Ch. 56 (Chapter 56 of Title 20 of the Pennsylvania Consolidated Statutes). Title 20 (the Probate, Estates and Fiduciaries Code) also contains statutory provisions regarding health care powers of attorney. 20 Pa.C.S. Ch. 54.

<sup>3</sup> House Resolution No. 484 is replicated in the Appendix of this report, *infra* pp. 213-214. The resolution provides "[t]hat the Joint State Government Commission report its recommendations to the House of Representatives within 18 months of the adoption of this resolution." The resolution was adopted on September 16, 2008, making the report due by March 16, 2010.

<sup>4</sup> The current Subcommittee on Guardianships and Powers of Attorney consists of John J. Lombard, Jr., Esq., Chair; William R. Cooper, Esq.; Jay C. Glickman, Esq.; Neil E. Hendershot, Esq.; The Honorable Anne E. Lazarus; James F. Mannion, Esq.; John F. Meck, Esq.; Michael J. Mullaugh, Esq.; The Honorable Paula Francisco Ott; William Campbell Ries, Esq. and Robert B. Wolf, Esq. In addition, The Honorable Calvin S. Drayer, Jr. and The Honorable Stanley R. Ott were invited to participate in the subcommittee's review and discussion process.

and how to improve Pennsylvania law.<sup>5</sup> The Subcommittee subsequently submitted a draft report containing its findings and recommendations for consideration by the Advisory Committee. At its February 4, 2010 meeting, the Advisory Committee discussed the draft report and reached consensus on the proposed amendments to the Probate, Estates and Fiduciaries Code, which are contained in this report.<sup>6</sup>

### *General Observations*

The Advisory Committee recognized that although the UPAA is better organized and more thorough and specific than Pennsylvania's current power of attorney statute, many of its best principles are already incorporated into 20 Pa.C.S. Chapter 56. The Advisory Committee acknowledged a general sense of satisfaction among practitioners regarding Pennsylvania's current power of attorney statute. Accordingly, it did not favor the wholesale adoption of the uniform act, instead opting to recommend discrete amendments to 20 Pa.C.S. Chapter 56 to address specific concerns or problems encountered by practitioners and others.

The primary concern evidenced by the court system and commentators regarding durable powers of attorney is the potential for abuse by agents seeking to enrich themselves or benefit those close to them, such as through the altering of the principal's estate plan. Nevertheless, durable powers of attorney are very helpful tools for handling the principal's financial matters as well as for planning purposes; their inexpensive and private nature contrasts with the guardianship alternative. Therefore, the Advisory Committee reasoned that any statutory amendment to 20 Pa.C.S. Chapter 56 should preserve what is best about powers of attorney in Pennsylvania: their privacy, expediency and efficiency.

The Advisory Committee also reviewed several provisions of 20 Pa.C.S. Chapter 54 regarding health care powers of attorney since 20 Pa.C.S. § 5602(a)(8), (9) and (23) and § 5603(h) and (u.1) currently permit a principal to incorporate by reference in a power of attorney the power to (1) authorize the principal's admission to a facility and enter into agreements for the principal's care, (2) authorize medical and surgical procedures and (3) make an anatomical gift of all or part of the principal's body. The Advisory Committee observed that several amendments to 20 Pa.C.S. Chapters 54 and 56 were appropriate regarding health care decision-making.

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<sup>5</sup> Between April 2009 and January 2010, the Subcommittee formally met as a group via teleconference on seven occasions in 2009 (April 21, June 23, August 24, October 2, November 2, November 19 and December 18) and two occasions in 2010 (January 13 and January 28).

<sup>6</sup> Subsequent to the February 4, 2010 annual meeting of the Advisory Committee, the Subcommittee on Guardianships and Powers of Attorney met as a group via teleconference on two separate occasions to refine the proposed statutory amendments concerning powers of attorney, based on the consensus reached at the February 4 meeting.

## *Statutory History of Pennsylvania's Power of Attorney Provisions Under 20 Pa.C.S. Chapter 56*

In 1982, Pennsylvania repealed its existing power of attorney provisions and added a new 20 Pa.C.S. Chapter 56, which included the following provisions: general provision (§ 5601), form of power of attorney (§ 5602), implementation of power of attorney (§ 5603), durable powers of attorney (§ 5604), power of attorney not revoked until notice (§ 5605), proof of continuance of durable or other powers of attorney by affidavit (§ 5606) and corporate attorney-in-fact (§ 5607).<sup>7</sup> For the first time, Pennsylvania enacted provisions regarding enumerated powers that could be incorporated by reference. The enumerated powers under § 5602(a), which were defined in § 5603, included the power (1) either “to make gifts”<sup>8</sup> or “to make limited gifts”; (2) “to create a trust for my benefit”; (3) “to make additions to an existing trust for my benefit”; (4) “to claim an elective share of the estate of my deceased spouse”; (5) “to disclaim any interest in property”; (6) “to renounce fiduciary positions”; (7) “to withdraw and receive the income or corpus of a trust”; (8) “to authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care” and (9) “to authorize medical and surgical procedures.”

Act No. 24 of 1992<sup>9</sup> amended 20 Pa.C.S. §§ 5603(d) and (e) and 5604(c) to change the term “incompetent” to “incapacitated person.”

Act No. 152 of 1992<sup>10</sup> amended 20 Pa.C.S. Chapter 56 in several ways.<sup>11</sup> The act added provisions concerning execution requirements (§ 5601(b)) and liability (§ 5608). It specified that all powers of attorney are durable unless specifically provided otherwise in the power of attorney (§ 5601.1), that a principal may provide for the delegation of one or more powers to another person (§ 5602(b)(1.1)) and that divorce revokes the

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<sup>7</sup> Act No. 26 of 1982 repealed existing 20 Pa.C.S. Chapter 56, which was added December 10, 1974 (P.L. 899, No. 295), and replaced it with the current statutory framework. The act, which was approved February 18, 1982 and made effective immediately, applied to all powers of attorney executed on or after February 18, 1982 but did not limit the effectiveness of powers of attorney in effect prior to that date.

<sup>8</sup> The power “to make gifts” meant that the attorney-in-fact (*i.e.*, the agent) “may make gifts for and on behalf of the principal to any donees (including the attorney-in-fact) and in such amounts as the attorney-in-fact may decide.”

<sup>9</sup> Approved Apr. 16, 1992 and made effective in 60 days.

<sup>10</sup> Approved Dec. 16, 1992 and made effective immediately.

<sup>11</sup> The amendment of § 5604(b) (relating to durable powers of attorney) applied to instruments, trusts and the estates of decedents whether the instrument was executed, the trust was created or the decedent died before, on or after December 16, 1992. The amendment of §§ 5601.1 (relating to powers of attorney presumed durable) and 5605(c) (relating to powers of attorney not revoked until notice) applied to powers of attorney executed on or after December 16, 1992. The remaining amendments in the act applied beginning with December 16, 1992.

designation of a principal's spouse as the principal's attorney-in-fact unless it appears from the power of attorney that the designation was intended to survive the divorce (§ 5605(c)). The act also amended §§ 5603, 5604 and 5606 and added thirteen more enumerated powers under § 5602, which were defined in § 5603 and included the power (1) "to engage in real property transactions"; (2) "to engage in tangible personal property transactions"; (3) "to engage in stock, bond and other securities transactions"; (4) "to engage in commodity and option transactions"; (5) "to engage in banking and financial transactions"; (6) "to borrow money"; (7) "to enter safe deposit boxes"; (8) "to engage in insurance transactions"; (9) "to engage in retirement plan transactions"; (10) "to handle interests in estates and trusts"; (11) "to pursue claims and litigation"; (12) "to receive government benefits" and (13) "to pursue tax matters." The act provided that all the enumerated powers "shall be exercisable with respect to any matter in which the principal is in any way interested at the giving of the power of attorney or thereafter and whether arising in this Commonwealth or elsewhere" (§ 5603(v)).

Act No. 102 of 1994<sup>12</sup> added another enumerated power under § 5602(23), the power "to make an anatomical gift of all or part of my body," which was defined in § 5603(u.1).<sup>13</sup>

Act No. 39 of 1999<sup>14</sup> amended 20 Pa.C.S. Chapter 56 in significant ways. The term "attorney-in-fact" was changed to "agent" throughout the chapter because "agent" is a more commonly understood term. In § 5601, the execution requirements were amended (subsection (b)),<sup>15</sup> a notice requirement and form were added (subsection (c)),<sup>16</sup> an acknowledgment requirement and form were added (subsection (d)),<sup>17</sup> an agent's fiduciary relationship with the principal was set forth (subsection (e))<sup>18</sup> and the term

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<sup>12</sup> Approved Dec. 1, 1994 and made effective in 90 days.

<sup>13</sup> The amendment of §§ 5602 and 5603 applied beginning with the effective date of the act.

<sup>14</sup> Approved Oct. 12, 1999.

<sup>15</sup> The amendment of § 5601(b) enabled an individual to execute a principal's power of attorney at the direction of the principal, but the third-party execution would need to be witnessed by two other individuals. The amendment also mandated that a witness be at least 18 years old.

<sup>16</sup> The amendment of § 5601(c) required all powers of attorney to include the statutory notice. If a power of attorney would contain the signed notice provision, the burden of demonstrating an agent's impropriety in exercising a power would fall to the person challenging the action. If the power of attorney would not contain the notice provision, the agent would carry the burden of demonstrating the propriety of a challenged action. The shifting burden was intended to protect a principal and provide a sanction for an agent operating under a power of attorney with no signed notice provision.

<sup>17</sup> The amendment specified that an agent could execute the acknowledgment at any time (not just when the principal executes the power of attorney), but the agent could not properly act until the acknowledgment would be executed.

<sup>18</sup> Subsection (e) did not create a duty to act on the part of the agent. However, the agent would need to comply with the provision when acting pursuant to the power of attorney.

“agent” was defined (subsection (f)). The enumerated power “to make gifts” was repealed in §§ 5602 and 5603, and new § 5601.2 provided special rules for gifts.<sup>19</sup> Section 5603(a)(2) was amended regarding the class of permissible donees, gift splitting, qualified transfers for tuition and medical care and the annual gift tax exclusions. Section 5603(u.1) was amended to specify that the power to make an anatomical gift meant that the agent could arrange and consent to procedures to make an anatomical gift either before or after the death of the principal. Section 5605(c) was amended to provide that if a principal designated his or her spouse as agent and thereafter either the principal or spouse filed an action for divorce, the designation was revoked as of the time of the filing, unless it appeared from the power of attorney that the designation was intended to survive the filing.<sup>20</sup> Section 5607 was amended to ensure that the section was consistent with § 106 of the Banking Code of 1965.<sup>21</sup> Finally, the act added new §§ 5609 (compensation and reimbursement for expenses), 5610 (account) and 5611 (validity). Act No. 39 had complex transitional language provisions, with the addition of § 5601(c) and (d) taking effect in six months and the remainder of the act taking effect in 60 days.<sup>22</sup>

Act No. 50 of 2002<sup>23</sup> added the following subsections to 20 Pa.C.S. § 5601: new subsection (e.1), to limit the applicability of the notice, acknowledgment and fiduciary relationship provisions in commercial transactions, and new subsection (e.2), to provide that the notice and acknowledgment provisions do not apply to a power of attorney that exclusively provides for health care decision making.<sup>24</sup>

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<sup>19</sup> The repeal of the ability to authorize unlimited gifts by incorporation by reference, however, did not preclude a principal from authorizing the agent to make unlimited gifts. However, the power of attorney would need to specifically provide for and define this authority (§ 5601.2(c)). New § 5601.2(a), (b) and (c) was intended to overrule *In re Estate of Reifsneider*, 610 A.2d 958 (Pa. 1992), to the extent that *Reifsneider* would permit an agent to make a gift under a power of attorney that did not specifically provide for that power. New § 5601.2(d), (e) and (f) was based on repealed § 5603(a)(3), (4) and (5).

<sup>20</sup> As a result of the amendment of § 5605(c), a conforming amendment was made to § 5606.

<sup>21</sup> Act of Nov. 30, 1965 (P.L. 847, No. 356), § 106.

<sup>22</sup> In addition, the act applied as follows: (1) the amendment or addition of §§ 5601(b), 5601.2(a), (b) and (c) and 5605(c) applied to powers of attorney executed on or after the effective date of the amendment or addition of those sections; (2) the addition of § 5601(c) applied to powers of attorney executed on or after the effective date of the addition of that subsection; (3) the addition of § 5601(d) applied to agents acting under powers of attorney executed on or after the effective date of the addition of that subsection; (4) the amendment or addition of §§ 5601.2(d) and (e) and 5603(a)(2)(i), (ii), (iv) and (v) and (u.1) applied to powers of attorney executed before, on or after the effective date of the amendment or addition of those sections; (5) the amendment or repeal of §§ 5602(a)(1) and 5603(a)(1) applied to powers of attorney executed on or after the effective date of the amendment or repeal of those sections, and such amendment or repeal did not affect the authority of an agent to make unlimited gifts under any power of attorney relying on those sections executed before the effective date of the amendment or repeal of those sections and (6) the repeal of § 5603(a)(2)(iii), (3), (4) and (5) applied beginning with the effective date of the repeal of that section. The remaining amendments in the act applied beginning with the effective date of the amendment of those sections.

<sup>23</sup> Approved May 16, 2002.

<sup>24</sup> The addition of § 5601(e.1) and (e.2) retroactively took effect April 12, 2000.

Act No. 36 of 2003<sup>25</sup> amended 20 Pa.C.S. § 5601(e.1) to add new paragraph (1)(v) to provide that the notice, acknowledgment and fiduciary relationship provisions do not apply to a dealer of new or used vehicles using the power in conjunction with a sale, purchase or transfer of a title.<sup>26</sup>

The Appendix of this report contains the statutory history of the gifting provisions under Pennsylvania's power of attorney statute.<sup>27</sup>

### ***Contents of Report***

This report contains a detailed analysis of the UPAA and 20 Pa.C.S. Chapter 56,<sup>28</sup> along with the specific recommendations of the Advisory Committee in the form of proposed legislation and official comments.<sup>29</sup> The official comments may be used in determining the intent of the General Assembly.<sup>30</sup> The uniform provisions are to be interpreted and construed to effect their general purpose to make uniform the laws of those states that enact them.<sup>31</sup> Notes may follow the individual statutory provisions. Transitional language, in the form of applicability and effective date provisions, follows the proposed legislation and official comments.<sup>32</sup> This report also contains two separate charts listing the analogous provisions of the UPAA and 20 Pa.C.S. Chapter 56.<sup>33</sup>

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<sup>25</sup> Approved Nov. 25, 2003.

<sup>26</sup> The amendment of § 5601(e.1) took effect January 26, 2004.

<sup>27</sup> *Infra* pp. 209-211.

<sup>28</sup> *Infra* pp. 15-101.

<sup>29</sup> *Infra* pp. 103-128. The specific recommendations are also discussed throughout the report.

<sup>30</sup> 1 Pa.C.S. § 1939 (“The comments or report of the commission . . . which drafted a statute may be consulted in the construction or application of the original provisions of the statute if such comments or report were published or otherwise generally available prior to the consideration of the statute by the General Assembly”).

<sup>31</sup> 1 Pa.C.S. § 1927.

<sup>32</sup> *Infra* p. 129.

<sup>33</sup> *Infra* pp. 131-134.

## SUMMARY OF RECOMMENDATIONS

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This report contains the following proposed amendments to 20 Pa.C.S. Chapter 56 (powers of attorney):

**§ 5601.** Subsection (b) is amended to provide that two witnesses are required when any power of attorney is executed, thereby changing current law, which provides that two witnesses are only required when the power of attorney is executed by mark or by another individual. The amendment makes the execution of a power of attorney under Chapter 56 consistent with the execution of a health care power of attorney under Chapter 54. However, an agent appointed under a Chapter 56 power of attorney may not be a witness. Notarization, where the specific circumstances permit, is good practice but is not required. Subsection (b) is also amended to specify that a power of attorney “shall be dated and signed by the principal,” thereby replacing “signed and dated by the principal.”<sup>34</sup>

Subsections (d) and (e) are amended to provide statutory language regarding the preservation of the estate plan of the principal, including the effect of intestacy if the principal does not have a will.<sup>35</sup>

Subsection (e.3) is new and provides that an agent and a recipient of a gift or other financial benefit, during the principal’s life or at the principal’s death, arising from the action of the agent is liable as equity and justice may require to the extent that the court determines that the action of the agent was inconsistent with (1) prudent estate planning or financial management for the principal or (2) the known or probable intent of the principal with respect to the disposition of the principal’s property. An agent who in good faith exercises reasonable caution and prudence shall not be personally liable.<sup>36</sup>

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<sup>34</sup> *Infra* pp. 18-19.

<sup>35</sup> *Infra* pp. 33-34.

<sup>36</sup> *Infra* pp. 46-47.

**§ 5601.2.** The title of § 5601.2 and subsection (a) are amended to specify that, similar to the gift provisions, a principal may empower an agent to make changes to the principal’s estate plan only in specific circumstances. A power to make a gift or make changes to the principal’s estate plan may not be inferred from a grant of another power or from a general grant of authority to do anything that the principal could do, except to the extent that a principal expressly grants the agent the power to provide for personal and family maintenance.<sup>37</sup>

Subsection (b) is amended to clarify that limited gifts authorized in compliance with this subsection do not require court approval.<sup>38</sup>

Subsection (c) is amended to change the title from “unlimited gifts” to “other gifts specifically authorized and not requiring court approval” and to clarify that other gifts specifically authorized in compliance with this subsection do not require court approval. The amendments permit a principal to authorize an agent to make a gift, which is not a limited gift under subsection (b), only by specifically identifying the donee and the gifted property or cash amounts. In addition, subsection (c)(1) specifies that the phrase “any donee” or other language showing a similar intent is not permitted.<sup>39</sup>

Subsection (c.1) is new and provides that an agent may act without court approval if the agent’s action is otherwise authorized by the power of attorney (*e.g.*, to make a beneficiary designation or create a joint account) and maintains and is consistent with the preservation of the principal’s estate plan, including the effect of intestacy if the principal has no will. An action may not be taken if the interest of any beneficiary under the principal’s existing estate plan, including an intestacy if the principal has no will, is prejudiced thereby.<sup>40</sup>

Subsection (c.2) is new and provides that an agent may make gifts or change the principal’s estate plan (such as by creating or changing rights of survivorship or a beneficiary designation; by creating an inter vivos trust or amending, revoking or terminating an existing trust; or by waiving the principal’s right to be a beneficiary of a joint and survivor annuity) only if the power of attorney expressly grants the agent the authority *and* the court approves the agent’s action, in the manner set forth in new subsection (g), after finding that the action is consistent with (1) prudent estate planning or financial management and (2) the known or probable intent of the principal with respect to the disposition of the principal’s property. If an agent

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<sup>37</sup> *Infra* pp. 91 & 94.

<sup>38</sup> *Infra* pp. 91-92 & 94.

<sup>39</sup> *Infra* pp. 92 & 94-95.

<sup>40</sup> *Infra* pp. 92 & 95.



complies with the grant of authority for gifts, the agent does not need to follow the procedures under Chapter 55 (incapacitated persons) so as to implement estate planning changes. Conversely, if the agent does not so comply, a guardianship proceeding would need to occur.<sup>41</sup>

Subsection (d)(1), in defining the nature of a limited gift, is amended to add that the agent may make a gift to each donee to a tuition savings account or prepaid tuition plan.<sup>42</sup>

Subsection (e), concerning equity and justice with respect to gifts, is repealed and replaced by § 5601(e.3) to make the concept of equity and justice applicable to all actions of an agent under Chapter 56.<sup>43</sup>

Subsection (g) is new and provides for procedures concerning court proceedings for subsection (c.2).<sup>44</sup>

**§ 5602.** Subsection (a) is amended to repeal paragraph (8) (“To authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care”), paragraph (9) (“To authorize medical and surgical procedures”) and paragraph (23) (“To make an anatomical gift of all or part of my body”). The substance of these paragraphs is being moved to Chapter 54.<sup>45</sup>

Subsection (a) is amended to broaden paragraph (17) to include annuity transactions.<sup>46</sup>

Subsection (a) is amended to add new paragraphs (24) (“To operate a business or entity”) and (25) (“To provide for personal and family maintenance”).<sup>47</sup>

Subsection (c) is amended to change the reference from “executed copy of the power of attorney” to “originally executed power of attorney.”<sup>48</sup>

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<sup>41</sup> *Infra* pp. 92-93 & 95-96.

<sup>42</sup> *Infra* pp. 93-94.

<sup>43</sup> *Infra* pp. 47, 93 & 96.

<sup>44</sup> *Infra* p. 94.

<sup>45</sup> *Infra* pp. 54-55.

<sup>46</sup> *Infra* p. 73.

<sup>47</sup> *Infra* pp. 67 & 79.

<sup>48</sup> *Infra* pp. 20-21.

Subsection (d) is new and specifies that, except for the purpose of filing at the courthouse, a photocopy or electronically transmitted copy of an originally executed power of attorney has the same effect as the original.<sup>49</sup>

**§ 5603.** Subsection (a)(2)(ii), regarding gift splitting, is amended to (1) clarify that an agent can make a gift of the principal's assets up to twice the amount of the annual exclusion if the principal's spouse indicates a willingness to "split" gifts and (2) add a provision that limited gifts to a "family unit" (which is a child and a child's descendants) can be equalized even if this means exceeding the available annual exclusions and thus using a portion of the principal's cumulative lifetime gift exemption or paying gift tax if there is an insufficient amount of such exemption remaining.<sup>50</sup>

Subsections (d) (power to claim an elective share) and (e) (power to disclaim any interest in property) are amended to eliminate as unnecessary the references to adjudication, since 20 Pa.C.S. § 102 defines an incapacitated person as "a person determined to be an incapacitated person under the provisions of Chapter 55 (relating to incapacitated person)." The determination under Chapter 55 necessarily involves an adjudication.<sup>51</sup>

Subsection (h) (power to authorize admission to medical facility and power to authorize medical procedures) is repealed, in light of Chapter 54.<sup>52</sup>

Subsection (k)(4) (power to engage in stock, bond and other securities transactions) is amended to specify that the agent may also join in any consolidation, dissolution or liquidation, thereby making the provision more parallel to 20 Pa.C.S. § 7780.6(a)(13), concerning the illustrative powers of a trustee under the Pennsylvania Uniform Trust Act.<sup>53</sup>

Subsection (p) (power to engage in insurance transactions) is amended to include annuity transactions. Paragraph (3) is amended to give an agent the authority to change a beneficiary designation but only as permitted under § 5601.2(c.1) and (c.2), which concerns actions that change an estate plan and that may or may not require court approval.<sup>54</sup>

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<sup>49</sup> *Infra* p. 21.

<sup>50</sup> *Infra* pp. 96-97.

<sup>51</sup> *Infra* p. 56.

<sup>52</sup> *Infra* p. 55. The amendments to 20 Pa.C.S. Chapter 54 are summarized *infra* p. 13.

<sup>53</sup> *Infra* p. 62.

<sup>54</sup> *Infra* pp. 73-74.

Subsection (q) (power to engage in retirement plan transactions) is amended to give an agent the authority to change a beneficiary designation but only as permitted under § 5601.2(c.1) and (c.2), which concerns actions that change an estate plan and that may or may not require court approval.<sup>55</sup>

Subsection (u.1) (power to make anatomical gift) is repealed, in light of Chapter 54.<sup>56</sup>

Subsection (u.2) is new and defines the power to operate a business or entity.<sup>57</sup>

Subsection (u.3) is new and defines the power to provide for personal and family maintenance.<sup>58</sup>

**§ 5604.** Subsection (c)(1) is amended to delete the word “adjudicated” (with respect to an incapacitated principal) in the first sentence and to delete the second sentence, which provides that the guardian has the same power to revoke or amend the power of attorney that the principal would have if the principal were not incapacitated.<sup>59</sup>

Subsection (c)(3) is new and requires the court to determine whether, and the extent to which, the incapacitated person’s durable power of attorney remains in effect and include that determination in its guardianship order.<sup>60</sup>

Subsection (d.1) is new and specifies that except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, the principal’s guardian, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or (upon the death of the principal) the personal representative or successor in interest of the principal’s estate.<sup>61</sup>

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<sup>55</sup> *Infra* pp. 84-85.

<sup>56</sup> *Infra* p. 55. The amendments to 20 Pa.C.S. Chapter 54 are summarized *infra* p. 13.

<sup>57</sup> *Infra* p. 68.

<sup>58</sup> *Infra* p. 80.

<sup>59</sup> *Infra* p. 23.

<sup>60</sup> *Id.*

<sup>61</sup> *Infra* pp. 38-39.

- § 5610. A third sentence is added clarifying that the court may assess the costs of the accounting proceeding as it deems appropriate, including the costs of preparing and filing the account.<sup>62</sup>
- § 5612. This new section authorizes the court to order an investigation, appoint a guardian ad litem, make a referral to an appropriate agency or take any other appropriate action regarding allegations of financial abuse or mismanagement against a principal by his or her agent under a power of attorney. Any such order is made upon petition by an appropriate party and a reasonable showing of the financial abuse or mismanagement. However, the court may consider information not only from the formal petition but from other sources (such as from a report by a social service agency or from other communications).<sup>63</sup>
- § 5613. This new section provides that venue of any matter pertaining to the exercise of a power by an agent acting under a power of attorney is in the county where the principal is domiciled, a resident or residing in a long-term care facility. A court may decline to exercise jurisdiction if it determines that a court of another county or state is a more appropriate forum, in which case the court shall either dismiss the proceeding or stay the proceeding upon the condition that a proceeding be promptly commenced in another county or state. The court may impose other conditions as well. This new section provides the court with maximum flexibility regarding the relevant and important factors to be used in determining whether to exercise jurisdiction.<sup>64</sup>
- § 5614. This new section supplements Chapter 56 with the common law and principles of equity.<sup>65</sup>

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<sup>62</sup> *Infra* p. 38.

<sup>63</sup> *Infra* pp. 40-41.

<sup>64</sup> *Infra* p. 41.

<sup>65</sup> *Infra* p. 46.

This report also contains the following proposed amendments to 20 Pa.C.S. Chapter 54 (health care):

- § 5422. The definition of “health care decision” is amended to include decisions regarding (1) an individual’s admission to a facility or entering into agreements for the individual’s care and (2) after the individual’s death, making anatomical gifts, disposing of the remains or consenting to autopsies.<sup>66</sup>
- § 5456. Subsection (a) is amended to specify that the health care agent’s power includes the power to authorize admission to a facility or enter into agreements for the principal’s care.<sup>67</sup>
- § 5460. Subsection (a) is amended to repeal the last sentence, which provides that the guardian has the same power to revoke or amend the appointment of a health care agent that the principal would have if the principal were not incapacitated, but the guardian may not revoke or amend other instructions in an advance health directive absent judicial authorization. Subsection (a) is also amended to add statutory language providing that in its guardianship order and determination of a person’s incapacity, the court shall determine the extent to which the health care agent’s authority to act remains in effect.<sup>68</sup>

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<sup>66</sup> *Infra* p. 53.

<sup>67</sup> *Infra* p. 54.

<sup>68</sup> *Infra* pp. 23-24.



# ANALYSIS OF THE UNIFORM ACT AND PENNSYLVANIA LAW

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## *Article 1 of the Uniform Act (General Provisions)*

### *Definitions*

The UPAA defines the following terms: agent, durable, electronic, good faith, incapacity, person, power of attorney, presently exercisable general power of appointment, principal, property, record, sign, state, and stocks and bonds.<sup>69</sup>

Conversely, 20 Pa.C.S. Chapter 56 simply defines “agent” and “durable power of attorney”:

§ 5601. General provisions.

\* \* \*

(f) Definition.--As used in this chapter, the term “agent” means a person designated by a principal in a power of attorney to act on behalf of that principal.

§ 5604. Durable powers of attorney.

(a) Definition.--A durable power of attorney is a power of attorney by which a principal designates another his agent in writing. The authority conferred shall be exercisable notwithstanding the principal’s subsequent disability or incapacity. A principal may provide in the power of attorney that the power shall become effective at a specified future time or upon the occurrence of a specified contingency, including the disability or incapacity of the principal.

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<sup>69</sup> UPAA § 102.

However, other terms defined in the uniform act may be defined elsewhere in the Pennsylvania statutes.<sup>70</sup>

The Advisory Committee recommends no amendment adding the UPAA definitions into 20 Pa.C.S. Chapter 56.

### ***Applicability***

Section 103 of the UPAA provides the following:

This [act] applies to all powers of attorney except:

- (1) a power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction;
- (2) a power to make health-care decisions;
- (3) a proxy or other delegation to exercise voting rights or management rights with respect to an entity; and
- (4) a power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.

However, 20 Pa.C.S. Chapter 56 provides a more limited version of UPAA § 103: 20 Pa.C.S. § 5601(e.1) provides for the limitation on applicability in commercial transactions, and 20 Pa.C.S. § 5601(e.2) provides for the limitation on applicability in health care powers of attorney.

The Advisory Committee recommends no amendment incorporating the uniform provision into 20 Pa.C.S. Chapter 56.

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<sup>70</sup> For example, an incapacitated person is “an adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.” 20 Pa.C.S. § 5501. A person “[i]ncludes a corporation, partnership, limited liability company, business trust, other association, government entity (other than the Commonwealth), estate, trust, foundation or natural person.” 1 Pa.C.S. § 1991. A state, “[w]hen used in reference to the different parts of the United States, includes the District of Columbia and the several territories of the United States.” *Id.*



## ***Durability***

Section 104 of the UPAA provides that a power of attorney “is durable unless it expressly provides that it is terminated by the incapacity of the principal.”

Similarly, 20 Pa.C.S. Chapter 56 provides the following:

§ 5601.1. Powers of attorney presumed durable.

Unless specifically provided otherwise in the power of attorney, all powers of attorney shall be durable as provided in section 5604 (durable powers of attorney).

§ 5604. Durable powers of attorney.

\* \* \*

(b) Durable power of attorney not affected by disability or lapse of time.--All acts done by an agent pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were competent and not disabled. Unless the power of attorney states a time of termination, it is valid notwithstanding the lapse of time since its execution.

\* \* \*

The Advisory Committee concluded that an amendment to 20 Pa.C.S. Chapter 56 regarding the durability of a power of attorney is unnecessary.

## ***Execution of a Power of Attorney***

Section 105 of the UPAA provides the following with respect to the execution of a power of attorney:

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

The execution requirements under 20 Pa.C.S. Chapter 56 are as follows:

§ 5601. General provisions.

\* \* \*

(b) Execution.--A power of attorney shall be signed and dated by the principal by signature or mark, or by another on behalf of and at the direction of the principal. If the power of attorney is executed by mark or by another individual, then it shall be witnessed by two individuals, each of whom is 18 years of age or older. A witness shall not be the individual who signed the power of attorney on behalf of and at the direction of the principal.

\* \* \*

The Advisory Committee acknowledged that the execution requirements regarding the granting of health care powers in Chapters 54 and 56 are inconsistent: under 20 Pa.C.S. § 5452(b)(2), a health care power of attorney must be witnessed by two individuals, each of whom is at least 18 years old, but under 20 Pa.C.S. § 5601(b), a power of attorney must be witnessed by two individuals, each of whom is at least 18 years old, only if the power of attorney is executed by mark or by another individual. In addition, 20 P.S. § 5452(b)(1) specifies that a health care power of attorney must be “dated and signed by the principal,” while 20 Pa.C.S. § 5601(b) specifies that a power of attorney “shall be signed and dated by the principal.”

The Advisory Committee favored amending Chapter 56 to require two witnesses in all instances, with an effective date six months after enactment to allow time for practitioners to change their procedures and forms and become acquainted with the new statutory requirements. The Advisory Committee reasoned that the two-witness requirement is more protective of the principal (*i.e.*, it lessens the possibility of undue influence and duress) and expedites future actions taken by an agent on behalf of the principal, such as in the case of a real estate transaction, where witnesses are required for the proper recordation of documents.

The Advisory Committee also favored the inclusion of a comment stating that notarization of a power of attorney at its execution is good practice but is not required.

In addition, the Advisory Committee agreed that (1) the statute should explicitly provide that an agent under a power of attorney should not act as a witness when the power of attorney is executed and (2) the “dated and signed” language should be consistent with 20 Pa.C.S. Chapter 54.

Accordingly, the Advisory Committee recommends the following statutory amendments and comment:

§ 5601. General provisions.

\* \* \*

(b) Execution.--A power of attorney shall be dated and signed [and dated] by the principal by signature or mark, or by another individual on behalf of and at the direction of the principal if the principal is unable to

sign but specifically directs another individual to sign the power of attorney. [If the power of attorney is executed by mark or by another individual, then it] The power of attorney shall be witnessed by two individuals, each of whom is 18 years of age or older. A witness shall not be an agent appointed in the power of attorney or the individual who signed the power of attorney on behalf of and at the direction of the principal.

\* \* \*

#### Comment

Two witnesses are now required for all powers of attorney under Chapter 56, not just for a principal whose power of attorney is executed by mark or by another individual at the principal's direction. This execution requirement is the same as that under Chapter 54, which concerns health care powers of attorney. However, an agent appointed under a Chapter 56 power of attorney may not be a witness. Notarization is still not required for a power of attorney, though it is universally viewed as good practice where the specific circumstances permit. A notary may act as one of the required witnesses because the notary is only taking the acknowledgment of the principal, not the witnesses.

### ***Validity of a Power of Attorney***

Section 106(a), (b) and (c) of the UPAA provides the following with respect to the validity of a power of attorney:

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

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

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

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

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

The provision under 20 Pa.C.S. Chapter 56 governing the validity of a power of attorney states the following:

§ 5611. Validity.

A power of attorney executed in another state or jurisdiction and in conformity with the laws of that state or jurisdiction shall be considered valid in this Commonwealth, except to the extent that the power of attorney executed in another state or jurisdiction would allow an agent to make a decision inconsistent with the laws of this Commonwealth.

The Advisory Committee recommends no change to this provision under 20 Pa.C.S. Chapter 56.

### *Copies of a Power of Attorney*

Section 106(d) of the UPAA provides that “[e]xcept as otherwise provided by statute other than this [act], a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.”

Although 20 Pa.C.S. Chapter 56 is generally silent on the subject matter, § 5602(c) references “an executed copy of the power of attorney,” which implies an *original* copy of a power of attorney:

An executed copy of the power of attorney may be filed with the clerk of the orphans’ court division of the court of common pleas in the county in which the principal resides, and if it is acknowledged, it may be recorded in the office for the recording of deeds of the county of the principal’s residence and of each county in which real property to be affected by an exercise of the power is located. The clerk of the orphans’ court division or any office for the recording of deeds with whom the power has been filed, may, upon request, issue certified copies of the power of attorney. Each such certified copy shall have the same validity and the same force and effect as if it were the original, and it may be filed of record in any other office of this Commonwealth (including, without limitation, the clerk of the orphans’ court division or the office for the recording of deeds) as if it were the original.

The Advisory Committee recommends the following amendment to 20 Pa.C.S. § 5602(c) because the words “executed copy” are ambiguous:

(c) Filing of power of attorney.--An originally executed [copy of the] power of attorney may be filed with the clerk of the orphans’ court division of the court of common pleas in the county in which the principal resides, and if it is acknowledged, it may be recorded in the office for the recording of deeds of the county of the principal’s residence and of each county in which real property to be affected by an exercise of the power is located. The clerk of the orphans’ court division or any office for the

recording of deeds with whom the power has been filed, may, upon request, issue certified copies of the power of attorney. Each such certified copy shall have the same validity and the same force and effect as if it were the original, and it may be filed of record in any other office of this Commonwealth (including, without limitation, the clerk of the orphans' court division or the office for the recording of deeds) as if it were the original.

Although the Advisory Committee acknowledged the ability to alter a power of attorney, it agreed that 20 Pa.C.S. Chapter 56 should reflect technological changes with respect to such things as electronically transmitted copies, while noting that most entities will accept a copy of an executed power of attorney. Accordingly, the Advisory Committee agreed that language analogous to § 106(d) of the UPAA should be incorporated into 20 Pa.C.S. Chapter 56 and recommends the addition of the following subsection to 20 Pa.C.S. § 5602 (form of power of attorney):

(d) Copy of power of attorney.--Except for the purpose of filing under subsection (c), a photocopy or electronically transmitted copy of an originally executed power of attorney has the same effect as the original.

### ***Meaning and Effect of a Power of Attorney***

Section 107 of the UPAA provides that “[t]he meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.”

Other than partly addressing this subject matter in 20 Pa.C.S. § 5611 (validity),<sup>71</sup> Pennsylvania's current power of attorney statute does not directly provide for the meaning and effect of a power of attorney.

Nevertheless, the Advisory Committee does not recommend the addition of a new section in 20 Pa.C.S. Chapter 56 regarding the meaning and effect of a power of attorney.

### ***Guardians and Agents***

Section 108(a) of the UPAA provides that a principal may nominate a guardian in a power of attorney:

In a power of attorney, a principal may nominate a [conservator or guardian] of the principal's estate or [guardian] of the principal's person

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<sup>71</sup> *Supra* p. 20.

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

Pennsylvania's current power of attorney statute contains a similar provision:

§ 5604. Durable powers of attorney.

\* \* \*

(c) Relation of agent to court-appointed guardian.--

\* \* \*

(2) A principal may nominate, by a durable power of attorney, the guardian of his estate or of his person for consideration by the court if incapacity proceedings for the principal's estate or person are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.

\* \* \*

The Advisory Committee recommends no change to the provision regarding the nomination of a guardian.

Section 108(b) of the UPAA addresses the relation of an agent to a court-appointed fiduciary:

If, after a principal executes a power of attorney, a court appoints a [conservator or guardian] of the principal's estate or other fiduciary charged with the management of some or all of the principal's property, the agent is accountable to the fiduciary as well as to the principal. [The power of attorney is not terminated and the agent's authority continues unless limited, suspended, or terminated by the court.]<sup>72</sup>

Throughout its review and discussions of guardianship law in Pennsylvania,<sup>73</sup> the Subcommittee on Guardianships and Powers of Attorney recommended certain amendments to 20 Pa.C.S. Chapter 56, along with explanatory notes and comments. One set of amendments concerned the relationship between a guardian and an agent under 20 Pa.C.S. § 5604.

The Advisory Committee recommends the following statutory amendments and comment, based on the Subcommittee's review and discussions:

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<sup>72</sup> This provision is analogous to 20 Pa.C.S. § 5604(c)(1).

<sup>73</sup> The review and discussions predated the first Subcommittee teleconference pursuant to House Resolution No. 484 of 2007.

§ 5604. Durable powers of attorney.

\* \* \*

(c) Relation of agent to court-appointed guardian.--

(1) If, following execution of a durable power of attorney, the principal [is adjudicated] becomes an incapacitated person and a guardian is appointed for his estate, the agent is accountable to the guardian as well as to the principal. [The guardian shall have the same power to revoke or amend the power of attorney that the principal would have had if he were not an incapacitated person.]

\* \* \*

(3) In its guardianship order and determination of a person's incapacity, the court shall determine whether and the extent to which the incapacitated person's durable power of attorney remains in effect.

\* \* \*

Comment

A corollary of subsection (c)(1) for health care powers of attorney appears in § 5460(a).

The second sentence of subsection (c)(1) is deleted because a guardian of the estate should not be able to revoke a power of attorney or modify the agent's power. Even with the sentence deleted, a guardian of the estate may still request that the court revoke the appointment of an agent or modify the agent's powers.

The appointment of a guardian of the estate for an incapacitated person does not automatically revoke the person's power of attorney. The court in its appointment of a guardian of the estate should determine whether and to what extent the powers of the agent remain in effect. If the court is unaware of the existence of the incapacitated person's power of attorney when it appoints a guardian of the estate for the incapacitated person, the court has equitable authority to later determine which provisions of the incapacitated person's power of attorney remain in effect during the guardianship.

The reference to "adjudication" in subsection (c)(1) has been deleted as unnecessary. The deletion is not intended to change existing law. An incapacitated person is defined in § 102 as "a person determined to be an incapacitated person under the provisions of Chapter 55 (relating to incapacitated persons)."

In light of the proposed amendments to 20 Pa.C.S. § 5604(c)(1) and (3), the following amendment of 20 Pa.C.S. § 5460(a) (relating to relation of health care agent to court-appointed guardian and other agents) is also recommended:

(a) Accountability of health care agent.--If a principal who has executed a health care power of attorney is later adjudicated an incapacitated person and a guardian of the person to make health care decisions is appointed by a court, the health care agent is accountable to

the guardian as well as to the principal. [The guardian shall have the same power to revoke or amend the appointment of a health care agent that the principal would have if the principal were not incapacitated but may not revoke or amend other instructions in an advance health directive absent judicial authorization.] In its guardianship order and determination of a person's incapacity, the court shall determine the extent to which the health care agent's authority to act remains in effect.

The Advisory Committee further recommends that a comment should be included to explain that the amendment of § 5460(a) is done in conjunction with the amendment of § 5604(c)(1):

#### Comment

The repeal of the second sentence of subsection (a) is done in conjunction with the amendment of § 5604(c)(1). A guardian of the person should not be able to revoke the appointment of a health care agent or modify the agent's powers. Even with the sentence deleted, a guardian of the person may still request that the court do so if the situation should warrant it, but no such action should be taken lightly, as the appointment of a health care agent and the grant of health care powers by the principal represent the exercise of a fundamental and highly personal right.

The appointment of a guardian of the person for an incapacitated person does not automatically revoke the person's health care power of attorney. The court in its appointment of a guardian of the person should determine whether and to what extent the powers of the health care agent remain in effect. If the court is unaware of the existence of the incapacitated person's health care power of attorney when it appoints a guardian of the person for the incapacitated person, the court has equitable authority to later determine which provisions of the incapacitated person's health care power of attorney remain in effect during the guardianship.

#### ***When a Power of Attorney Is Effective***

Section 109 of the UPAA outlines when a power of attorney is effective:

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

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



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

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

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

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

The definition of a durable power of attorney under 20 Pa.C.S. § 5604(a)<sup>74</sup> is analogous to § 109(a) of the UPAA. Although Pennsylvania's current power of attorney statute allows a power of attorney to be effective according to its own terms, it does not provide detailed statutory default provisions as does § 109 of the UPAA. Unlike the UPAA, 20 Pa.C.S. Chapter 56 does not define incapacity; instead, 20 Pa.C.S. Chapter 55 (incapacitated persons) governs.<sup>75</sup> Therefore, the statutory framework of the UPAA differs considerably from that of 20 Pa.C.S. Chapter 56.

The Advisory Committee does not recommend amending the Pennsylvania statute in this regard, preferring to rely on common law and current practice.

During its review, the Subcommittee on Guardianships and Powers of Attorney discussed the implications of the Health Insurance Portability and Accountability Act (HIPAA), referenced in § 109(d) of the UPAA. The uniform comment to § 109 of the UPAA states the following:

Because the person authorized to verify the principal's incapacitation will likely need access to the principal's health information, subsection (d) qualifies that person to act as the principal's "personal representative" for purposes of the Health Insurance Portability and Accountability Act

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<sup>74</sup> *Supra* p. 15.

<sup>75</sup> The UPAA defines "incapacity" as "inability of an individual to manage property or business affairs because the individual: (A) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or (B) is: (i) missing; (ii) detained, including incarcerated in a penal system; or (iii) outside the United States and unable to return." UPAA § 102(5). The definition of "incapacitated person" under 20 Pa.C.S. § 5501 appears *supra* note 70.

(HIPAA). *See* 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that for purposes of disclosing an individual’s protected health information, “a covered entity must . . . treat a personal representative as the individual”). Section 109 does not, however, empower the agent to make health-care decisions for the principal. *See* Section 103 and comment (discussing exclusion from this Act of powers to make health-care decisions).

Therefore, unless a principal authorizes an agent to make health care decisions for the principal, the agent is not treated as a personal representative under HIPAA,<sup>76</sup> and a covered entity may only share protected health information with that agent under certain circumstances.<sup>77</sup> Accordingly, the Subcommittee regarded the uniform provision to be ineffective and did not favor incorporating it into Pennsylvania law.

The Advisory Committee does not recommend the inclusion of any provision analogous to § 109(d) of the UPAA and its comment.

### ***Termination of a Power of Attorney or an Agent’s Authority***

Section 110 of the UPAA provides the following regarding the termination of a power of attorney and the authority of an agent acting under a power of attorney:

- (a) A power of attorney terminates when:
  - (1) the principal dies;
  - (2) the principal becomes incapacitated, if the power of attorney is not durable;
  - (3) the principal revokes the power of attorney;
  - (4) the power of attorney provides that it terminates;
  - (5) the purpose of the power of attorney is accomplished; or

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<sup>76</sup> 45 C.F.R. § 164.502(g)(1) and (2).

<sup>77</sup> A covered entity may disclose to a family member, another relative or a close personal friend of an individual, or any other person identified by the individual, the protected health information directly relevant to the person’s involvement with the individual’s care or payment related to the individual’s health care. *Id.* § 164.510(b)(1)(i). If the individual is present for, or otherwise available prior to, the use or disclosure of the information and has the capacity to make health care decisions, the covered entity may use or disclose the information if it (1) obtains the individual’s agreement; (2) provides the individual with the opportunity to object to the disclosure, and the individual does not express an objection; or (3) reasonably infers from the circumstances, based on the exercise of professional judgment, that the individual does not object to the disclosure. *Id.* § 164.510(b)(2). If the individual is incapacitated or an emergency circumstance exists, the covered entity may exercise its professional judgment to “determine whether the disclosure is in the best interests of the individual and, if so, disclose only the protected health information that is directly relevant to the person’s involvement with the individual’s health care.” *Id.* § 164.510(b)(3). In addition, “[a] covered entity may use professional judgment and its experience with common practice to make reasonable inferences of the individual’s best interest in allowing a person to act on behalf of the individual to pick up filled prescriptions, medical supplies, x-rays, or other similar forms of protected health information.” *Id.*

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

(b) An agent's authority terminates when:

(1) the principal revokes the authority;

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

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

(4) the power of attorney terminates.

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

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

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

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

The most analogous provision under 20 Pa.C.S. Chapter 56 provides the following:

§ 5605. Power of attorney not revoked until notice.

(a) Death of principal.--The death of a principal who has executed a written power of attorney, durable or otherwise, shall not revoke or terminate the agency as to the agent or other person, who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, shall bind successors in interest of the principal.

(b) Disability or incapacity of principal.--The disability or incapacity of a principal who has previously executed a written power of attorney which is not a durable power shall not revoke or terminate the agency as to the agent or other person, who, without actual knowledge of the disability or incapacity of the principal, acts in good faith under the power. Any

action so taken, unless otherwise invalid or unenforceable, shall bind the principal and his successors in interest.

(c) Filing a complaint in divorce.--If a principal designates his spouse as his agent and thereafter either the principal or his spouse files an action in divorce, the designation of the spouse as agent shall be revoked as of the time the action was filed, unless it appears from the power of attorney that the designation was intended to survive such an event.

The Advisory Committee does not recommend supplementing 20 Pa.C.S. Chapter 56 by including the more detailed provisions of § 110 of the UPAA.

### ***Co-Agents and Successor Agents***

Section 111(a) and (b) of the UPAA provides for the designation of co-agents and successor agents and, in the case of co-agents, specifies that the co-agents may act independently unless the power of attorney otherwise provides:

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

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

- (1) has the same authority as that granted to the original agent; and
- (2) may not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.

Similarly, 20 Pa.C.S. Chapter 56 provides for the appointment of more than one agent and successor agents, but the statute specifies that co-agents shall only act jointly if the power of attorney expresses no guidance on whether they should act jointly or severally:

§ 5602. Form of power of attorney.

\* \* \*

(b) Appointment of agent and successor agent.--A principal may provide for:

- (1) The appointment of more than one agent, who shall act jointly, severally or in any other combination that the principal may designate, but if there is no such designation, such agents shall only act jointly.

(1.1) The delegation of one or more powers by the agent to such person or persons as the agent may designate and on terms as the power of attorney may specify.

(2) The appointment of one or more successor agents who shall serve in the order named in the power of attorney, unless the principal expressly directs to the contrary.

(3) The delegation to an original or successor agent of the power to appoint his successor or successors.

\* \* \*

The Advisory Committee does not favor reversing the Pennsylvania law regarding how co-agents should act if the power of attorney is silent, thereby rejecting the language of the second sentence of § 111(a) of the UPAA. The Advisory Committee notes that 20 Pa.C.S. § 5602(b)(1) is more protective of the principal and, therefore, is a better alternative to the second sentence of § 111(a) of the UPAA.

The Advisory Committee considered whether to amend 20 Pa.C.S. § 5602(b)(3) to include the ability of an agent under a power of attorney to appoint a co-agent.<sup>78</sup> The Advisory Committee recommends no amendment authorizing this appointment.

In terms of the liability of co-agents and successor agents, § 111(c) and (d) of the UPAA provides the following:

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

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

Even though 20 Pa.C.S. Chapter 56 does not contain a provision comparable to § 111(c) and (d) of the UPAA, the Advisory Committee does not consider an amendment to that effect to be warranted.

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<sup>78</sup> The specific amendment considered was as follows: "A principal may provide for: . . . (3) The delegation to an original or successor agent of the power to appoint his successor or successors or a co-agent." During its review, the Subcommittee on Guardianships and Powers of Attorney reviewed the following scenario: a mother and child-1 serve jointly as agents under a power of attorney; the mother becomes incapacitated; child-1 would like to appoint child-2 as a co-agent to assist with the duties under the power of attorney now that the mother is incapacitated and can no longer serve as the co-agent with child-1; child-2 is willing and able to serve as a co-agent with child-1. The Subcommittee did not favor the statutory authorization of an agent to appoint a co-agent.

### ***Reimbursement and Compensation***

Under § 112 of the UPAA, “[u]nless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances.”

Likewise, 20 Pa.C.S. Chapter 56 has a comparable provision:

§ 5609. Compensation and reimbursement for expenses.

(a) Compensation.--In the absence of a specific provision to the contrary in the power of attorney, the agent shall be entitled to reasonable compensation based upon the actual responsibilities assumed and performed.

(b) Reimbursement for expenses.--An agent shall be entitled to reimbursement for actual expenses advanced on behalf of the principal and to reasonable expenses incurred in connection with the performance of the agent's duties.

The Advisory Committee recommends no change to 20 Pa.C.S. Chapter 56.

### ***Acceptance of an Appointment***

Section 113 of the UPAA provides that “[e]xcept as otherwise provided in the power of attorney, a person accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.”

Even though 20 Pa.C.S. Chapter 56 does not contain a comparable provision, the Advisory Committee does not consider an amendment to be warranted.

### ***Duties of an Agent Generally***

Section 114 of the UPAA sets forth in detail the duties of an agent acting under a power of attorney:

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

(1) act in accordance with the principal’s reasonable expectations to the extent actually known by the agent and, otherwise, in the principal’s best interest;

(2) act in good faith; and

(3) act only within the scope of authority granted in the power of attorney.

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

(1) act loyally for the principal's benefit;

(2) act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;

(3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;

(4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

(5) cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; . . .

Under 20 Pa.C.S. Chapter 56, the fiduciary relationship between the agent and principal is described as follows:

§ 5601. General provisions.

\* \* \*

(e) Fiduciary relationship.--An agent acting under a power of attorney has a fiduciary relationship with the principal. In the absence of a specific provision to the contrary in the power of attorney, the fiduciary relationship includes the duty to:

(1) Exercise the powers for the benefit of the principal.

(2) Keep separate the assets of the principal from those of an agent.

(3) Exercise reasonable caution and prudence.

(4) Keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.

\* \* \*

The Advisory Committee decided that it was unnecessary to amend 20 Pa.C.S. Chapter 56 regarding the foregoing general duties of an agent acting under a power of attorney. However, the Advisory Committee recommends a new paragraph (5) regarding an agent's duty to preserve the estate plan of the principal, as well as a corresponding amendment to subsection (d) regarding the acknowledgment.<sup>79</sup>

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<sup>79</sup> *Infra* pp. 33-34.

## *Standard of Care*

Section 114 of the UPAA also provides that “[e]xcept as otherwise provided in the power of attorney, an agent that has accepted appointment shall . . . act with care, competence, and diligence ordinarily exercised by agents in similar circumstances.”<sup>80</sup> In addition, “[i]f an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent’s representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.”<sup>81</sup>

Pennsylvania’s default standard is “reasonable caution and prudence”: “In the absence of a specific provision to the contrary in the power of attorney, the fiduciary relationship includes the duty to . . . [e]xercise reasonable caution and prudence.”<sup>82</sup>

Although the Advisory Committee acknowledged that these two standards may indeed be substantively similar, if not identical, it recommends that the Pennsylvania standard of “reasonable caution and prudence” should remain in place barring some compelling reason to change it. Practitioners and the courts are familiar with the standard of “reasonable caution and prudence,” and case law has developed from that standard.<sup>83</sup>

## *Estate Plans*

Section 114(b)(6) of the UPAA provides the following regarding a principal’s estate plan:

Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall . . . attempt to preserve the principal’s estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal’s best interest based on all relevant factors, including:

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

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<sup>80</sup> UPAA § 114(b)(3). This standard is repeated throughout § 114.

<sup>81</sup> UPAA § 114(e).

<sup>82</sup> 20 Pa.C.S. § 5601(e)(3).

<sup>83</sup> Even assuming that the standards contained in the UPAA and 20 Pa.C.S. Chapter 56 are substantively similar, the Advisory Committee still disfavored amending Pennsylvania’s current power of attorney statute to simply parrot the language of the UPAA because the implication would be that a substantive change in the law was intended, thereby creating unnecessary confusion.



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

Because no comparable provision exists in 20 Pa.C.S. Chapter 56 and because of the frequency of litigation regarding the subject matter, the Advisory Committee agreed that statutory language should be inserted to preserve a principal's estate plan.<sup>84</sup> Accordingly, the Advisory Committee recommends the following underlined amendments to 20 Pa.C.S. § 5601 (general provisions):

(d) Acknowledgment executed by agent.--An agent shall have no authority to act as agent under the power of attorney unless the agent has first executed and affixed to the power of attorney an acknowledgment in substantially the following form:

I, \_\_\_\_\_, have read the attached power of attorney and am the person identified as the agent for the principal. I hereby acknowledge that in the absence of a specific provision to the contrary in the power of attorney or in 20 Pa.C.S. when I act as agent:

- I shall exercise the powers for the benefit of the principal.
- I shall keep the assets of the principal separate from my assets.
- I shall exercise reasonable caution and prudence.
- I shall keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.

I shall preserve the estate plan of the principal, including the effect of intestacy if the principal does not have a will.

.....  
 .....  
 (Agent) (Date)

(e) Fiduciary relationship.--An agent acting under a power of attorney has a fiduciary relationship with the principal. In the absence of a specific provision to the contrary in the power of attorney, the fiduciary relationship includes the duty to:

- (1) Exercise the powers for the benefit of the principal.
- (2) Keep separate the assets of the principal from those of an agent.
- (3) Exercise reasonable caution and prudence.
- (4) Keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.
- (5) Preserve the estate plan of the principal, including the effect of intestacy if the principal does not have a will.

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<sup>84</sup> However, the Advisory Committee supported a truncated version of UPAA § 114(b)(6).

The Advisory Committee also recommends the inclusion of a comment regarding § 5601(e)(5) as follows:

Comment

Subsection (e)(5) adds the duty of the agent to preserve the principal's estate plan, which includes (1) the intended disposition of the principal's assets whether during life or at death (and at death whether by will, revocable trust, nonprobate disposition or otherwise) and (2) powers granted under a power of attorney.

The Advisory Committee also discussed amending 20 Pa.C.S. § 5601.2 to provide additional special rules for gifts and to provide special rules for changes to a principal's estate plan.<sup>85</sup>

***Records and Disclosure***

Section 114(h) of the UPAA requires the following with respect to the disclosure of receipts, disbursements and transactions:

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

The current Pennsylvania power of attorney statute contains several provisions regarding records:

§ 5604. Durable powers of attorney.

\* \* \*

(c) Relation of agent to court-appointed guardian.--

(1) If, following execution of a durable power of attorney, the principal is adjudicated an incapacitated person and a guardian is appointed for his estate, the agent is accountable to the guardian as well as to the principal. The guardian shall have the same power to revoke or amend the power of attorney that the principal would have had if he were not an incapacitated person.

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<sup>85</sup> See the section titled *Gifts*, *infra* pp. 88-97.

(d) Discovery of information and records regarding actions of agent.--

(1) If the agency acting pursuant to the act of November 6, 1987 (P.L.381, No.79), known as the Older Adults Protective Services Act, is denied access to records necessary for the completion of a proper investigation of a report or a client assessment and service plan or the delivery of needed services in order to prevent further abuse, neglect, exploitation or abandonment of the older adult principal reported to be in need of protective services, the agency may petition the court of common pleas for an order requiring the appropriate access when either of the following conditions applies:

(i) the older adult principal has provided written consent for confidential records to be disclosed and the agent denies access; or

(ii) the agency can demonstrate that the older adult principal has denied or directed the agent to deny access to the records because of incompetence, coercion, extortion or justifiable fear of future abuse, neglect, exploitation or abandonment.

(2) This petition may be filed in the county wherein the agent resides or has his principal place of business or, if a nonresident, in the county wherein the older adult principal resides. The court, after reasonable notice to the agent and to the older adult principal, may conduct a hearing on the petition.

(3) Upon the failure of the agent to provide the requested information, the court may make and enforce such further orders.

(4) A determination to grant or deny an order, whether in whole or in part, shall not be considered a finding regarding the competence, capacity or impairment of the older adult principal, nor shall the granting or denial of an order preclude the availability of other remedies involving protection of the person or estate of the older adult principal or the rights and duties of the agent.

\* \* \*

#### § 5610. Account.

An agent shall file an account of his administration whenever directed to do so by the court and may file an account at any other time. All accounts shall be filed in the office of the clerk in the county where the principal resides.

The Subcommittee on Guardianships and Powers of Attorney began its review of the subject matter by discussing comparable provisions under title 15 of article 5 of the general obligations law of New York, effective September 1, 2009:

§ 5-1505. Standard of care; fiduciary duty; compelling disclosure of record.

\* \* \*

2. Fiduciary duty. (a) An agent acting under a power of attorney has a fiduciary duty to the principal. The fiduciary duty includes each of the following obligations:

\* \* \*

(3) To keep a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal and to make such record and power of attorney available at the request of the principal. The agent shall make such record and a copy of the power of attorney available within fifteen days of a written request by any of the following:

(i) a monitor;<sup>86</sup>

(ii) a co-agent or successor agent acting under a power of attorney;

(iii) a government entity, or official thereof, investigating a report that the principal may be in need of protective or other services, or investigating a report of abuse or neglect;

(iv) a court evaluator . . .;

(v) a guardian ad litem . . .;

(vi) the guardian or conservator of the estate of the principal, if such record has not already been provided to the court evaluator or guardian ad litem; or

(vii) the personal representative of the estate of a deceased principal if such record has not already been provided to the guardian or conservator of the estate of the principal.

\* \* \*

§ 5-1509. Appointment of monitor. A principal may appoint a monitor or monitors in the power of attorney who shall have the authority to request, receive and compel the agent to provide a record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal, to request and receive such records held by third parties, and to request and receive a copy of the power of attorney. Nothing in this title shall be construed to impose a fiduciary duty on the monitor.

The Subcommittee on Guardianships and Powers of Attorney discussed whether the concept of a monitor should be incorporated into Pennsylvania law. The members considered the practicality of appointing a monitor, in addition to an agent, in a power of attorney. The avowed role of the monitor would be “watchdog” on behalf of the principal; information would be shared with the monitor, who would in turn be able to

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<sup>86</sup> A monitor is “a person appointed in the power of attorney who has the authority to request, receive, and seek to compel the agent to provide a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal.” N.Y. Gen. Oblig. Law § 5-1501(8).

determine any financial or ethical irregularities in the conduct of the principal's agent. The monitor could be, for example, another child of the principal, a tax consultant, an investment advisor, an accountant or an attorney. The principal, therefore, would be able to provide for an additional safeguard over his or her estate, without the need to appoint a professional co-agent, which would likely result in higher fees for the estate (presumably, the fees charged by a professional monitor would be lower than those of a professional co-agent).

The Subcommittee on Guardianships and Powers of Attorney conceptually agreed that inclusion of monitor provisions in the power of attorney statute would make sense if:

- (1) The monitor is a private individual (i.e., not court-appointed).
- (2) The designation of a monitor is strictly voluntary (with no mandatory requirement that one be designated).
- (3) The monitor could prevent matters from reaching the litigation stage.
- (4) The monitor has financial experience.
- (5) The role of the monitor does not curtail judicial authority.
- (6) It does not overly complicate the status quo.<sup>87</sup>

The Subcommittee acknowledged that adding statutory provisions to 20 Pa.C.S. Chapter 56 regarding monitors raises several issues that must be resolved: (1) what must a designated monitor do to assume that role, (2) how to provide for compensation,

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<sup>87</sup> One possible method of amending 20 Pa.C.S. Chapter 56 to include the concept of a monitor is to add a new subsection to § 5602, with an accompanying comment, as follows:

§ 5602. Form of power of attorney.

(e) Appointment of monitor.--

(1) A principal may appoint a monitor with authority to request, receive and seek to compel the agent to provide a record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal.

(2) Absent a specific provision to the contrary in the power of attorney, the monitor is entitled to reasonable compensation based upon the actual responsibilities assumed and performed.

(3) The monitor is entitled to reimbursement for actual expenses advanced on behalf of the principal and to reasonable expenses incurred in connection with the performance of the monitor's duties.

(4) The monitor has a fiduciary relationship with the principal.

#### Comment

The designation of a monitor is strictly voluntary; there is no mandatory requirement that a monitor be designated in a power of attorney. By definition, a monitor is not court-appointed. The monitor is intended to serve as an additional watchdog over the estate of the principal, without the need for the principal to appoint a co-agent, professional or otherwise, and consequently have the principal's estate incur even greater fees. Ideally, however, the monitor should have experience in specific financial or legal matters (for example, a tax consultant, investment advisor, accountant or attorney would be prime candidates to serve as a monitor). Ultimately, the role of monitor should be to address potential financial or legal problems before they reach the litigation stage. However, the role of the monitor does not curtail judicial authority or affect the litigation process.

(3) whether the monitor owes a fiduciary duty to the principal (even if there is no such duty, there should be some mechanism for the monitor to report to the court), and (4) how to address liability when the monitor fails to properly fulfill his or her duties (such as reporting potential problems to the court).

Although allowing a principal to provide for the appointment of a monitor in a power of attorney is responsive to concerns regarding potential abuse against principals, the Subcommittee on Guardianships and Powers of Attorney ultimately disfavored the statutory authorization of such appointment at this time. The Subcommittee preferred instead to revisit the subject matter at a later time, after the effects of the New York provisions can be better evaluated and feedback from that law can be properly analyzed. The Subcommittee, therefore, will continue to collect information on the subject matter.

In reviewing 20 Pa.C.S. § 5610 (account) in the context of records and disclosure, the Advisory Committee agreed that the statute should explicitly provide that the court may assess costs against a person requesting an account.<sup>88</sup> Although the orphans' court already has equitable authority to do this, the Advisory Committee favored express clarity in the statute. Accordingly, the Advisory Committee recommends the following amendment:

§ 5610. Account.

An agent shall file an account of his administration whenever directed to do so by the court and may file an account at any other time. All accounts shall be filed in the office of the clerk in the county where the principal resides. The court may assess the costs of the accounting proceeding as it deems appropriate, including the costs of preparing and filing the account.

In addition, the Advisory Committee also recommends that the Pennsylvania's current power of attorney statute be amended to include a provision analogous to § 114(h) of the UPAA as part of 20 Pa.C.S. § 5604 (durable powers of attorney) and that a comment follow the provision:

(d.1) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements or transactions conducted on behalf of the principal unless:

(1) ordered by a court; or

(2) requested by:

(i) the principal;

(ii) the principal's guardian;

(iii) another fiduciary acting for the principal;

(iv) a governmental agency having authority to protect the welfare of the principal as set forth in subsection (d); or

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<sup>88</sup> Costs may become an increasingly important issue if, for example, a person makes multiple or onerous requests regarding an account.

(v) the personal representative or successor in interest of the principal's estate, upon the death of the principal.

Comment

Subsection (d.1)(2)(v) includes a residuary beneficiary of the principal's estate, whether under a will or revocable trust, or a beneficiary of the principal's nonprobate assets.

***Exoneration of Agents***

Section 115 of the UPAA provides the following regarding the exoneration of an agent:

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

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

The Advisory Committee does not recommend the adoption of the uniform provision. It was discussed that the incorporation of this concept into 20 Pa.C.S. Chapter 56 could result in every power of attorney including this type of boilerplate exoneration language, thereby minimizing the benefit of the statutory provision. In addition, some members of the Advisory Committee worried that a provision of this nature would be void as against public policy.

***Judicial Relief***

Section 116(a) of the UPAA sets forth who has standing to petition the court:

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

- (1) the principal or the agent;
- (2) a guardian, conservator, or other fiduciary acting for the principal;
- (3) a person authorized to make health-care decisions for the principal;
- (4) the principal's spouse, parent, or descendant;

(5) an individual who would qualify as a presumptive heir of the principal;

(6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;

(7) a governmental agency having regulatory authority to protect the welfare of the principal;

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

(9) a person asked to accept the power of attorney.<sup>89</sup>

The Advisory Committee recognized that paragraphs (1), (2), (3), (4) and (7) are straightforward and sensible, but paragraphs (5), (6), (8) and (9) are overly and unnecessarily broad, thereby creating potential problems and raising the likelihood that the process will become too intrusive. Currently, a Pennsylvania court will generally consider allegations of an agent's improper actions if the petitioner has some quantum of proof to that effect. However, no specific statutory language exists regarding standing for this in Pennsylvania.

Several members of the Advisory Committee favored retaining current Pennsylvania law, citing no real need to include language analogous to § 116 of the UPAA because such inclusion could spawn additional litigation. Broadening standing expends time and financial resources as the court must consider each petition.

Other members reasoned that nothing in 20 Pa.C.S. Chapter 56 provides guidance as to standing, and clarity would be helpful. The fact that a person "may petition" does not mean that relief will ultimately be granted. Since there is no clear law regarding who has standing to bring a power of attorney matter before the court, typically a person files a guardianship petition alleging an agent's wrongdoing. These allegations likely will occur when the principal is incapacitated or thought to be incapacitated or of weakened intellect.

The Advisory Committee recommends the inclusion of a new section of 20 Pa.C.S. Chapter 56 and an explanatory comment:

§ 5612. Investigation of financial abuse and mismanagement.

The court may order an investigation, appoint a guardian ad litem, make a referral to an appropriate agency or take any other appropriate action regarding allegations that a principal is suffering from financial abuse or mismanagement by his or her agent under a power of attorney:

(1) upon petition by an appropriate party and a reasonable showing of the financial abuse or mismanagement; or

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<sup>89</sup> Unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney, the court must dismiss the petition upon principal's motion. UPAA § 116(b).



(2) after the court is otherwise informed of the financial abuse or mismanagement.

Comment

This section reflects current Pennsylvania practice and procedure regarding the principles that a court would apply in entertaining a proceeding involving alleged financial abuse or mismanagement of the affairs of a principal under a power of attorney. This section specifically leaves the determination of standing to the discretion of the court. It also enables the court to consider information from a report (such as one from a social service agency) or other communication apart from the filing of a formal petition. The court would need to evaluate whether (1) the person submitting the report or communication is genuinely motivated by the best interests of the principal and (2) the assertions or allegations contained in the report or communication are credible and made in good faith.

The Advisory Committee also recommends the inclusion of a new section in 20 Pa.C.S. Chapter 56 concerning jurisdiction and venue, along with an explanatory comment:

§ 5613. Jurisdiction and venue.

(a) County having venue.--Venue of any matter pertaining to the exercise of a power by an agent acting under a power of attorney as provided in this chapter shall be in the county in which the principal is domiciled, a resident or residing in a long-term care facility.

(b) Declining jurisdiction.--

(1) A court having jurisdiction may decline to exercise jurisdiction if at any time it determines that a court of another county or state is a more appropriate forum.

(2) If a court of this Commonwealth declines to exercise jurisdiction, it shall either dismiss the proceeding or stay the proceeding upon condition that a proceeding be promptly commenced in another county or state. A court may impose any other condition that it deems appropriate.

Comment

This section is designed to provide the court with maximum flexibility regarding the relevant and important factors to be used in determining whether to exercise jurisdiction.

### ***Liability of Agents and Remedies***

Section 114 of the UPAA discusses an agent's liability in conjunction with his or her duties:

(c) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

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

\* \* \*

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

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

Section 117 of the UPAA provides the following regarding an agent's liability:

An agent that violates this [act] is liable to the principal or the principal's successors in interest for the amount required to:

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

Although a comparable provision does not exist in 20 Pa.C.S. Chapter 56, the Advisory Committee believed that courts are sophisticated enough to resolve issues regarding an agent's liability and grant appropriate relief without the need for language analogous to that contained in §§ 114 and 117 of the UPAA.

### ***Resignation of Agent***

Unlike 20 Pa.C.S. Chapter 56, the UPAA in § 118 contains a specific provision relating to an agent's resignation and the required notice:

Unless the power of attorney provides a different method for an agent's resignation, an agent may resign by giving notice to the principal and, if the principal is incapacitated:

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

The Advisory Committee does not recommend adding a comparable provision to 20 Pa.C.S. Chapter 56.

### ***Acceptance of and Reliance on a Power of Attorney; Third Party Liability***

Sections 119 and 120 of the UPAA provide a detailed statutory framework for acceptance of and reliance on a power of attorney as well as liability for the refusal to accept a power of attorney:

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

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

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

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

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

- (1) an agent's certification under penalty of perjury of any factual matter concerning the principal, agent, or power of attorney;
- (2) an English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English; and
- (3) an opinion of counsel as to any matter of law concerning the power of attorney if the person making the request provides in a writing or other record the reason for the request.

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

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

#### Alternative A

### SECTION 120. LIABILITY FOR REFUSAL TO ACCEPT ACKNOWLEDGED POWER OF ATTORNEY.

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

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

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

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

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

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

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

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

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

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

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

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

- (1) a court order mandating acceptance of the power of attorney;
- and
- (2) liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.<sup>90</sup>

Several provisions under 20 Pa.C.S. Chapter 56 relate to this subject matter:

§ 5606. Proof of continuance of powers of attorney by affidavit.

As to acts undertaken in good faith reliance thereon, an affidavit executed by the agent under a power of attorney stating that he did not have at the time of exercise of the power actual knowledge of the termination of the power by revocation, death or, if applicable, disability or incapacity or the filing of an action in divorce and that, if applicable, the specified future time or contingency has occurred, is conclusive proof of the nonrevocation or nontermination of the power at that time and conclusive proof that the specified time or contingency has occurred. The agent shall furnish an affidavit to a person relying upon the power of attorney on demand; however, good faith reliance on the power shall protect the person who acts without an affidavit. If the exercise of the power of attorney requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable. This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

§ 5608. Liability.

(a) Third party liability.--Any person who is given instructions by an agent in accordance with the terms of a power of attorney shall comply with the instructions. Any person who without reasonable cause fails to comply with those instructions shall be subject to civil liability for any damages resulting from noncompliance. Reasonable cause under this subsection shall include, but not be limited to, a good faith report having been made by the third party to the local protective services agency regarding abuse, neglect, exploitation or abandonment pursuant to section 302 of the act of November 6, 1987 (P.L.381, No.79), known as the Older Adults Protective Services Act.

(b) Third party immunity.--Any person who acts in good faith reliance on a power of attorney shall incur no liability as a result of acting in accordance with the instructions of the agent.

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<sup>90</sup> UPAA § 120 (Alternative B) is not replicated here because it concerns the liability for refusal to accept an acknowledged statutory form power of attorney, which Pennsylvania does not mandate under 20 Pa.C.S. Chapter 56.

The Advisory Committee considered whether to incorporate a provision analogous to § 119(f) of the UPAA, on the assumption that the mere fact that one employee at a financial institution has knowledge of pertinent information regarding a power of attorney does not mean that another individual conducting a transaction in reliance on that power of attorney necessarily knows that same information. However, the Advisory Committee reasoned that at some point an employee with knowledge that, for example, a principal has died or that the power of attorney has been revoked has an obligation to convey that information to other employees at the financial institution. Therefore, the Advisory Committee recommends that the acceptance, reliance and third party liability provisions under 20 Pa.C.S. Chapter 56 should be retained without amendment.

### *Law and Equity*

Section 121 of the UPAA provides that “[u]nless displaced by a provision of this [act], the principles of law and equity supplement this [act].”

The Advisory Committee recommends that an analogous provision should be included in 20 Pa.C.S. Chapter 56 along the following lines:

§ 5614. Principles of law and equity.

Except as otherwise provided by this chapter or another statute of this Commonwealth, common law and the principles of equity supplement this chapter.

Throughout its review and discussions of guardianship law in Pennsylvania, the Subcommittee on Guardianships and Powers of Attorney favored certain amendments to 20 Pa.C.S. Chapter 56, along with explanatory notes and comments. One set of amendments concerned equity and justice, and the Advisory Committee recommends those amendments to 20 Pa.C.S. §§ 5601 and 5601.2, as follows, along with the following note and comments:

§ 5601. General provisions.

\* \* \*

(e.3) Equity and justice.--

(1) An agent and a recipient of a gift or other financial benefit, during the principal’s life or at the principal’s death, arising from the action of the agent is liable as equity and justice may require to the extent that the court determines that the action of the agent was inconsistent with:

(i) prudent estate planning or financial management for the principal; or

(ii) the known or probable intent of the principal with respect to the disposition of the principal’s property.

(2) An agent who in good faith exercises reasonable caution and prudence shall not be personally liable.

\* \* \*

Note

Subsection (e.3) is based on § 5601.2(e) and will now apply to any action of the agent under Chapter 56.

Comment

Subsection (e.3) extends judicial authority to exercise principles of equity and justice from the limited application set forth in former § 5601.2(e) concerning special rules for gifts to all actions of an agent under Chapter 56.

§ 5601.2. Special rules for gifts.

\* \* \*

[(e) Equity.--An agent and the donee of a gift shall be liable as equity and justice may require to the extent that, as determined by the court, a gift made by the agent is inconsistent with prudent estate planning or financial management for the principal or with the known or probable intent of the principal with respect to disposition of the estate.]

\* \* \*

Comment

Subsection (e), which was limited in scope and applied only with respect to gifts, was repealed because § 5601(e.3) extends judicial authority to exercise principles of equity and justice to any action of the agent under Chapter 56.

The Advisory Committee noted that the orphans' courts, which possess equitable powers, can currently address the subject matter contained in proposed 20 Pa.C.S. § 5601(e.3). Nevertheless, it recommends that the proposed subsection be made effective immediately to help clarify this judicial authority and possibly bolster a court's resolve to take action. Accordingly, it also recommends the immediate repeal of current 20 Pa.C.S. § 5601.2(e).

***Laws Applicable to Financial Institutions and Entities***

Section 122 of the UPAA provides that “[t]his [act] does not supersede any other law applicable to financial institutions or other entities, and the other law controls if inconsistent with this [act].”

Although 20 Pa.C.S. Chapter 56 does not contain a comparable provision, the following statutory language concerns corporate agents:

§ 5607. Corporate agent.

A bank and trust company or a trust company authorized to act as a fiduciary in this Commonwealth and acting as an agent pursuant to a power of attorney, or appointed by another who possesses such a power, shall have the powers, duties and liabilities set forth in section 3321 (relating to nominee registration; corporate fiduciary as agent; deposit of securities in a clearing corporation; book-entry securities).

The Advisory Committee recommends no amendment of 20 Pa.C.S. Chapter 56 to incorporate a provision comparable to § 122 of the UPAA.

***Remedies Under Other Law***

Section 123 of the UPAA provides that “[t]he remedies under this [act] are not exclusive and do not abrogate any right or remedy under the law of this state other than this [act].”

Although no comparable provision exists in 20 Pa.C.S. Chapter 56, the Advisory Committee makes no recommendation amending Pennsylvania’s current power of attorney law in this regard.



## *Article 2 of the Uniform Act (Authority)*

### *Specific and General Grants of Authority*

Section 201 of the UPAA sets forth provisions concerning (1) authority that requires a specific grant and (2) the grant of general authority:

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

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

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

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

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

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

(f) Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in this state and whether or not the authority is exercised or the power of attorney is executed in this state.

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

Under § 201(c) of the UPAA, therefore, an agent has a general grant of authority only with respect to provisions relating to real property (§ 204); tangible personal property (§ 205); stocks and bonds (§ 206); commodities and options (§ 207); banks and other financial institutions (§ 208); the operation of an entity or business (§ 209); insurance and annuities (§ 210); estates, trusts and other beneficial interests (§ 211); claims and litigation (§ 212); personal and family maintenance (§ 213); benefits from governmental programs or civil or military service (§ 214); retirement plans (§ 215) and taxes (§ 216). Excluded from this general grant of authority is the power to make gifts (§ 217 of the UPAA).

The Subcommittee on Guardianships and Powers of Attorney discussed whether the general grant of authority under the UPAA would limit the agent, contrary to Pennsylvania law, to *just* those powers set forth in §§ 204 through 216 of the UPAA, thereby closing the door on the ability of a principal to generally grant authority in a power of attorney for a power not enumerated in those sections. The Subcommittee also worried that the powers listed in § 201(a) of the UPAA are not properly defined. Furthermore, the Subcommittee noted that § 201(b) of the UPAA provides an additional layer of protection for the principal, despite the grant of authority set forth in § 201(a) of the UPAA.

### ***Incorporation of Authority***

Section 202 of the UPAA provides the following with respect to the incorporation of authority:

- (a) An agent has authority described in this [article] if the power of attorney refers to general authority with respect to the descriptive term for the subjects stated in Sections 204 through 217 or cites the section in which the authority is described.
- (b) A reference in a power of attorney to general authority with respect to the descriptive term for a subject in Sections 204 through 217 or a citation to a section of Sections 204 through 217 incorporates the entire section as if it were set out in full in the power of attorney.
- (c) A principal may modify authority incorporated by reference.

The Subcommittee on Guardianships and Powers of Attorney believed that the wording of § 202(a) of the UPAA (“refers to general authority with respect to the descriptive term”) seems awkward and potentially confusing.

Under 20 Pa.C.S. § 5601(a),

[i]n addition to all other powers that may be delegated to an agent, any or all of the powers referred to in section 5602(a) (relating to form of power of attorney) may lawfully be granted in writing to an agent and, unless the power of attorney expressly directs to the contrary, shall be construed in accordance with the provisions of this chapter.

The 23 enumerated powers set forth in 20 Pa.C.S. § 5602(a) may be incorporated by reference. A principal in a power of attorney may include one or more of these powers and implicate the statutory definitions<sup>91</sup> of each power:

§ 5602. Form of power of attorney.

(a) Specification of powers.--A principal may, by inclusion of the language quoted in any of the following paragraphs or by inclusion of other language showing a similar intent on the part of the principal, empower an agent to do any or all of the following, each of which is defined in section 5603 (relating to implementation of power of attorney):

- (1) "To make limited gifts."
- (2) "To create a trust for my benefit."
- (3) "To make additions to an existing trust for my benefit."
- (4) "To claim an elective share of the estate of my deceased spouse."
- (5) "To disclaim any interest in property."
- (6) "To renounce fiduciary positions."
- (7) "To withdraw and receive the income or corpus of a trust."
- (8) "To authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care."
- (9) "To authorize medical and surgical procedures."
- (10) "To engage in real property transactions."
- (11) "To engage in tangible personal property transactions."
- (12) "To engage in stock, bond and other securities transactions."
- (13) "To engage in commodity and option transactions."
- (14) "To engage in banking and financial transactions."
- (15) "To borrow money."
- (16) "To enter safe deposit boxes."
- (17) "To engage in insurance transactions."
- (18) "To engage in retirement plan transactions."
- (19) "To handle interests in estates and trusts."
- (20) "To pursue claims and litigation."

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<sup>91</sup> 20 Pa.C.S. § 5603. In the alternative, a principal may favor inclusion of the statutory definition of each power, perhaps with modifications, in the power of attorney. Pennsylvania permits a general grant of authority to an agent to do anything that the principal can do, except in the case of unlimited gifts, which must be expressly authorized. *Id.* § 5601.2(c). In addition, "[a]ll powers described in this section shall be exercisable with respect to any matter in which the principal is in any way interested at the giving of the power of attorney or thereafter and whether arising in this Commonwealth or elsewhere." *Id.* § 5603(v).

- (21) “To receive government benefits.”
- (22) “To pursue tax matters.”
- (23) “To make an anatomical gift of all or part of my body.”

\* \* \*

The Subcommittee on Guardianships and Powers of Attorney acknowledged that the UPAA provides an additional method to incorporate by reference, which is not found in Pennsylvania law: under § 202, a power of attorney may cite a uniform act section number (*i.e.*, §§ 204 through 217 of the UPAA). The Subcommittee agreed that from a drafting perspective, this method seems less desirable because of the lack of context and description that would be contained in the power of attorney.

In general, 20 Pa.C.S. Chapter 56 contains several powers that are not covered by the UPAA:<sup>92</sup>

- (1) Creating a trust for the benefit of the principal.<sup>93</sup>
- (2) Claiming an elective share of the estate of the principal’s deceased spouse.<sup>94</sup>

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<sup>92</sup> The UPAA does not apply to “a power to make health-care decisions.” UPAA § 103(2). Pennsylvania did not statutorily provide for a health care power of attorney until 2007, after the enactment of 20 Pa.C.S. Chapter 54 (health care), which was added by the act of Nov. 29, 2006 (P.L. 1484, No. 169) and became effective 60 days later. The inclusion of the following provisions in 20 Pa.C.S. Chapter 56 is a consequence of this previous lack of a health care power of attorney statute in Pennsylvania:

- (1) §§ 5602(a)(8) and 5603(h)(1). The power “[t]o authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care” means “that the agent may apply for the admission of the principal to a medical, nursing, residential or other similar facility, execute any consent or admission forms required by such facility . . . and enter into agreements for the care of the principal by such facility or elsewhere during his lifetime or for such lesser period of time as the agent may designate, including the retention of nurses for the principal.” 20 Pa.C.S. § 5603(h)(1).
- (2) §§ 5602(a)(9) and 5603(h)(2). The power “[t]o authorize medical and surgical procedures” means “that the agent may arrange for and consent to medical, therapeutical and surgical procedures for the principal, including the administration of drugs.” *Id.* § 5603(h)(2).
- (3) §§ 5602(a)(23) and 5603(u.1). The power “[t]o make an anatomical gift of all or part of my body” means “that the agent may arrange and consent, either before or after the death of the principal, to procedures to make an anatomical gift in accordance with Chapter 86 (relating to anatomical gifts).” *Id.* § 5603(u.1).

<sup>93</sup> *Id.* §§ 5602(a)(2) and 5603(b). See the section titled *Estates, Trusts and Other Beneficial Interests*, *infra* pp. 74-76.

<sup>94</sup> *Id.* §§ 5602(a)(4) and 5603(d). See the subsequent text for the statutory language and proposed amendment.

- (3) Disclaiming any interest in property.<sup>95</sup>
- (4) Renouncing fiduciary positions.<sup>96</sup>

The Advisory Committee considered whether 20 Pa.C.S. Chapter 56 should be amended to repeal § 5602(a)(8), (9) and (23) and § 5603(h) and (u.1) (concerning the powers to authorize the admission of a principal to a facility, to authorize medical and surgical procedures for the principal, and to make an anatomical gift of all or part of a principal's body), now that 20 Pa.C.S. Chapter 54 has been enacted.<sup>97</sup> The consensus of the Advisory Committee was to repeal the health care provisions in Chapter 56 and harmonize the language in Chapter 54 with the repealed language of Chapter 56.<sup>98</sup> Accordingly, the Advisory Committee recommends the following amendments to §§ 5422, 5456, 5602 and 5603 and comments to §§ 5602 and 5603:

§ 5422. Definitions.

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

\* \* \*

“Health care decision.” A decision regarding an individual's health care, including, but not limited to, the following:

- (1) Selection and discharge of a health care provider.
- (2) Approval or disapproval of a diagnostic test, surgical procedure or program of medication.
- (3) Directions to initiate, continue, withhold or withdraw all forms of life-sustaining treatment, including instructions not to resuscitate.
- (4) Admission to a medical, nursing, residential or similar facility, or entering into agreements for the individual's care.
- (5) After the death of the individual, making anatomical gifts, disposing of the remains or consenting to autopsies.

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<sup>95</sup> *Id.* §§ 5602(a)(5) and 5603(e). See the subsequent text for the statutory language and proposed amendment.

<sup>96</sup> *Id.* §§ 5602(a)(6) and 5603(f). This power means “that the agent may: (i) renounce any fiduciary position to which the principal has been appointed; and (ii) resign any fiduciary position in which the principal is then serving, and either file an accounting with a court of competent jurisdiction or settle on receipt and release or other informal method as the agent deems advisable.” *Id.* § 5603(f)(1). A fiduciary includes “an executor, administrator, trustee, guardian, agent or officer or director of a corporation.” *Id.* § 5603(f)(2).

<sup>97</sup> See, e.g., 20 Pa.C.S. § 5456(a): “a health care agent shall have the authority to make any health care decision and to exercise any right and power regarding the principal's care, custody and health care treatment that the principal could have made and exercised. The health care agent's authority may extend beyond the principal's death to make anatomical gifts, dispose of the remains and consent to autopsies.” The Advisory Committee notes that the statutory provisions in 20 Pa.C.S. Chapters 54 and 56 are similar but not identical.

<sup>98</sup> Specific transitional language is set forth *infra* p. 129.

\* \* \*

§ 5456. Authority of health care agent.

(a) Extent of authority.--Except as expressly provided otherwise in a health care power of attorney and subject to subsection (b) and section 5460 (relating to relation of health care agent to court-appointed guardian and other agents), a health care agent shall have the authority to make any health care decision and to exercise any right and power regarding the principal's care, custody and health care treatment that the principal could have made and exercised. The foregoing power shall include the power to authorize admission to a medical, nursing, residential or similar facility, or to enter into agreements for the principal's care. The health care agent's authority may extend beyond the principal's death to make anatomical gifts, dispose of the remains and consent to autopsies.

\* \* \*

§ 5602. Form of power of attorney.

(a) Specification of powers.--A principal may, by inclusion of the language quoted in any of the following paragraphs or by inclusion of other language showing a similar intent on the part of the principal, empower an agent to do any or all of the following, each of which is defined in section 5603 (relating to implementation of power of attorney):

\* \* \*

[(8) "To authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care."]

(9) "To authorize medical and surgical procedures."]

\* \* \*

[(23) "To make an anatomical gift of all or part of my body."]

\* \* \*

Comment

Pennsylvania has since 1982 included in its power of attorney statute the power to (1) authorize admission to a medical, nursing, residential or similar facility and to enter into agreements for the principal's care and (2) authorize medical and surgical procedures. On December 1, 1994 (effective in 90 days), Pennsylvania included in its power of attorney statute the power to make an anatomical gift of all or part of the principal's body. The subsequent enactment in 2006 of the Health Care Agents and Representatives Act, which was added to Chapter 54, includes far more comprehensive provisions relative to these matters, so that § 5602(a)(8), (9) and (23) has been removed from Chapter 56 and placed into Chapter 54. Health care powers of attorney executed after the effective date of the amendment of § 5602(a) will be governed entirely by Chapter 54. Powers of attorney containing the foregoing powers executed

prior to the effective date of the amendment of § 5602(a) will be unaffected by the removal of paragraphs (8), (9) and (23) and will continue to be governed by the prior statute. It is expected, however, that the more comprehensive provisions of Chapter 54 may provide helpful guidance to a court charged with the task of interpreting the proper administration and decision-making process under the prior statutory health care powers.

§ 5603. Implementation of power of attorney.

\* \* \*

[(h) Power to authorize admission to medical facility and power to authorize medical procedures.--

(1) A power “to authorize my admission to a medical, nursing, residential or similar facility, and to enter into agreements for my care” shall mean that the agent may apply for the admission of the principal to a medical, nursing, residential or other similar facility, execute any consent or admission forms required by such facility which are consistent with this paragraph, and enter into agreements for the care of the principal by such facility or elsewhere during his lifetime or for such lesser period of time as the agent may designate, including the retention of nurses for the principal.

(2) A power “to authorize medical and surgical procedures” shall mean that the agent may arrange for and consent to medical, therapeutical and surgical procedures for the principal, including the administration of drugs.]

\* \* \*

[(u.1) Power to make anatomical gift.--A power “to make an anatomical gift of all or part of my body” shall mean that the agent may arrange and consent, either before or after the death of the principal, to procedures to make an anatomical gift in accordance with Chapter 86 (relating to anatomical gifts).]

\* \* \*

Comment

Subsections (h) and (u.1) are repealed in light of the repeal of § 5602(8), (9) and (23). The substance of the repealed provisions has been moved to the definition of “health care decision” in § 5422 and to § 5456(a).

Throughout its review and discussions of guardianship law in Pennsylvania, the Subcommittee on Guardianships and Powers of Attorney favored certain amendments to 20 Pa.C.S. Chapter 56, along with explanatory notes and comments. One set of amendments concerned the power to claim an elective share and the power to disclaim any interest in property. The Advisory Committee recommends the following statutory amendments and comment, based on the Subcommittee’s review and discussions:

§ 5603. Implementation of power of attorney.

\* \* \*

(d) Power to claim an elective share.--A power “to claim an elective share of the estate of my deceased spouse” shall mean that the agent may elect to take against the will and conveyances of the principal’s deceased spouse, disclaim any interest in property which the principal is required to disclaim as a result of such election, retain any property which the principal has the right to elect to retain, file petitions pertaining to the election, including petitions to extend the time for electing and petitions for orders, decrees and judgments in accordance with section 2211(c) and (d) (relating to determination of effect of election; enforcement), and take all other actions which the agent deems appropriate in order to effectuate the election: Provided, however, That the election shall be made only upon the approval of the court having jurisdiction of the principal’s estate in accordance with section 2206 (relating to right of election personal to surviving spouse) in the case of a principal who [has been adjudicated] is an incapacitated person, or upon the approval of the court having jurisdiction of the deceased spouse’s estate in the case of a principal who [has not been adjudicated] is not an incapacitated person.

(e) Power to disclaim any interest in property.--A power “to disclaim any interest in property” shall mean that the agent may release or disclaim any interest in property on behalf of the principal in accordance with Chapter 62 (relating to disclaimers) or section 6103 (relating to release or disclaimer of powers or interests), provided that any disclaimer under Chapter 62 shall be in accordance with the provisions of section 6202 (relating to disclaimers by fiduciaries or agents) in the case of a principal who [shall have been adjudicated] is an incapacitated person at the time of the execution of the disclaimer.

\* \* \*

Comment

References to “adjudication” in subsections (d) and (e) have been deleted as unnecessary. The deletions are not intended to change existing law. An incapacitated person is defined in § 102 as “a person determined to be an incapacitated person under the provisions of Chapter 55 (relating to incapacitated persons).”

***Construction of Authority Generally***

Section 203 of the UPAA provides the following:

Except as otherwise provided in the power of attorney, by executing a power of attorney that incorporates by reference a subject described in Sections 204 through 217 or that grants to an agent authority to do all acts



that a principal could do pursuant to Section 201(c), a principal authorizes the agent, with respect to that subject, to:

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

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

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

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

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

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

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

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

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

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

The Subcommittee on Guardianships and Powers of Attorney questioned why or when an agent would create "a schedule listing some or all of the principal's property and attaching it to the power of attorney" (§ 203(3) of the UPAA) and acknowledged the existence of a catch-all category (§ 203(10) of the UPAA). However, the Subcommittee generally did not favor including a provision analogous to § 203 of the UPAA, remarking that the Pennsylvania's current power of attorney statute did not require detailing all these incidental types of authority in light of the phrase "in general, exercise all powers with respect to [the respective power] that the principal could if present," which is contained in a number of the subsections of 20 Pa.C.S. § 5603 defining the powers.

The Advisory Committee agreed and does not recommend the inclusion of a provision analogous to § 203 of the UPAA into 20 Pa.C.S. Chapter 56.

### ***Real Property***

Section 204 of the UPAA provides for the granting of authority with respect to real property:

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to real property authorizes the agent to:

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

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

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

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

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

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

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

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

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

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

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

(A) selling or otherwise disposing of them;

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

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

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

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

The analogous provision in 20 Pa.C.S. § 5602(a)(10) references the power to engage in real property transactions, which means the following:

§ 5603. Implementation of power of attorney.

\* \* \*

(i) Power to engage in real property transactions.--A power to “engage in real property transactions” shall mean that the agent may:

(1) Acquire or dispose of real property (including the principal’s residence) or any interest therein, including, but not limited to, the power to buy or sell at public or private sale for cash or credit or partly for each; exchange, mortgage, encumber, lease for any period of time; give or acquire options for sales, purchases, exchanges or leases; buy at judicial sale any property on which the principal holds a mortgage.

(2) Manage, repair, improve, maintain, restore, alter, build, protect or insure real property; demolish structures or develop real estate or any interest in real estate.

(3) Collect rent, sale proceeds and earnings from real estate; pay, contest, protest and compromise real estate taxes and assessments.

(4) Release in whole or in part, assign the whole or a part of, satisfy in whole or in part and enforce any mortgage, encumbrance, lien or other claim to real property.

(5) Grant easements, dedicate real estate, partition and subdivide real estate and file plans, applications or other documents in connection therewith.

(6) In general, exercise all powers with respect to real property that the principal could if present.

\* \* \*

The Advisory Committee recommends no change to 20 Pa.C.S. Chapter 56 with respect to real property transactions.

## *Tangible Personal Property*

Section 205 of the UPAA provides for the granting of authority with respect to tangible personal property:

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to tangible personal property authorizes the agent to:

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

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

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

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

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

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

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

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

(D) moving the property from place to place;

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

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

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

The analogous provision in 20 Pa.C.S. § 5602(a)(11) references the power to engage in tangible personal property transactions, which means the following:

§ 5603. Implementation of power of attorney.

\* \* \*

(j) Power to engage in tangible personal property transactions.--A power to “engage in tangible personal property transactions” shall mean that the agent may:

(1) Buy, sell, lease, exchange, collect, possess and take title to tangible personal property.

(2) Move, store, ship, restore, maintain, repair, improve, manage, preserve and insure tangible personal property.

(3) In general, exercise all powers with respect to tangible personal property that the principal could if present.

\* \* \*

The Advisory Committee recommends no change to 20 Pa.C.S. Chapter 56 with respect to tangible personal property transactions.

### ***Stocks and Bonds***

Section 206 of the UPAA provides for the granting of authority with respect to stocks and bonds:

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to stocks and bonds authorizes the agent to:

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

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

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

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

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

The analogous provision in 20 Pa.C.S. § 5602(a)(12) references the power to engage in stock, bond and other securities transactions, which means the following:

§ 5603. Implementation of power of attorney.

\* \* \*

(k) Power to engage in stock, bond and other securities transactions.--A power to “engage in stock, bond and other securities transactions” shall mean that the agent may:

(1) Buy or sell (including short sales) at public or private sale for cash or credit or partly for cash all types of stocks, bonds and securities; exchange, transfer, hypothecate, pledge or otherwise dispose of any stock, bond or other security.

(2) Collect dividends, interest and other distributions.

(3) Vote in person or by proxy, with or without power of substitution, either discretionary, general or otherwise, at any meeting.

(4) Join in any merger, reorganization, voting-trust plan or other concerted action of security holders and make payments in connection therewith.

(5) Hold any evidence of the ownership of any stock, bond or other security belonging to the principal in the name of a nominee selected by the agent.

(6) Deposit or arrange for the deposit of securities in a clearing corporation as defined in Division 8 of Title 13 (relating to investment securities).

(7) Receive, hold or transfer securities in book-entry form.

(8) In general, exercise all powers with respect to stocks, bonds and securities that the principal could if present.

\* \* \*

The Advisory Committee recommends that 20 Pa.C.S. § 5603(k)(4) be amended to make the provision more parallel to 20 Pa.C.S. § 7780.6(a)(13), which illustrates powers of a trustee under the Pennsylvania Uniform Trust Act and specifically provides the following: “The powers which a trustee may exercise pursuant to section 7780.5 (relating to powers of trustees - UTC 815) include the following powers: . . . (13) To join in any reorganization, consolidation, merger, dissolution, liquidation, voting trust plan or other concerted action of securityholders and to delegate discretionary duties with respect thereto.” The Advisory Committee, therefore, recommends the following amendment to § 5603(k)(4), along with an explanatory note:

(k) Power to engage in stock, bond and other securities transactions.--  
A power to “engage in stock, bond and other securities transactions” shall mean that the agent may:

\* \* \*

(4) Join in any merger, reorganization, consolidation, dissolution, liquidation, voting-trust plan or other concerted action of security holders and make payments in connection therewith.

\* \* \*

#### Note

The amendment of subsection (k)(4) is intended to make the provision more parallel to § 7780.6(a)(13).

The Advisory Committee recommends no other changes to 20 Pa.C.S. Chapter 56 with respect to stock, bond and other securities transactions.

### ***Commodities and Options***

Section 207 of the UPAA provides for the granting of authority with respect to commodities and options:

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to commodities and options authorizes the agent to:

- (1) buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call or put options on stocks or stock indexes traded on a regulated option exchange; and
- (2) establish, continue, modify, and terminate option accounts.

The analogous provision in 20 Pa.C.S. § 5602(a)(13) references the power to engage in commodity and option transactions, which means the following:

§ 5603. Implementation of power of attorney.

\* \* \*

(1) Power to engage in commodity and option transactions.--A power to “engage in commodity and option transactions” shall mean that the agent may:

- (1) Buy, sell, exchange, assign, convey, settle and exercise commodities future contracts and call and put options on stocks and stock indices traded on a regulated options exchange and collect and receipt for all proceeds of any such transactions.
- (2) Establish or continue option accounts for the principal with any securities of a futures broker.
- (3) In general, exercise all powers with respect to commodity and option transactions that the principal could if present.

\* \* \*

The Advisory Committee recommends no change to 20 Pa.C.S. Chapter 56 with respect to commodity and option transactions.

### ***Banks and Other Financial Institutions***

Section 208 of the UPAA provides for the granting of authority with respect to banks and financial institutions:

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to banks and other financial institutions authorizes the agent to:

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

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

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

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

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

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

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

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

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

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

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

Several provisions in 20 Pa.C.S. Chapter 56 concern banking and financial institutions, including those outlining the power to (1) engage in banking and financial transactions, (2) borrow money and (3) enter safe deposit boxes:<sup>99</sup>

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<sup>99</sup> 20 Pa.C.S. §§ 5602(a)(14)-(16) and 5603(m)-(o). The power to borrow money, set forth in 20 Pa.C.S. §§ 5602(a)(15) and 5603(n), is analogous to § 208(7) of the UPAA. The power to enter safe deposit boxes, set forth in 20 Pa.C.S. §§ 5602(a)(16) and 5603(o), is covered in § 208(3) and (6) of the UPAA.



§ 5603. Implementation of power of attorney.

\* \* \*

(m) Power to engage in banking and financial transactions.-- A power to “engage in banking and financial transactions” shall mean that the agent may:

(1) Sign checks, drafts, orders, notes, bills of exchange and other instruments (“items”) or otherwise make withdrawals from checking, savings, transaction, deposit, loan or other accounts in the name of the principal and endorse items payable to the principal and receive the proceeds in cash or otherwise.

(2) Open and close such accounts in the name of the principal, purchase and redeem savings certificates, certificates of deposit or similar instruments in the name of the principal and execute and deliver receipts for any funds withdrawn or certificates redeemed.

(3) Deposit any funds received for the principal in accounts of the principal.

(4) Do all acts regarding checking, savings, transaction, deposit, loan or other accounts, savings certificates, certificates of deposit or similar instruments, the same as the principal could do if personally present.

(5) Sign any tax information or reporting form required by Federal, State or local taxing authorities, including, but not limited to, any Form W-9 or similar form.

(6) In general, transact any business with a banking or financial institution that the principal could if present.

(n) Power to borrow money.--A power to “borrow money” shall mean that the agent may borrow money and pledge or mortgage any properties that the principal owns as a security therefor.

(o) Power to enter safe deposit boxes.--A power to “enter safe deposit boxes” shall mean that the agent may enter any safe deposit box in the name of the principal; add to or remove the contents of such box, open and close safe deposit boxes in the name of the principal; however, the agent shall not deposit or keep in any safe deposit box of the principal any property in which the agent has a personal interest.

\* \* \*

The Advisory Committee noted that § 208(3) and (6) of the UPAA does not prohibit an agent from placing his or her own assets into the safe deposit box, which is prohibited by 20 Pa.C.S. § 5603(o). Similarly, the UPAA does not consider the implications of whether a safe deposit box is rented individually by or jointly with the principal.

The Advisory Committee recommends no change to 20 Pa.C.S. Chapter 56 with respect to banking and financial transactions, borrowing money and entering safe deposit boxes.

## ***Operation of an Entity or Business***

Section 209 of the UPAA provides for the granting of authority with respect to the operation of an entity or business:

Subject to the terms of a document or an agreement governing an entity or an entity ownership interest, and unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to operation of an entity or business authorizes the agent to:

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

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

(3) enforce the terms of an ownership agreement;

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

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

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

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

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

(B) determine:

(i) the location of its operation;

(ii) the nature and extent of its business;

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

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

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

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

- (D) demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the entity or business and control and disburse the money in the operation of the entity or business;
- (8) put additional capital into an entity or business in which the principal has an interest;
- (9) join in a plan of reorganization, consolidation, conversion, domestication, or merger of the entity or business;
- (10) sell or liquidate all or part of an entity or business;
- (11) establish the value of an entity or business under a buy-out agreement to which the principal is a party;
- (12) prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to an entity or business and make related payments; and
- (13) pay, compromise, or contest taxes, assessments, fines, or penalties and perform any other act to protect the principal from illegal or unnecessary taxation, assessments, fines, or penalties, with respect to an entity or business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

The Advisory Committee acknowledged that 20 Pa.C.S. Chapter 56 does not contain a counterpart to § 209 of the UPAA.<sup>100</sup> The Advisory Committee recommends that Pennsylvania's current power of attorney statute should be amended to explicitly include a definition of the power to operate an entity or business, analogous to § 209 of the UPAA, so that the power may be incorporated by reference into a power of attorney. The Advisory Committee recommends the addition of a new paragraph (24) under 20 Pa.C.S. § 5602(a) and a new subsection (u.2) under 20 Pa.C.S. § 5603 along the following lines:

§ 5602. Form of power of attorney.

(a) Specification of powers.--A principal may, by inclusion of the language quoted in any of the following paragraphs or by inclusion of other language showing a similar intent on the part of the principal, empower an agent to do any or all of the following, each of which is defined in section 5603 (relating to implementation of power of attorney):

\* \* \*

(24) "To operate a business or entity."

\* \* \*

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<sup>100</sup> Currently, a principal may grant this power to an agent (*e.g.*, by including a power to the following effect: "to invest my assets through any general or limited partnership or limited liability company or entity, and to take any actions on my behalf with respect to any such entity or business in which I may have an interest"), but not through simply referencing a definition under 20 Pa.C.S. § 5603.

§ 5603. Implementation of power of attorney.

\* \* \*

(u.2) Power to operate a business or entity.--A power “to operate a business or entity” shall mean that the agent may:

(1) Continue or participate in the operation of any business or other entity in which the principal holds an interest, whether alone or with others, by making and implementing decisions regarding its financing, operations, employees and all other matters pertinent to the business or entity.

(2) Change the form of ownership of the business or entity to a corporation, partnership, limited liability company or other entity, and initiate or take part in a corporate reorganization, including a merger, consolidation, dissolution or other change in organizational form.

(3) Compensate an agent actively managing, supervising or engaging in the operation of a business or entity, as appropriate, from the principal’s assets or from the business or entity, provided the compensation is reasonably based upon the actual responsibilities assumed and performed.

(4) In general, exercise all powers with respect to operating a business or entity that the principal could if present.

\* \* \*

Comment

Subsection (u.2) is intended to encompass all modern business and entity forms, including limited liability companies, limited liability partnerships and entities that may be organized other than for a business purpose.

The Advisory Committee also recommends the following conforming amendments to 20 Pa.C.S. §§ 3314 and 3315:

§ 3314. Continuation of business.

[The court,] Giving due regard to the provisions of the governing instrument and any other factor that the court deems relevant, and aided by the report of a master if necessary, the court may authorize the personal representative to continue any business of the estate for the benefit of the estate [and in doing so the court, for cause shown, may disregard the provisions of the governing instrument, if any]. The order may be with or without notice. If prior notice is not given to all parties in interest, it shall be given within five days after the order or within such extended time as the court, for cause shown, shall allow. Any party in interest may, at any time, petition the court to revoke or modify the order. The order may provide:

(1) for the conduct of business, by the personal representative alone or jointly with others, or, unless restricted by the terms of the

governing instrument, as a corporation, partnership, limited liability company or other entity to be formed;

(2) the extent of the liability of the estate or any part thereof, or of the personal representative, for obligations incurred in the continuation of the business;

(3) whether liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate set aside for use in the business or to the estate as a whole;

(4) the period of time the business may be conducted; [and]

(4.1) for the compensation of a personal representative actively managing, supervising or engaging in the operation of an entity or business, from the estate's assets or from the entity or business, as appropriate, provided the compensation is reasonably based upon the actual responsibilities assumed and performed; and

(5) such other regulations, including accountings, as the court shall deem advisable.

§ 3315. Incorporation of or formation of entity to operate estate's business.

After notice to all parties in interest, aided by the report of a master if necessary, and giving due regard to the provisions of the governing instrument and any other factor that the court deems relevant, the court[, unless restricted by the terms of the governing instrument,] may authorize the personal representative alone or jointly with others, to organize a corporation or form a partnership, limited liability company or other entity to carry on the business of the estate, whether the business was owned solely or with others, and may contribute for stock of the corporation, as capital, or for an interest in a partnership, limited liability company or other entity, all or part of the property of the estate which was invested in the business.

Because House Resolution No. 484 of 2007 does not provide a basis to make formal recommendations concerning provisions unrelated to powers of attorney, this report does not replicate the proposed amendments to 20 Pa.C.S. §§ 3314 and 3315 in its "Summary of Recommendations" or "Statutory Recommendations." They are set forth here because the Subcommittee on Guardianships and Powers of Attorney first proposed them during the review and discussions of the UPAA and Pennsylvania's current power of attorney statute. At its February 4, 2010 annual meeting, the Advisory Committee considered these proposed amendments as part of the review and discussions of other provisions of 20 Pa.C.S. unrelated to powers of attorney. Because the Advisory Committee reached consensus on these proposed amendments, they will be contained in a separate and subsequent report of the Joint State Government Commission, along with other findings and recommendations of the Advisory Committee, and presented to the Task Force on Decedents' Estates Laws.

## *Insurance and Annuities*

Section 210 of the UPAA provides for the granting of authority with respect to insurance and annuities:

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to insurance and annuities authorizes the agent to:

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

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

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

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

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

(6) exercise an election;

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

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

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

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

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

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

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

The analogous provision in 20 Pa.C.S. § 5602(a)(17) references the power to engage in insurance transactions, which means the following:

§ 5603. Implementation of power of attorney.

\* \* \*

(p) Power to engage in insurance transactions.--A power to “engage in insurance transactions” shall mean that the agent may:

(1) Purchase, continue, renew, convert or terminate any type of insurance (including, but not limited to, life, accident, health, disability or liability insurance) and pay premiums and collect benefits and proceeds under insurance policies.

(2) Exercise nonforfeiture provisions under insurance policies.

(3) In general, exercise all powers with respect to insurance that the principal could if present; however, the agent cannot designate himself beneficiary of a life insurance policy unless the agent is the spouse, child, grandchild, parent, brother or sister of the principal.

\* \* \*

At its February 2007 annual meeting, the Advisory Committee discussed this provision in light of the case of *In re Weidner*<sup>101</sup> in which the Pennsylvania Superior Court held that if an individual in a power of attorney authorizes an agent to engage in any transaction authorized by 20 Pa.C.S. Chapter 56, that authorization is not enough to alert the individual that the agent could change the beneficiary of a life insurance policy. The Superior Court determined that the power of attorney in this case did not specifically provide the agent with the authority to engage in any matter relating to insurance. Therefore, the court did not hold that the agent possessed the authority but misused it, but rather that the agent did not have it in the first place. In reviewing the implications of this holding, the Advisory Committee determined that the opinion cast some doubt on the effectiveness of the short form power of attorney permitted by 20 Pa.C.S. § 5602. Accordingly, the Advisory Committee reached consensus on the following amendment to § 5603(p):<sup>102</sup>

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<sup>101</sup> 895 A.2d 11 (Pa. Super. Ct. 2006), *rev'd*, 938 A.2d 354 (Pa. 2007). The power of attorney authorized several specific powers and then granted “the power and authority to do any act which is set forth in Chapter 56 of Title 20” and incorporated by reference all the provisions set forth in Chapter 56. 895 A.2d at 15-16. The power “to engage in insurance transactions” was not one of the specific powers authorized. This reversal is discussed *infra* note 102.

<sup>102</sup> For a history of these Advisory Committee deliberations, see the Joint State Government Commission Report of the Advisory Committee titled *The Probate, Estates and Fiduciaries Code: Proposed Amendments to Title 20 of the Pennsylvania Consolidated Statutes 5-6* (Oct. 2007). Subsequent to the issuance of this report, the Pennsylvania Supreme Court reversed the holding of the Superior Court and stated that the “decendent [principal] chose to incorporate by reference the powers enumerated in the statute, and by doing so evinced her intent to confer broad authority on her attorneys-in-fact. She specifically stated no specific powers were intended to limit the general powers conferred.” *In re Weidner*, 938 A.2d at 360. The Supreme Court held that because the decendent empowered the agent to do all the things permitted by 20 Pa.C.S. Chapter 56, thereby implicitly empowering the agent to engage in insurance transactions, the power of attorney at issue was sufficient to empower the agent to change the beneficiary of the decendent’s life insurance policy. *Id.* at 361.

(p) Power to engage in insurance transactions.--A power to “engage in insurance transactions” shall mean that the agent may:

(1) Purchase, continue, renew, convert or terminate any type of insurance (including, but not limited to, life, accident, health, disability or liability insurance) and pay premiums and collect benefits and proceeds under insurance policies.

(2) Exercise nonforfeiture provisions under insurance policies.

(3) In general, exercise all powers with respect to insurance that the principal could if present; however, the agent cannot designate himself beneficiary of a life insurance policy unless the agent is the spouse, child, grandchild, parent, brother or sister of the principal. An agent and a beneficiary of a life insurance policy shall be liable as equity and justice may require to the extent that, as determined by the court, a beneficiary designation made by the agent is inconsistent with the known or probable intent of the principal.

The amendment of 20 Pa.C.S. § 5603(p) was included in Senate Bill No. 1203 of 2007,<sup>103</sup> Senate Bill No. 53 of 2009<sup>104</sup> and House Bill No. 120 of 2009.<sup>105</sup>

Because of the proposed addition of new 20 Pa.C.S. § 5601(e.3) regarding equity and justice,<sup>106</sup> the Advisory Committee recommends the removal of the last sentence of subsection (p)(3) from the pending legislation. In addition, the Advisory Committee recommends an amendment to reference new § 5601.2(c.1) and (c.2) and repeal the existing language regarding the agent designating himself or herself as beneficiary of the principal’s life insurance policy. Finally, the Advisory Committee recommends that 20 Pa.C.S. § 5603(p) should be broadened to include references to annuities, which would also necessitate the amendment of 20 Pa.C.S. § 5602(a)(17).

Assuming that neither Senate Bill No. 53 nor House Bill No. 120 is enacted prior to the introduction and enactment of the legislation contained in this report, the Advisory Committee’s recommended amendment of 20 Pa.C.S. §§ 5602(a)(17) and 5603(p) would be as follows:

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<sup>103</sup> In 2008, Senate Bill No. 1203 was approved by the Senate by a vote of 50-0 and subsequently reported as committed from the House Judiciary Committee, after which it received first consideration. However, the bill was not enacted.

<sup>104</sup> At the time of publication of this report, Senate Bill No. 53 had been reported as amended from the Senate Judiciary Committee, received first consideration, was re-referred to the Senate Appropriations Committee, re-reported as amended from that committee and received second consideration on March 8, 2010.

<sup>105</sup> At the time of publication of this report, House Bill No. 120 had been approved by the House by a vote of 194-0 and was subsequently referred to the Senate Judiciary Committee.

<sup>106</sup> *Supra* pp. 46-47.



§ 5602. Form of power of attorney.

(a) Specification of powers.--A principal may, by inclusion of the language quoted in any of the following paragraphs or by inclusion of other language showing a similar intent on the part of the principal, empower an agent to do any or all of the following, each of which is defined in section 5603 (relating to implementation of power of attorney):

\* \* \*

(17) “To engage in insurance and annuity transactions.”

\* \* \*

§ 5603. Implementation of power of attorney.

\* \* \*

(p) Power to engage in insurance and annuity transactions.--A power to “engage in insurance and annuity transactions” shall mean that the agent may:

(1) Purchase, continue, renew, convert or terminate any type of insurance (including, but not limited to, life, accident, health, disability or liability insurance) or annuity and pay premiums and collect benefits and proceeds under [insurance] these policies.

(2) Exercise nonforfeiture provisions under insurance policies and annuity contracts.

(3) In general, exercise all powers with respect to insurance and annuities that the principal could if present[; however, the agent cannot designate himself beneficiary of a life insurance policy unless the agent is the spouse, child, grandchild, parent, brother or sister of the principal], including the designation of a beneficiary, but only as permitted under section 5601.2(c.1) and (c.2) (relating to special rules for gifts and changes to principal’s estate plan).

\* \* \*

If, however, the amendment of 20 Pa.C.S. § 5603(p)(3) pursuant to Senate Bill No. 53 or House Bill No. 120 would be enacted prior to the introduction and enactment of the legislation contained in this report, the Advisory Committee’s recommended amendment of 20 Pa.C.S. § 5603(p) would be as follows:<sup>107</sup>

(p) Power to engage in insurance and annuity transactions.--A power to “engage in insurance and annuity transactions” shall mean that the agent may:

(1) Purchase, continue, renew, convert or terminate any type of insurance (including, but not limited to, life, accident, health, disability or liability insurance) or annuity and pay premiums and collect benefits and proceeds under [insurance] these policies.

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<sup>107</sup> This report assumes that the enactment of the amendment of 20 Pa.C.S. § 5603(p)(3) under Senate Bill No. 53 or House Bill No. 120 has not occurred prior to the introduction of the legislation contained in this report. The Subcommittee also recommended a comment that concerns 20 Pa.C.S. § 5603(p)(3) and (q). *Infra* p. 86.

(2) Exercise nonforfeiture provisions under insurance policies and annuity contracts.

(3) In general, exercise all powers with respect to insurance and annuities that the principal could if present[; however, the agent cannot designate himself beneficiary of a life insurance policy unless the agent is the spouse, child, grandchild, parent, brother or sister of the principal. An agent and a beneficiary of a life insurance policy shall be liable as equity and justice may require to the extent that, as determined by the court, a beneficiary designation made by the agent is inconsistent with the known or probable intent of the principal.], including the designation of a beneficiary, but only as permitted under section 5601.2(c.1) and (c.2) (relating to special rules for gifts and changes to principal's estate plan).

### ***Estates, Trusts and Other Beneficial Interests***

Section 211 of the UPAA provides for the granting of authority with respect to estates, trusts and other beneficial interests:

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

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

(1) accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from an estate, trust, or other beneficial interest;

(2) demand or obtain money or another thing of value to which the principal is, may become, or claims to be, entitled by reason of an estate, trust, or other beneficial interest, by litigation or otherwise;

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

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

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

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

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

(8) reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust, or other beneficial interest].

Several provisions in 20 Pa.C.S. Chapter 56 concern estates, trusts and other beneficial interests, including those outlining the power to (1) make additions to an existing trust for the principal's benefit, (2) withdraw and receive the income or corpus of a trust and (3) handle interests in estates and trusts:<sup>108</sup>

§ 5603. Implementation of power of attorney.

\* \* \*

(c) Power to make additions to an existing trust.--A power "to make additions to an existing trust for my benefit" shall mean that the agent, at any time or times, may add any or all of the property owned by the principal to any trust in existence when the power was created, provided that the terms of such trust relating to the disposition of the income and corpus during the lifetime of the principal are the same as those set forth in subsection (b). The agent and the trust and its beneficiaries shall be answerable as equity and justice may require to the extent that an addition to a trust is inconsistent with prudent estate planning or financial management for the principal or with the known or probable intent of the principal with respect to disposition of his estate.

\* \* \*

(g) Power to withdraw and receive.--A power "to withdraw and receive the income or corpus of a trust" shall mean that the agent may:

(1) demand, withdraw and receive the income or corpus of any trust over which the principal has the power to make withdrawals;

(2) request and receive the income or corpus of any trust with respect to which the trustee thereof has the discretionary power to make distribution to or on behalf of the principal; and

(3) execute a receipt and release or similar document for the property received under paragraphs (1) and (2).

\* \* \*

(r) Power to handle interests in estates and trusts.--A power to "handle interests in estates and trusts" shall mean that the agent may receive a bequest, devise, gift or other transfer of real or personal property to the

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<sup>108</sup> 20 Pa.C.S. §§ 5602(a)(3), (7) and (19) and 5603(c), (g) and (r). The power to make additions to an existing trust for the principal's benefit, in 20 Pa.C.S. §§ 5602(a)(3) and 5603(c), is analogous to UPAA § 211(b)(7). The power to withdraw and receive the income or corpus of a trust, in 20 Pa.C.S. §§ 5602(a)(7) and 5603(g), is covered by UPAA § 211(b)(1) and (2). The power to handle interests in estates and trusts, in 20 Pa.C.S. §§ 5602(a)(19) and 5603(r), is covered by UPAA § 211(b)(1), (2), (3), (4), (5) and (8).

principal in the principal's own right or as a fiduciary for another and give full receipt and acquittance therefor or a refunding bond therefor; approve accounts of any estate, trust, partnership or other transaction in which the principal may have an interest; and enter into any compromise and release in regard thereto.

\* \* \*

In addition, 20 Pa.C.S. § 5602(a)(2) references the power to create a trust for the principal's benefit, which means the following:

§ 5603. Implementation of power of attorney.

\* \* \*

(b) Power to create a trust.--A power "to create a trust for my benefit" shall mean that the agent may execute a deed of trust, designating one or more persons (including the agent) as original or successor trustees and transfer to the trust any or all property owned by the principal as the agent may decide, subject to the following conditions:

(1) The income and corpus of the trust shall either be distributable to the principal or to the guardian of his estate, or be applied for the principal's benefit, and upon the principal's death, any remaining balance of corpus and unexpended income of the trust shall be distributed to the deceased principal's estate.

(2) The deed of trust may be amended or revoked at any time and from time to time, in whole or in part, by the principal or the agent, provided that any such amendment by the agent shall not include any provision which could not be included in the original deed.

\* \* \*

The Advisory Committee noted that § 211(b)(7) of the UPAA permits assets to be transferred by the agent to a principal's revocable trust created by the principal as settlor, but under 20 Pa.C.S. Chapter 56, that could only be done if the revocable trust passes back to the principal's estate. Interestingly, no such limitations appear in the UPAA.

The Advisory Committee recommends no change to 20 Pa.C.S. Chapter 56 with respect to estates, trusts and other beneficial interests.

### ***Claims and Litigation***

Section 212 of the UPAA provides for the granting of authority with respect to claims and litigation:

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to claims and litigation authorizes the agent to:

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

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

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

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

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

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

(7) act for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal or some other person, or with respect to a reorganization, receivership, or application for the appointment of a receiver or trustee which affects an interest of the principal in property or other thing of value;

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

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

The analogous provision in 20 Pa.C.S. § 5602(a)(20) references the power to pursue claims and litigation, which means the following:

§ 5603. Implementation of power of attorney.

\* \* \*

(s) Power to pursue claims and litigation.--A power to “pursue claims and litigation” shall mean that the agent may:

(1) Institute, prosecute, defend, abandon, arbitrate, compromise, settle or otherwise dispose of, and appear for the principal in, any legal

proceedings before any tribunal regarding any claim relating to the principal or to any property interest of the principal.

(2) Collect and receipt for any claim or settlement proceeds; waive or release rights of the principal; employ and discharge attorneys and others on such terms (including contingent fee arrangements) as the agent deems appropriate.

(3) In general, exercise all powers with respect to claims and litigation that the principal could if present.

\* \* \*

The Advisory Committee recommends no change to 20 Pa.C.S. Chapter 56 with respect to claims and litigation.

### ***Personal and Family Maintenance***

Section 213 of the UPAA provides for the granting of authority with respect to personal and family maintenance:

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

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

(A) the principal's children;

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

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

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

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

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

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

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

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

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

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

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

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

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

The Advisory Committee noted that this power is implicit under 20 Pa.C.S. Chapter 56 but is not specifically enumerated and that this type of provision is analogous to 20 Pa.C.S. § 5536 (distributions of income and principal during incapacity). The Advisory Committee agreed that Pennsylvania's current power of attorney statute should be amended to explicitly define the power, analogous to § 213 of the UPAA, so that the power may be incorporated by reference into a power of attorney. Accordingly, the Advisory Committee recommends the addition of a new paragraph (25) under 20 Pa.C.S. § 5602(a) and a new subsection (u.3) under 20 Pa.C.S. § 5603 along the following lines and including a comment to § 5603(u.3):

§ 5602. Form of power of attorney.

(a) Specification of powers.--A principal may, by inclusion of the language quoted in any of the following paragraphs or by inclusion of other language showing a similar intent on the part of the principal, empower an agent to do any or all of the following, each of which is defined in section 5603 (relating to implementation of power of attorney):

\* \* \*

(25) "To provide for personal and family maintenance."

\* \* \*

§ 5603. Implementation of power of attorney.

\* \* \*

(u.3) Power to provide for personal and family maintenance.--

(1) A power “to provide for personal and family maintenance” shall mean that the agent may provide for the health, education, maintenance and support, in order to maintain the customary standard of living of the principal’s spouse and the following individuals, whether living when the power of attorney is executed or later born:

(i) The principal’s minor children.

(ii) Other individuals legally entitled to be supported by the principal.

(iii) The individuals whom the principal has customarily supported.

(2) In acting under this subsection, the agent shall:

(i) Take into account the long-term needs of the principal.

(ii) Consider any independent means available to those individuals apart from the support provided by the principal.

(3) Authority with respect to personal and family maintenance is in addition to and not limited by authority that an agent may or may not have, or court approval that may be necessary, with respect to gifts under this chapter.

Comment

Subsection (u.3) is in addition to the common law authority, as well as a matter of common sense, that the agent may maintain the principal, which is consistent with the agent’s duty under § 5601(e)(1) to exercise the powers under the power of attorney for the benefit of the principal. Although payments made for the benefit of persons under this section may in fact be subject to gift tax treatment, subsection (u.3)(3) clarifies that the authority for personal and family maintenance payments by an agent emanates from this subsection rather than § 5601.2. This is an important distinction because § 5601.2 has special rules that are applicable to authorize gift making. The authority to make payments under subsection (u.3) is not limited by the provisions of § 5601.2. However, the equity and justice provision of § 5601(e.3) applies.

In making its recommendation, the Advisory Committee decided to include “minor children” in paragraph (1)(i) but not “adult children.” Adult children would be covered under paragraph (1)(ii) and (iii) if they are legally entitled to be supported or have been customarily supported by the principal. The Advisory Committee observed that if a principal has a pre-existent duty to support another individual, the principal’s agent should continue to fulfill that obligation under the authority granted by the principal’s power of attorney, even though the power of attorney does not specifically provide for such.



***Benefits from Governmental Programs or Civil or Military Service***

Section 214 of the UPAA provides for the granting of authority with respect to benefits from governmental programs or civil or military service:

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

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

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

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

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

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

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

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

The analogous provision in 20 Pa.C.S. § 5602(a)(21) references the power to receive government benefits, which means the following:

§ 5603. Implementation of power of attorney.

\* \* \*

(t) Power to receive government benefits.--A power to “receive government benefits” shall mean that the agent may prepare, sign and file any claim or application for Social Security, unemployment, military service or other government benefits; collect and receipt for all

government benefits or assistance; and, in general, exercise all powers with respect to government benefits that the principal could if present.

\* \* \*

The Advisory Committee recommends no change to 20 Pa.C.S. Chapter 56 with respect to the power to receive government benefits.

### ***Retirement Plans***

Section 215 of the UPAA provides for the granting of authority with respect to retirement plans:

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

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

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

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

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

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

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

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

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

(1) select the form and timing of payments under a retirement plan and withdraw benefits from a plan;

(2) make a rollover, including a direct trustee-to-trustee rollover, of benefits from one retirement plan to another;

(3) establish a retirement plan in the principal’s name;

(4) make contributions to a retirement plan;

- (5) exercise investment powers available under a retirement plan;  
and
- (6) borrow from, sell assets to, or purchase assets from a retirement plan.

The analogous provision in 20 Pa.C.S. § 5602(a)(18) references the power to engage in retirement plan transactions, which means the following:

§ 5603. Implementation of power of attorney.

\* \* \*

(q) Power to engage in retirement plan transactions.--A power to “engage in retirement plan transactions” shall mean that the agent may contribute to, withdraw from and deposit funds in any type of retirement plan (including, but not limited to, any tax qualified or nonqualified pension, profit sharing, stock bonus, employee savings and retirement plan, deferred compensation plan or individual retirement account), select and change payment options for the principal, make roll-over contributions from any retirement plan to other retirement plans and, in general, exercise all powers with respect to retirement plans that the principal could if present.

\* \* \*

At its February 2007 annual meeting, the Advisory Committee discussed this provision along with 20 Pa.C.S. § 5603(p) (power to engage in insurance transactions)<sup>109</sup> and reached consensus on the following amendment to § 5603(q):

(q) Power to engage in retirement plan transactions.--A power to “engage in retirement plan transactions” shall mean that the agent may contribute to, withdraw from and deposit funds in any type of retirement plan (including, but not limited to, any tax qualified or nonqualified pension, profit sharing, stock bonus, employee savings and retirement plan, deferred compensation plan or individual retirement account), select and change payment options for the principal, make roll-over contributions from any retirement plan to other retirement plans and, in general, exercise all powers with respect to retirement plans that the principal could if present. However, the agent cannot designate himself beneficiary of a retirement plan unless the agent is the spouse, child, grandchild, parent, brother or sister of the principal. An agent and a beneficiary of a retirement plan shall be liable as equity and justice may require to the extent that, as determined by the court, a beneficiary designation made by the agent is inconsistent with the known or probable intent of the principal.

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<sup>109</sup> *Supra* pp. 71-72.

The amendment to 20 Pa.C.S. § 5603(q) was included in Senate Bill No. 1203 of 2007, Senate Bill No. 53 of 2009 and House Bill No. 120 of 2009.<sup>110</sup>

Because of the proposed addition of new 20 Pa.C.S. § 5601(e.3) regarding equity and justice,<sup>111</sup> the Advisory Committee recommends the removal of the last sentence of subsection (q) from the pending legislation. In addition, the Advisory Committee recommends an amendment to reference new § 5601.2(c.1) and (c.2) and repeal the existing language regarding the agent designating himself or herself as beneficiary of the principal's retirement plan. Assuming that neither Senate Bill No. 53 nor House Bill No. 120 is enacted prior to the introduction and enactment of the legislation contained in this report, the Advisory Committee's recommended amendment of 20 Pa.C.S. § 5603(q) would be as follows:

(q) Power to engage in retirement plan transactions.--A power to “engage in retirement plan transactions” shall mean that the agent may contribute to, withdraw from and deposit funds in any type of retirement plan (including, but not limited to, any tax qualified or nonqualified pension, profit sharing, stock bonus, employee savings and retirement plan, deferred compensation plan or individual retirement account), select and change payment options for the principal, make roll-over contributions from any retirement plan to other retirement plans and, in general, exercise all powers with respect to retirement plans that the principal could if present, including the designation of a beneficiary, but only as permitted under section 5601.2(c.1) and (c.2).

If, however, the amendment of 20 Pa.C.S. § 5603(q) pursuant to Senate Bill No. 53 or House Bill No. 120 would be enacted prior to the introduction and enactment of the legislation contained in this report, the Advisory Committee's recommended amendment of 20 Pa.C.S. § 5603(q) would be as follows:<sup>112</sup>

(q) Power to engage in retirement plan transactions.--A power to “engage in retirement plan transactions” shall mean that the agent may contribute to, withdraw from and deposit funds in any type of retirement plan (including, but not limited to, any tax qualified or nonqualified pension, profit sharing, stock bonus, employee savings and retirement plan, deferred compensation plan or individual retirement account), select and change payment options for the principal, make roll-over contributions from any retirement plan to other retirement plans and, in general, exercise all powers with respect to retirement plans that the

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<sup>110</sup> See *supra* notes 103-105.

<sup>111</sup> *Supra* pp. 46-47.

<sup>112</sup> This report assumes that the enactment of the amendment of 20 Pa.C.S. § 5603(q) under Senate Bill No. 53 or House Bill No. 120 has not occurred prior to the introduction of the legislation contained in this report.

principal could if present[. However, the agent cannot designate himself beneficiary of a retirement plan unless the agent is the spouse, child, grandchild, parent, brother or sister of the principal. An agent and a beneficiary of a retirement plan shall be liable as equity and justice may require to the extent that, as determined by the court, a beneficiary designation made by the agent is inconsistent with the known or probable intent of the principal], including the designation of a beneficiary, but only as permitted under section 5601.2(c.1) and (c.2).

During the course of the discussions of the Subcommittee on Guardianships and Powers of Attorney, the Pennsylvania Supreme Court decided the case of *In re Estate of Slomski*.<sup>113</sup> The majority opinion held “that a principal’s Power of Attorney granting the agent the power to engage in retirement plan transactions authorized his agent to change the beneficiary of the principal’s retirement plan.”<sup>114</sup> Although “the power to engage in retirement plan transactions does not specifically include the ability to change the beneficiary designations, it does authorize the agent to ‘exercise all powers with respect to retirement plans that the principal could if present.’”<sup>115</sup> In so holding, the majority opinion rejected the argument that the change of the retirement plan beneficiaries was a gift beyond the agent’s powers since the power of attorney did not include the power to make unlimited gifts.<sup>116</sup>

The majority opinion also noted the limiting language in 20 Pa.C.S. § 5603(p)(3): (“however, the agent cannot designate himself beneficiary of a life insurance policy unless the agent is the spouse, child, grandchild, parent, brother or sister of the principal”). Because 20 Pa.C.S. § 5603(q) has no comparable limitation, the majority opinion infers that the legislature did not intend to limit the power under subsection (q) and, therefore, the change in beneficiaries was proper.<sup>117</sup>

The dissenting opinion in *Slomski* stated that 20 Pa.C.S. § 5602(a)(18) (the reference to the power to engage in retirement plan transactions, which is defined in § 5603(q)) must be read in conjunction with § 5601.2 (special rules for gifts), given their material overlap. Accordingly, the dissenting opinion agreed with the reasoning of the Pennsylvania Superior Court:

[T]he purpose of [Section 5601.2] is to ensure that if the principal desires to authorize the agent to make a gift, that authorization must be specifically stated in the power of attorney and it cannot be incorporated

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<sup>113</sup> 987 A.2d 141 (Pa. 2009).

<sup>114</sup> *Id.* at 141.

<sup>115</sup> *Id.* at 143.

<sup>116</sup> *Id.* at 144.

<sup>117</sup> *Id.* at 142-143 & 143-144 n.2.

by reference to the general powers offered to agents in the statutory provision of [S]ection 5602. It was intended to prevent the potential for abuse of the power to make gifts by agents acting under a power of attorney.<sup>118</sup>

Although the dissenting opinion stated that the “all powers” language of § 5603(q) includes the power to change a beneficiary, it disagreed that “this conclusion by itself excludes the possibility that designating a beneficiary is also a gift subject to Section 5601.2’s special rules for gifts”; therefore, “an additional assessment of the nature of a change of beneficiary is required.”<sup>119</sup>

The Subcommittee on Guardianships and Powers of Attorney supported the policy reflected by the reasoning of the dissenting opinion in *Slomski*, believing that the change of a beneficiary designation should be permitted without court approval only if that power is expressly granted in the power of attorney and if the exercise of the power maintains and is consistent with the preservation of the principal’s estate plan.<sup>120</sup> When the change in a beneficiary designation is inconsistent with the preservation of the principal’s estate plan, the Subcommittee favored the ability of an agent to make the change with court approval if that power is granted in the power of attorney and the court finds that the change is consistent with both prudent estate planning or financial management for the principal and the known or probable intent of the principal with respect to the disposition of the principal’s property.<sup>121</sup>

In light of the proposed amendments to 20 Pa.C.S. § 5603(p.3) and (q), the Advisory Committee recommends the following comment to § 5603:

Comment

Subsections (p)(3) and (q) as amended make beneficiary designations subject to § 5601(c.1) and (c.2). The amendments clarify that the General Assembly intends that the same powers and protections should apply to both subsections and statutorily reverse the effect of the 2009 Pennsylvania Supreme Court decision of *In re Estate of Slomski*, 987 A.2d 141 (Pa. 2009).

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<sup>118</sup> *Id.* at 145-146 (quoting *Estate of Slomski v. Thermoclad Co.*, 956 A.2d 438, 447 (Pa. Super. Ct. 2008)).

<sup>119</sup> *Id.* at 146.

<sup>120</sup> *Infra* pp. 92-93 & 95-96 (proposed § 5601.2(c.1)).

<sup>121</sup> *Id.* (proposed § 5601.2(c.2)).

## *Taxes*

Section 216 of the UPAA provides for the granting of authority with respect to taxes:

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

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

The analogous provision in 20 Pa.C.S. § 5602(a)(22) references the power to pursue tax matters, which means the following:

§ 5603. Implementation of power of attorney.

\* \* \*

(u) Power to pursue tax matters.--A power to “pursue tax matters” shall mean that the agent may:

- (1) Prepare, sign, verify and file any tax return on behalf of the principal, including, but not limited to, joint returns and declarations of estimated tax; examine and copy all the principal's tax returns and tax records.
- (2) Sign an Internal Revenue Service power of attorney form.
- (3) Represent the principal before any taxing authority; protest and litigate tax assessments; claim, sue for and collect tax refunds; waive rights and sign all documents required to settle, pay and determine tax liabilities; sign waivers extending the period of time for the assessment of taxes or tax deficiencies.
- (4) In general, exercise all powers with respect to tax matters that the principal could if present.

\* \* \*

The Advisory Committee recommends no change to 20 Pa.C.S. Chapter 56 with respect to the power to pursue tax matters.

### *Gifts*

Section 217 of the UPAA provides for the granting of authority with respect to gifts:

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

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

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

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

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

- (1) the value and nature of the principal’s property;
- (2) the principal’s foreseeable obligations and need for maintenance;
- (3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;
- (4) eligibility for a benefit, a program, or assistance under a statute or regulation; and
- (5) the principal’s personal history of making or joining in making gifts.



The comment to § 217(c) specifies the following:

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

Several provisions in 20 Pa.C.S. Chapter 56 concern the power to make gifts:

§ 5601.2. Special rules for gifts.

(a) General rule.--A principal may empower an agent to make a gift in a power of attorney only as provided in this section.

(b) Limited gifts.--A principal may authorize an agent to make a limited gift as defined under section 5603(a)(2) (relating to implementation of power of attorney) by the inclusion of:

(1) the language quoted in section 5602(a)(1) (relating to form of power of attorney); or

(2) other language showing a similar intent on the part of the principal to empower the agent to make a limited gift.

(c) Unlimited gifts.--A principal may authorize an agent to make any other gift only by specifically providing for and defining the agent's authority in the power of attorney.

(d) Nature of gifts.--In the absence of a specific provision to the contrary in the power of attorney:

(1) A power to make a limited gift shall be construed to empower the agent to make a gift to each donee either outright or in trust.

(2) In the case of any gift to a minor, that gift may be made in trust or in accordance with Chapter 53 (relating to Pennsylvania Uniform Transfers to Minors Act) or section 5155 (relating to order of court).

(3) In the case of any gift made in trust, the agent may execute a deed of trust for such purpose, designating one or more persons, including the agent, as original or successor trustees, or may make an addition to an existing trust.

(4) In making any gift, the agent need not treat the donees equally or proportionately and may entirely exclude one or more permissible donees.

(5) The pattern followed on the occasion of any gift need not be followed on the occasion of any other gift.

(e) Equity.--An agent and the donee of a gift shall be liable as equity and justice may require to the extent that, as determined by the court, a gift made by the agent is inconsistent with prudent estate planning or financial management for the principal or with the known or probable intent of the principal with respect to disposition of the estate.

(f) Third party.--No transfer agent, depository or other third party acting in good faith shall have any responsibility to see to the proper discharge of the agent's duty.

§ 5602. Form of power of attorney.

(a) Specification of powers.--A principal may, by inclusion of the language quoted in any of the following paragraphs or by inclusion of other language showing a similar intent on the part of the principal, empower an agent to do any or all of the following, each of which is defined in section 5603 (relating to implementation of power of attorney):

(1) "To make limited gifts."

\* \* \*

§ 5603. Implementation of power of attorney.

(a) Power to make limited gifts.--

\* \* \*

(2) A power "to make limited gifts" shall mean that the agent may make only gifts for or on behalf of the principal which are limited as follows:

(i) The class of permissible donees under this paragraph shall consist solely of the principal's spouse, issue and a spouse of the principal's issue (including the agent if a member of any such class), or any of them.

(ii) During each calendar year, the gifts made to any permissible donee, pursuant to such power, shall have an aggregate value not in excess of, and shall be made in such manner as to qualify in their entirety for, the annual exclusion from the Federal gift tax permitted under section 2503(b) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 1 et seq.) for the principal and, if applicable, the principal's spouse.

\* \* \*

(iv) In addition to the gifts authorized by subparagraphs (i) and (ii), a gift made pursuant to such power may be for the tuition or medical care of any permissible donee to the extent that the gift is excluded from the Federal gift tax under section 2503(e) of the Internal Revenue Code of 1986 as a qualified transfer.

(v) The agent may consent, pursuant to section 2513(a) of the Internal Revenue Code of 1986, to the splitting of gifts made by the principal's spouse to the principal's issue or a spouse of the principal's issue in any amount and to the splitting of gifts made by the principal's spouse to any other person in amounts not exceeding the aggregate annual gift tax exclusions for both spouses under section 2503(b) of the Internal Revenue Code of 1986.

\* \* \*

The UPAA and 20 Pa.C.S. Chapter 56 contain several notable differences with respect to the power to make limited gifts:

- (1) Unlike UPAA § 217(b)(1), which includes the phrase “without regard to whether the federal gift tax exclusion applies to the gift,” 20 Pa.C.S. § 5603(a)(ii) expressly requires the gift to qualify for the exclusion.
- (2) Unlike UPAA § 217(b)(2), which authorizes the agent to consent to the splitting of a gift made by the principal’s spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses, 20 Pa.C.S. § 5603(a)(v) allows such splitting as to *any* amount when the gift is to the principal’s issue or a spouse of the principal’s issue.<sup>122</sup>
- (3) Under 20 Pa.C.S. § 5603(a)(2)(i), a limited gift may only be to the principal’s spouse, issue and a spouse of the principal’s issue, but UPAA § 217 contains no such donee limitation.
- (4) 20 Pa.C.S. § 5603(a)(iv) permits gifts for the tuition or medical care of a permissible donee, but the UPAA contains no such provision.
- (5) Unlike 20 Pa.C.S. Chapter 56, § 217(b)(1) permits a gift to be made “by the exercise of a presently exercisable general power of appointment held by the principal.”

The Advisory Committee concluded that the limited gift-making provisions under 20 Pa.C.S. Chapter 56 work well. Nevertheless, the Advisory Committee recommends several amendments to 20 Pa.C.S. §§ 5601.2 (special rules for gifts) and 5603(a)(1) (power to make limited gifts).<sup>123</sup> Those recommended amendments, along with notes and comments are as follows:

§ 5601.2. Special rules for gifts and changes to principal’s estate plan.

(a) General rule.--A principal may empower an agent to make a gift or make changes to the principal’s estate plan in a power of attorney only as provided in this section. A power to make a gift or make changes to the principal’s estate plan may not be inferred from a grant of another power or from a general grant of authority to do anything that the principal could do, except to the extent that a principal expressly grants the agent the power under section 5603(u.3) (relating to implementation of power of attorney) authorizing personal and family maintenance.

(b) Limited gifts not requiring court approval.--Limited gifts that are authorized in compliance with this subsection do not require court

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<sup>122</sup> 20 Pa.C.S. § 5603(a)(v) limits the splitting of gifts “to any other person in amounts not exceeding the aggregate annual gift tax exclusions for both spouses.”

<sup>123</sup> *Also see* the proposed recommendations regarding 20 Pa.C.S. § 5603(p)(3) and (q) and a discussion of the *Slomski* case, *supra* pp. 73 & 84-86.

approval. A principal may authorize an agent to make [a] limited [gift] gifts as defined under section 5603(a)(2) [(relating to implementation of power of attorney)] only by the inclusion of:

(1) the language quoted in section 5602(a)(1) (relating to form of power of attorney); or

(2) other language showing a similar intent on the part of the principal to empower the agent to make a limited gift.

(c) [Unlimited] Other gifts specifically authorized and not requiring court approval.--Other gifts that are specifically authorized in compliance with this subsection do not require court approval. A principal may authorize an agent to make any other gift only by specifically [providing for and defining the agent's authority in the power of attorney.] identifying:

(1) The donee, such as an individual, charity or other entity, whether by name, relationship, class or other description, except that the phrase "any donee" or other language showing a similar intent is not a specific identification.

(2) The property to be gifted or the amounts of cash gifts.

(c.1) Other actions not requiring court approval.--

(1) An agent may act without court approval if the action:

(i) Is otherwise authorized by the power of attorney.

(ii) Maintains and is consistent with the preservation of the principal's estate plan, including the effect of intestacy if the principal does not have a will.

(2) An action under this subsection may include:

(i) Placing property into joint names with rights of survivorship.

(ii) The use of a designation such as "in trust for," "payable on death" or "transfer on death."

(iii) The execution of a beneficiary designation.

(3) An action under this subsection may not be taken if the interest of any beneficiary under the principal's existing estate plan, including an intestacy if the principal has no will, is prejudiced thereby. Either of the following shall be considered a change in the principal's estate plan and governed by subsection (c.2), which requires court approval:

(i) An action that results in a beneficiary receiving at the death of the principal an interest outright and free of trust that would have passed in trust at death under the principal's present estate plan.

(ii) An action that converts an outright gift at death into one received in trust.

(c.2) Court-approved gifts and changes to estate plan.--

(1) Subject to paragraph (2), a principal may authorize an agent to do the following on behalf of the principal or with the principal's property:

(i) Make a gift other than a gift authorized under subsection (b) or (c).

(ii) Create or change rights of survivorship.

(iii) Create or change a beneficiary designation.

(iv) Create an inter vivos trust, other than a trust described in section 5603(b) or (c), or amend, revoke or terminate an existing trust, but only to the extent that the principal had previously retained or been granted such powers.

(v) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.

(2) An agent may exercise a power under paragraph (1) only if:

(i) The power of attorney expressly grants the agent the specific authority to exercise the power.

(ii) The court having jurisdiction over the agent, upon petition by the agent, approves the agent's proposed action after finding that it is consistent with both:

(A) Prudent estate planning or financial management for the principal.

(B) The known or probable intent of the principal with respect to the disposition of the principal's property.

(d) Nature of gifts.--In the absence of a specific provision to the contrary in the power of attorney:

(1) A power to make a [limited] gift under subsection (b) or (c) shall be construed to empower the agent to make a gift to each donee either outright, [or] in trust or to a tuition savings account or prepaid tuition plan as defined in section 529 of the Internal Revenue Code of 1986 (26 U.S.C. § 529).

(2) In the case of any gift to a minor, that gift may be made in trust or in accordance with Chapter 53 (relating to Pennsylvania Uniform Transfers to Minors Act) or section 5155 (relating to order of court).

(3) In the case of any gift made in trust, the agent may execute a deed of trust for such purpose, designating one or more persons, including the agent, as original or successor trustees, or may make an addition to an existing trust.

(4) In making any gift, the agent need not treat the donees equally or proportionately and may entirely exclude one or more permissible donees.

(5) The pattern followed on the occasion of any gift need not be followed on the occasion of any other gift.

[(e) Equity.--An agent and the donee of a gift shall be liable as equity and justice may require to the extent that, as determined by the court, a gift made by the agent is inconsistent with prudent estate planning or financial management for the principal or with the known or probable intent of the principal with respect to disposition of the estate.]

\* \* \*

(g) Court proceeding.--When court approval is required under subsection (c.2):

(1) The burden of proof, by clear and convincing evidence, shall be on the agent.

(2) Notice of the petition and hearing shall be given in the manner as the court shall direct to:

(i) All persons who are sui juris and would be entitled to share in the principal's estate if the principal died intestate at that time.

(ii) Any person known to the agent who would be prejudiced by the proposed action.

(iii) Such other parties as the court may direct.

(3) The hearing may be closed to the public unless the principal or the principal's counsel objects.

(4) The court sua sponte or upon request of the agent or others may direct that some or all of the pleadings or documents related to the petition and hearing be sealed or redacted in the manner and to the extent that the court deems appropriate.

#### Note

Subsection (d)(1) does not permit a gift using up to five years of annual exclusion in a single year for a gift to a 529 account, but the principal may grant this authority under subsection (c). The language of subsection (g)(2) and (3) largely parallels that of 20 Pa.C.S. Ch. 55.

#### Comment

The amendments to this section make a dramatic change to Pennsylvania law, representing an attempt to preserve the great usefulness of the power of attorney to manage a principal's financial affairs and to protect and implement the principal's estate plan.

Subsection (a) is expanded to also cover changes to the principal's estate plan. The new second sentence applies, *e.g.*, to any other expressly granted power in § 5603 that contains a general grant of power, such as "in general, exercise all powers with respect to real property that the principal could if present."

The limited gifts provision under subsection (b) is unchanged, the balance being in favor of this widely useful power with less prospect for abuse than gifting involving substantially larger amounts. For larger gifts, provided there is the requisite degree of specificity as to the donee and object of the gift, subsection (c) does not require court approval as is required in subsection (c.2).

Illustrative examples of "other gifts specifically authorized" under subsection (c) include (1) gifts of any or all of a principal's assets to the principal's spouse, so as to effectively use both spouse's exemptions, exclusion, credits and the like for transfer tax purposes or to implement Medicaid planning; (2) annual gifts of up to \$25,000 to each child of the principal (*i.e.*, the principal may give the agent discretion as to whether

and how much to give, up to the stated amount); (3) gifts to a 529 account for a child, as enhanced by an election to ratably spread the taxability of such a gift (to utilize up to five years of annual exclusion in one year); and (4) limited gifts to someone outside the class of permissible donees for limited gifts under § 5603(a)(2)(i), which class includes only the principal's spouse and issue and a spouse of the principal's issue (*e.g.*, a limited gift under subsection (c) could be made to one or more of the principal's nieces and nephews); (5) a gift indexed for inflation or tied to some other standard and (6) a gift to a specifically identified donee described by reference to the amount of the federal gift tax exclusions under Internal Revenue Code § 2503(b) or (e). Subsection (c) does not permit a gift of X to "any donee," but subsection (c.2) would allow such an approach with court approval.

Under subsection (c.1), an agent is permitted, for example, to make a beneficiary designation or create a survivorship interest if expressly authorized to do so in the power of attorney, and without the necessity of court approval, but only if the designation or creation is consistent with or maintains the principal's estate plan. If authority for one or more of these powers is not granted then a guardianship proceeding would be needed under Chapter 55 (incapacitated persons). Subsection (c.1) would permit moving an IRA or joint account from one financial institution to another or such actions which will carry out the principal's estate plan, but avoid probate, otherwise lower costs of estate administration, save taxes or accomplish some other objective.

Subsection (c.1)(3) prohibits, *e.g.*, an action that would change the identity of or the amount passing to a beneficiary. Subsection (c.1)(3) also recognizes that the manner and nature of how property passes at the death of the principal is just as important as the amount of the property so passing such that a change by an agent under this subsection causing property to pass outright instead of in trust, or vice versa, requires court approval under subsection (c.2) even if the beneficiary and the beneficiary's share of the property so passing is unchanged. This rule is in contrast to the rule for limited gifts and other gifts specifically authorized under subsections (b) and (c) respectively, where the agent is empowered to make the gift outright or in trust under subsection (d)(1), as broadened to cover subsection (c) and permit such gifts to a plan defined under Internal Revenue Code § 529.

The protection in subsection (c.2) requires both an express grant of authority in the power of attorney and court approval, when the agent's action would alter the recipient of the principal's assets or benefits during the principal's life, unless authorized in the power of attorney under subsection (b) or (c), or at the death of the principal, by effectuating an estate planning change via a beneficiary designation or survivorship rights (*e.g.*, TOD, POD or ITF). These new requirements apply even where close family members are involved, either as the agent or

donee/beneficiary, since that is often a situation where an abuse may occur.

An agent may not seek court approval to make gifts unless the agent is expressly granted authority to make gifts in the power of attorney under subsection (c.2). Absent a grant of authority for gifts encompassed by subsection (b), (c) or (c.2), the agent would need to follow the procedures under Chapter 55 (incapacitated persons) so as to implement estate planning changes.

Subsection (e), which was limited in scope and applied only with respect to gifts, was repealed because § 5601(e.3) extends judicial authority to exercise principles of equity and justice to any action of the agent under Chapter 56.

#### § 5603. Implementation of power of attorney.

(a) Power to make limited gifts.--

(1) (Deleted by amendment).

(2) A power “to make limited gifts” shall mean that the agent may make only gifts for or on behalf of the principal which are limited as follows:

(i) The class of permissible donees under this paragraph shall consist solely of the principal’s spouse, issue and a spouse of the principal’s issue (including the agent if a member of any such class), or any of them.

(ii) During each calendar year, the gifts made to any permissible donee, pursuant to such power, shall have an aggregate value not in excess of, and shall be made in such manner as to qualify in their entirety for, the annual exclusion from the Federal gift tax permitted under section 2503(b) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 1 et seq.) for the principal [and, if applicable, the principal’s spouse.] or, if the principal’s spouse agrees to consent to splitting gifts pursuant to section 2513(a) of the Internal Revenue Code of 1986, in an amount per donee (other than the spouse) not to exceed twice the annual exclusion limit. The limits under this subparagraph may be exceeded if and to the extent the agent elects to equalize gifts among family units with each child of the principal and his or her descendants treated as a family unit.

(iii) (Deleted by amendment).

(iv) In addition to the gifts authorized by subparagraphs (i) and (ii), a gift made pursuant to such power may be for the tuition or medical care of any permissible donee to the extent that the gift is excluded from the Federal gift tax under section 2503(e) of the Internal Revenue Code of 1986 as a qualified transfer.

(v) The agent may consent, pursuant to section 2513(a) of the Internal Revenue Code of 1986, to the splitting of gifts made by



the principal's spouse to the principal's issue or a spouse of the principal's issue in any amount and to the splitting of gifts made by the principal's spouse to any other person in amounts not exceeding the aggregate annual gift tax exclusions for both spouses under section 2503(b) of the Internal Revenue Code of 1986.

(3) (Deleted by amendment).

(4) (Deleted by amendment).

(5) (Deleted by amendment).

\* \* \*

#### Comment

The change as to gift splitting in subsection (a)(2)(ii) is to clarify that an agent can make a gift of the principal's assets up to twice the amount of the annual exclusion if the principal's spouse indicates a willingness to "split" gifts. The last sentence of subsection (a)(2)(ii) is a new provision so that limited gifts to a "family unit" can be equalized even if this means exceeding the available annual exclusions and thus using a portion of the principal's cumulative lifetime gift exemption (currently \$1,000,000) or paying gift tax if there is an insufficient amount of such exemption remaining.

The Advisory Committee recommends that the amendments to 20 Pa.C.S. §§ 5601.2 and 5603(a)(2)(ii) should take effect in six months, which would enable practitioners and the public to prepare for the statutory changes.

### ***Article 3 of the Uniform Act (Statutory Forms)***

Article 3 of the UPAA contains §§ 301 (statutory form power of attorney) and 302 (agent's certification).

Pennsylvania's current power of attorney statute does not provide for or require a statutory form power of attorney. However, 20 Pa.C.S. § 5601 mandates notice and acknowledgment provisions:

§ 5601. General provisions.

\* \* \*

(c) Notice.--All powers of attorney shall include the following notice in capital letters at the beginning of the power of attorney. The notice shall be signed by the principal. In the absence of a signed notice, upon a challenge to the authority of an agent to exercise a power under the power of attorney, the agent shall have the burden of demonstrating that the exercise of this authority is proper.

NOTICE

The purpose of this power of attorney is to give the person you designate (your "agent") broad powers to handle your property, which may include powers to sell or otherwise dispose of any real or personal property without advance notice to you or approval by you.

This power of attorney does not impose a duty on your agent to exercise granted powers, but when powers are exercised, your agent must use due care to act for your benefit and in accordance with this power of attorney.

Your agent may exercise the powers given here throughout your lifetime, even after you become incapacitated, unless you expressly limit the duration of these powers or you revoke these powers or a court acting on your behalf terminates your agent's authority.

Your agent must keep your funds separate from your agent's funds.

A court can take away the powers of your agent if it finds your agent is not acting properly.

The powers and duties of an agent under a power of attorney are explained more fully in 20 Pa.C.S. Ch. 56.

If there is anything about this form that you do not understand, you should ask a lawyer of your own choosing to explain it to you.

I have read or had explained to me this notice and I understand its contents.

(Principal)

(Date)

(d) Acknowledgment executed by agent.--An agent shall have no authority to act as agent under the power of attorney unless the agent has first executed and affixed to the power of attorney an acknowledgment in substantially the following form:

I, \_\_\_\_\_, have read the attached power of attorney and am the person identified as the agent for the principal. I hereby acknowledge that in the absence of a specific provision to the contrary in the power of attorney or in 20 Pa.C.S. when I act as agent:

I shall exercise the powers for the benefit of the principal.

I shall keep the assets of the principal separate from my assets.

I shall exercise reasonable caution and prudence.

I shall keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.

(Agent)

(Date)

\* \* \*

In addition, 20 Pa.C.S. Chapter 56 limits the applicability of § 5601(c) and (d) for commercial transactions and health care powers of attorney:

§ 5601. General provisions.

\* \* \*

(e.1) Limitation on applicability in commercial transaction.--

(1) Subsections (c), (d) and (e) do not apply to a power or a power of attorney contained in an instrument used in a commercial transaction which simply authorizes an agency relationship. This paragraph includes the following:

(i) A power given to or for the benefit of a creditor in connection with a loan or other credit transaction.

(ii) A power exclusively granted to facilitate transfer of stock, bonds and other assets.

(iii) A power contained in the governing document for a corporation, partnership or limited liability company or other legal entity by which a director, partner or member authorizes others to do other things on behalf of the entity.

(iv) A warrant of attorney conferring authority to confess judgment.

(v) A power given to a dealer as defined by the act of December 22, 1983 (P.L.306, No.84), known as the Board of Vehicles Act, when using the power in conjunction with a sale, purchase or transfer of a vehicle as authorized by 75 Pa.C.S. § 1119 (relating to application for certificate of title by agent).

(2) Powers and powers of attorney exempted by this subsection need not be dated.

(e.2) Limitation on applicability in health care power of attorney.--

Subsections (c) and (d) do not apply to a power of attorney which exclusively provides for health care decision making.

\* \* \*

The Subcommittee on Guardianships and Powers of Attorney did not favor including a statutory form -- mandatory or optional -- for powers of attorney within 20 Pa.C.S. Chapter 56. The Subcommittee based this policy decision upon the premise that (1) the drafting of a durable financial power of attorney should require a full decision-making process in order to minimize abuse and (2) the drafting of a durable financial power of attorney without the benefit of legal counsel should not be encouraged by the inclusion of a statutory form. This policy decision is in contrast to the provisions regarding a durable health care power of attorney under 20 Pa.C.S. § 5471, which contains an example of a combined living will and health care power of attorney. A durable health care power of attorney is less likely to be the subject of abuse and more likely to be properly completed without the benefit of legal counsel.

The Advisory Committee agreed and does not recommend the inclusion of a statutory form.

## ***Article 4 of the Uniform Act (Miscellaneous Provisions)***

### ***Uniformity of Application and Construction***

Section 401 of the UPAA provides that “[i]n applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.”

Pennsylvania law regarding the construction of uniform laws specifies that “[s]tatutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them.”<sup>124</sup>

The Advisory Committee considered the current provision in Pennsylvania law to be adequate.

### ***Relation to Electronic Signatures in Global and National Commerce Act***

Section 402 of the UPAA provides that the UPAA “modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).”

Pennsylvania’s relation to the Electronic Signatures in Global and National Commerce Act is governed by the Electronic Transactions Act.<sup>125</sup>

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<sup>124</sup> 1 Pa.C.S. § 1927.

<sup>125</sup> Act of Dec. 16, 1999, P.L. 971, No. 69 (73 P.S. §§ 2260.101 - 2260.5101). The Electronic Transactions Act “applies to electronic records and electronic signatures relating to a transaction.” *Id.* § 104(a) (73 P.S. § 2260.104(a)). A transaction is “[a]n action or set of actions occurring between two or more persons relating to the conduct of business, commercial or governmental affairs.” *Id.* § 103 (73 P.S. § 2260.103). The scope of the act is further set forth in § 104 (73 P.S. § 2260.104):

\* \* \*

(b) Exception.--Subject to subsection (c), this act does not apply to a transaction to the extent it is governed by any of the following:

- (1) A law governing the creation and execution of wills, codicils or testamentary trusts.
- (2) The provisions of 13 Pa.C.S. (relating to commercial code) other than:
  - (i) sections 1107 (relating to waiver or renunciation of claim or right after breach) and 1206 (relating to statute of frauds for kinds of personal property not otherwise covered);
  - (ii) Division 2 (relating to sales); and

The Advisory Committee considered the current provision in Pennsylvania law to be adequate.

### *Effect on Existing Powers of Attorney*

Section 403 of the UPAA provides the following regarding the effect on existing powers of attorney:

Except as otherwise provided in this [act], on [the effective date of this [act]]:

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

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

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

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

The Advisory Committee disfavored the retroactive application of statutory amendments and recommends no amendment incorporating the uniform provision into the Pennsylvania statute.

The Advisory Committee recommends that the amendment of 20 Pa.C.S. Chapters 54 and 56 should take effect in six months, except that new § 5601(e.3) and the repeal of current § 5601.2(e) should take effect immediately.

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(iii) Division 2A (relating to leases).

(c) Limitation of exception.--This act applies to an electronic record or electronic signature otherwise excluded from the application of this act under subsection (b) to the extent it is governed by a law other than those specified in subsection (b).

(d) Other law.--A transaction subject to this act is also subject to other applicable substantive law.



## **STATUTORY RECOMMENDATIONS**

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Title 20 of the Pennsylvania Consolidated Statutes (the Probate, Estates and Fiduciaries Code) is amended as follows:

### **§ 5422. Definitions.**

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

\* \* \*

“Health care decision.” A decision regarding an individual’s health care, including, but not limited to, the following:

- (1) Selection and discharge of a health care provider.
- (2) Approval or disapproval of a diagnostic test, surgical procedure or program of medication.
- (3) Directions to initiate, continue, withhold or withdraw all forms of life-sustaining treatment, including instructions not to resuscitate.
- (4) Admission to a medical, nursing, residential or similar facility, or entering into agreements for the individual’s care.
- (5) After the death of the individual, making anatomical gifts, disposing of the remains or consenting to autopsies.

\* \* \*

**§ 5456. Authority of health care agent.**

(a) Extent of authority.--Except as expressly provided otherwise in a health care power of attorney and subject to subsection (b) and section 5460 (relating to relation of health care agent to court-appointed guardian and other agents), a health care agent shall have the authority to make any health care decision and to exercise any right and power regarding the principal's care, custody and health care treatment that the principal could have made and exercised. The foregoing power shall include the power to authorize admission to a medical, nursing, residential or similar facility, or to enter into agreements for the principal's care. The health care agent's authority may extend beyond the principal's death to make anatomical gifts, dispose of the remains and consent to autopsies.

\* \* \*

**§ 5460. Relation of health care agent to court-appointed guardian and other agents.**

(a) Accountability of health care agent.--If a principal who has executed a health care power of attorney is later adjudicated an incapacitated person and a guardian of the person to make health care decisions is appointed by a court, the health care agent is accountable to the guardian as well as to the principal. [The guardian shall have the same power to revoke or amend the appointment of a health care agent that the principal would have if the principal were not incapacitated but may not revoke or amend other instructions in an advance health directive absent judicial authorization.] In its guardianship order and determination of a person's incapacity, the court shall determine the extent to which the health care agent's authority to act remains in effect.



\* \* \*

### Comment

The repeal of the second sentence of subsection (a) is done in conjunction with the amendment of § 5604(c)(1). A guardian of the person should not be able to revoke the appointment of a health care agent or modify the agent's powers. Even with the sentence deleted, a guardian of the person may still request that the court do so if the situation should warrant it, but no such action should be taken lightly, as the appointment of a health care agent and the grant of health care powers by the principal represent the exercise of a fundamental and highly personal right.

The appointment of a guardian of the person for an incapacitated person does not automatically revoke the person's health care power of attorney. The court in its appointment of a guardian of the person should determine whether and to what extent the powers of the health care agent remain in effect. If the court is unaware of the existence of the incapacitated person's health care power of attorney when it appoints a guardian of the person for the incapacitated person, the court has equitable authority to later determine which provisions of the incapacitated person's health care power of attorney remain in effect during the guardianship.

### § 5601. General provisions.

\* \* \*

(b) Execution.--A power of attorney shall be dated and signed [and dated] by the principal by signature or mark, or by another individual on behalf of and at the direction of the principal if the principal is unable to sign but specifically directs another individual to sign the power of attorney. [If the power of attorney is executed by mark or by another individual, then it] The power of attorney shall be witnessed by two individuals, each of whom is 18 years of age or older. A witness shall not be an agent appointed in the power of attorney or the individual who signed the power of attorney on behalf of and at the direction of the principal.

\* \* \*

(d) Acknowledgment executed by agent.--An agent shall have no authority to act as agent under the power of attorney unless the agent has first executed and affixed to the power of attorney an acknowledgment in substantially the following form:

I, \_\_\_\_\_, have read the attached power of attorney and am the person identified as the agent for the principal. I hereby acknowledge that in the absence of a specific provision to the contrary in the power of attorney or in 20 Pa.C.S. when I act as agent:

I shall exercise the powers for the benefit of the principal.

I shall keep the assets of the principal separate from my assets.

I shall exercise reasonable caution and prudence.

I shall keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.

I shall preserve the estate plan of the principal, including the effect of intestacy if the principal does not have a will.

.....  
.....

(Agent)

(Date)

(e) Fiduciary relationship.--An agent acting under a power of attorney has a fiduciary relationship with the principal. In the absence of a specific provision to the contrary in the power of attorney, the fiduciary relationship includes the duty to:

(1) Exercise the powers for the benefit of the principal.

(2) Keep separate the assets of the principal from those of an agent.

(3) Exercise reasonable caution and prudence.

(4) Keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.

(5) Preserve the estate plan of the principal, including the effect of intestacy if the principal does not have a will.

\* \* \*

(e.3) Equity and justice.--

(1) An agent and a recipient of a gift or other financial benefit, during the principal's life or at the principal's death, arising from the action of the agent is liable as equity and justice may require to the extent that the court determines that the action of the agent was inconsistent with:

(i) prudent estate planning or financial management for the principal; or

(ii) the known or probable intent of the principal with respect to the disposition of the principal's property.

(2) An agent who in good faith exercises reasonable caution and prudence shall not be personally liable.

\* \* \*

#### Note

**Subsection (e.3) is based on § 5601.2(e) and will now apply to any action of the agent under Chapter 56.**

#### Comment

**Two witnesses are now required for all powers of attorney under Chapter 56, not just for a principal whose power of attorney is executed by mark or by another individual at the principal's direction. This execution requirement is the same as that under Chapter 54, which concerns health care powers of attorney. However,**

**an agent appointed under a Chapter 56 power of attorney may not be a witness. Notarization is still not required for a power of attorney, though it is universally viewed as good practice where the specific circumstances permit. A notary may act as one of the required witnesses because the notary is only taking the acknowledgment of the principal, not the witnesses.**

**Subsection (e)(5) adds the duty of the agent to preserve the principal's estate plan, which includes (1) the intended disposition of the principal's assets whether during life or at death (and at death whether by will, revocable trust, nonprobate disposition or otherwise) and (2) powers granted under a power of attorney.**

**Subsection (e.3) extends judicial authority to exercise principles of equity and justice from the limited application set forth in former § 5601.2(e) concerning special rules for gifts to all actions of an agent under Chapter 56.**

**§ 5601.2. Special rules for gifts and changes to principal's estate plan.**

(a) General rule.--A principal may empower an agent to make a gift or make changes to the principal's estate plan in a power of attorney only as provided in this section. A power to make a gift or make changes to the principal's estate plan may not be inferred from a grant of another power or from a general grant of authority to do anything that the principal could do, except to the extent that a principal expressly grants the agent the power under section 5603(u.3) (relating to implementation of power of attorney) authorizing personal and family maintenance.

(b) Limited gifts not requiring court approval.--Limited gifts that are authorized in compliance with this subsection do not require court approval. A principal may authorize an agent to make [a] limited [gift] gifts as defined under section 5603(a)(2) [(relating to implementation of power of attorney)] only by the inclusion of:

(1) the language quoted in section 5602(a)(1) (relating to form of power of attorney); or

(2) other language showing a similar intent on the part of the principal to empower the agent to make a limited gift.

(c) [Unlimited] Other gifts specifically authorized and not requiring court approval.--  
Other gifts that are specifically authorized in compliance with this subsection do not require court approval. A principal may authorize an agent to make any other gift only by specifically [providing for and defining the agent’s authority in the power of attorney.] identifying:

(1) The donee, such as an individual, charity or other entity, whether by name, relationship, class or other description, except that the phrase “any donee” or other language showing a similar intent is not a specific identification.

(2) The property to be gifted or the amounts of cash gifts.

(c.1) Other actions not requiring court approval.--

(1) An agent may act without court approval if the action:

(i) Is otherwise authorized by the power of attorney.

(ii) Maintains and is consistent with the preservation of the principal’s estate plan, including the effect of intestacy if the principal does not have a will.

(2) An action under this subsection may include:

(i) Placing property into joint names with rights of survivorship.

(ii) The use of a designation such as “in trust for,” “payable on death” or “transfer on death.”

(iii) The execution of a beneficiary designation.

(3) An action under this subsection may not be taken if the interest of any beneficiary under the principal's existing estate plan, including an intestacy if the principal has no will, is prejudiced thereby. Either of the following shall be considered a change in the principal's estate plan and governed by subsection (c.2), which requires court approval:

(i) An action that results in a beneficiary receiving at the death of the principal an interest outright and free of trust that would have passed in trust at death under the principal's present estate plan.

(ii) An action that converts an outright gift at death into one received in trust.

(c.2) Court-approved gifts and changes to estate plan.--

(1) Subject to paragraph (2), a principal may authorize an agent to do the following on behalf of the principal or with the principal's property:

(i) Make a gift other than a gift authorized under subsection (b) or (c).

(ii) Create or change rights of survivorship.

(iii) Create or change a beneficiary designation.

(iv) Create an inter vivos trust, other than a trust described in section 5603(b) or (c), or amend, revoke or terminate an existing trust, but only to the extent that the principal had previously retained or been granted such powers.

(v) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.

(2) An agent may exercise a power under paragraph (1) only if:

(i) The power of attorney expressly grants the agent the specific authority to exercise the power.

(ii) The court having jurisdiction over the agent, upon petition by the agent, approves the agent's proposed action after finding that it is consistent with both:

(A) Prudent estate planning or financial management for the principal.

(B) The known or probable intent of the principal with respect to the disposition of the principal's property.

(d) Nature of gifts.--In the absence of a specific provision to the contrary in the power of attorney:

(1) A power to make a [limited] gift under subsection (b) or (c) shall be construed to empower the agent to make a gift to each donee either outright, [or] in trust or to a tuition savings account or prepaid tuition plan as defined in section 529 of the Internal Revenue Code of 1986 (26 U.S.C. § 529).

(2) In the case of any gift to a minor, that gift may be made in trust or in accordance with Chapter 53 (relating to Pennsylvania Uniform Transfers to Minors Act) or section 5155 (relating to order of court).

(3) In the case of any gift made in trust, the agent may execute a deed of trust for such purpose, designating one or more persons, including the agent, as original or successor trustees, or may make an addition to an existing trust.

(4) In making any gift, the agent need not treat the donees equally or proportionately and may entirely exclude one or more permissible donees.

(5) The pattern followed on the occasion of any gift need not be followed on the occasion of any other gift.

[(e) Equity.--An agent and the donee of a gift shall be liable as equity and justice may require to the extent that, as determined by the court, a gift made by the agent is

inconsistent with prudent estate planning or financial management for the principal or with the known or probable intent of the principal with respect to disposition of the estate.]

\* \* \*

(g) Court proceeding.--When court approval is required under subsection (c.2):

(1) The burden of proof, by clear and convincing evidence, shall be on the agent.

(2) Notice of the petition and hearing shall be given in the manner as the court shall direct to:

(i) All persons who are sui juris and would be entitled to share in the principal's estate if the principal died intestate at that time.

(ii) Any person known to the agent who would be prejudiced by the proposed action.

(iii) Such other parties as the court may direct.

(3) The hearing may be closed to the public unless the principal or the principal's counsel objects.

(4) The court sua sponte or upon request of the agent or others may direct that some or all of the pleadings or documents related to the petition and hearing be sealed or redacted in the manner and to the extent that the court deems appropriate.

#### Note

**Subsection (d)(1) does not permit a gift using up to five years of annual exclusion in a single year for a gift to a 529 account, but the principal may grant this authority under subsection (c). The language of subsection (g)(2) and (3) largely parallels that of 20 Pa.C.S. Ch. 55.**



## Comment

The amendments to this section make a dramatic change to Pennsylvania law, representing an attempt to preserve the great usefulness of the power of attorney to manage a principal's financial affairs and to protect and implement the principal's estate plan.

Subsection (a) is expanded to also cover changes to the principal's estate plan. The new second sentence applies, *e.g.*, to any other expressly granted power in § 5603 that contains a general grant of power, such as "in general, exercise all powers with respect to real property that the principal could if present."

The limited gifts provision under subsection (b) is unchanged, the balance being in favor of this widely useful power with less prospect for abuse than gifting involving substantially larger amounts. For larger gifts, provided there is the requisite degree of specificity as to the donee and object of the gift, subsection (c) does not require court approval as is required in subsection (c.2).

Illustrative examples of "other gifts specifically authorized" under subsection (c) include (1) gifts of any or all of a principal's assets to the principal's spouse, so as to effectively use both spouse's exemptions, exclusion, credits and the like for transfer tax purposes or to implement Medicaid planning; (2) annual gifts of up to \$25,000 to each child of the principal (*i.e.*, the principal may give the agent discretion as to whether and how much to give, up to the stated amount); (3) gifts to a 529 account for a child, as enhanced by an election to ratably spread the taxability of such a gift (to utilize up to five years of annual exclusion in one year); and (4) limited gifts to someone outside the class of permissible donees for limited gifts under § 5603(a)(2)(i), which class includes only the principal's spouse and issue and a spouse of the principal's issue (*e.g.*, a limited gift under subsection (c) could be made to one or more of the principal's nieces and nephews); (5) a gift indexed for inflation or tied to some other standard and (6) a gift to a specifically identified donee described by reference to the amount of the federal gift tax exclusions under Internal Revenue Code § 2503(b) or (e). Subsection (c) does not permit a gift of X to "any donee," but subsection (c.2) would allow such an approach with court approval.

Under subsection (c.1), an agent is permitted, for example, to make a beneficiary designation or create a survivorship interest if expressly authorized to do so in the power of attorney, and without the necessity of court approval, but only if the designation or creation is consistent with or maintains the principal's estate plan. If authority

for one or more of these powers is not granted then a guardianship proceeding would be needed under Chapter 55 (incapacitated persons). Subsection (c.1) would permit moving an IRA or joint account from one financial institution to another or such actions which will carry out the principal's estate plan, but avoid probate, otherwise lower costs of estate administration, save taxes or accomplish some other objective.

Subsection (c.1)(3) prohibits, *e.g.*, an action that would change the identity of or the amount passing to a beneficiary. Subsection (c.1)(3) also recognizes that the manner and nature of how property passes at the death of the principal is just as important as the amount of the property so passing such that a change by an agent under this subsection causing property to pass outright instead of in trust, or vice versa, requires court approval under subsection (c.2) even if the beneficiary and the beneficiary's share of the property so passing is unchanged. This rule is in contrast to the rule for limited gifts and other gifts specifically authorized under subsections (b) and (c) respectively, where the agent is empowered to make the gift outright or in trust under subsection (d)(1), as broadened to cover subsection (c) and permit such gifts to a plan defined under Internal Revenue Code § 529.

The protection in subsection (c.2) requires both an express grant of authority in the power of attorney and court approval, when the agent's action would alter the recipient of the principal's assets or benefits during the principal's life, unless authorized in the power of attorney under subsection (b) or (c), or at the death of the principal, by effectuating an estate planning change via a beneficiary designation or survivorship rights (*e.g.*, TOD, POD or ITF). These new requirements apply even where close family members are involved, either as the agent or donee/beneficiary, since that is often a situation where an abuse may occur.

An agent may not seek court approval to make gifts unless the agent is expressly granted authority to make gifts in the power of attorney under subsection (c.2). Absent a grant of authority for gifts encompassed by subsection (b), (c) or (c.2), the agent would need to follow the procedures under Chapter 55 (incapacitated persons) so as to implement estate planning changes.

Subsection (e), which was limited in scope and applied only with respect to gifts, was repealed because § 5601(e.3) extends judicial authority to exercise principles of equity and justice to any action of the agent under Chapter 56.

*Special Note*

*Also see the statutory recommendations regarding § 5603(p)(3) and (q), infra pp. 121-122 and the comment regarding the Slomski case, infra p. 124.*

**§ 5602. Form of power of attorney.**

(a) Specification of powers.--A principal may, by inclusion of the language quoted in any of the following paragraphs or by inclusion of other language showing a similar intent on the part of the principal, empower an agent to do any or all of the following, each of which is defined in section 5603 (relating to implementation of power of attorney):

- (1) “To make limited gifts.”
- (2) “To create a trust for my benefit.”
- (3) “To make additions to an existing trust for my benefit.”
- (4) “To claim an elective share of the estate of my deceased spouse.”
- (5) “To disclaim any interest in property.”
- (6) “To renounce fiduciary positions.”
- (7) “To withdraw and receive the income or corpus of a trust.”
- [(8) “To authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care.”
- (9) “To authorize medical and surgical procedures.”]
- (10) “To engage in real property transactions.”
- (11) “To engage in tangible personal property transactions.”
- (12) “To engage in stock, bond and other securities transactions.”

(13) “To engage in commodity and option transactions.”

(14) “To engage in banking and financial transactions.”

(15) “To borrow money.”

(16) “To enter safe deposit boxes.”

(17) “To engage in insurance and annuity transactions.”

(18) “To engage in retirement plan transactions.”

(19) “To handle interests in estates and trusts.”

(20) “To pursue claims and litigation.”

(21) “To receive government benefits.”

(22) “To pursue tax matters.”

[(23) “To make an anatomical gift of all or part of my body.”]

(24) “To operate a business or entity.”

(25) “To provide for personal and family maintenance.”

\* \* \*

(c) Filing of power of attorney.--An originally executed [copy of the] power of attorney may be filed with the clerk of the orphans’ court division of the court of common pleas in the county in which the principal resides, and if it is acknowledged, it may be recorded in the office for the recording of deeds of the county of the principal’s residence and of each county in which real property to be affected by an exercise of the power is located. The clerk of the orphans’ court division or any office for the recording of deeds with whom the power has been filed, may, upon request, issue certified copies of the power of attorney. Each such certified copy shall have the same validity and the same force and effect as if it were the original, and it may be filed of record in any other

office of this Commonwealth (including, without limitation, the clerk of the orphans' court division or the office for the recording of deeds) as if it were the original.

(d) Copy of power of attorney.--Except for the purpose of filing under subsection (c), a photocopy or electronically transmitted copy of an originally executed power of attorney has the same effect as the original.

### Comment

**Pennsylvania has since 1982 included in its power of attorney statute the power to (1) authorize admission to a medical, nursing, residential or similar facility and to enter into agreements for the principal's care and (2) authorize medical and surgical procedures. On December 1, 1994 (effective in 90 days), Pennsylvania included in its power of attorney statute the power to make an anatomical gift of all or part of the principal's body. The subsequent enactment in 2006 of the Health Care Agents and Representatives Act, which was added to Chapter 54, includes far more comprehensive provisions relative to these matters, so that § 5602(a)(8), (9) and (23) has been removed from Chapter 56 and placed into Chapter 54. Health care powers of attorney executed after the effective date of the amendment of § 5602(a) will be governed entirely by Chapter 54. Powers of attorney containing the foregoing powers executed prior to the effective date of the amendment of § 5602(a) will be unaffected by the removal of paragraphs (8), (9) and (23) and will continue to be governed by the prior statute. It is expected, however, that the more comprehensive provisions of Chapter 54 may provide helpful guidance to a court charged with the task of interpreting the proper administration and decision-making process under the prior statutory health care powers.**

### **§ 5603. Implementation of power of attorney.**

(a) Power to make limited gifts.--

(1) (Deleted by amendment).

(2) A power "to make limited gifts" shall mean that the agent may make only gifts for or on behalf of the principal which are limited as follows:

(i) The class of permissible donees under this paragraph shall consist solely of the principal's spouse, issue and a spouse of the principal's issue (including the agent if a member of any such class), or any of them.

(ii) During each calendar year, the gifts made to any permissible donee, pursuant to such power, shall have an aggregate value not in excess of, and shall be made in such manner as to qualify in their entirety for, the annual exclusion from the Federal gift tax permitted under section 2503(b) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 1 et seq.) for the principal [and, if applicable, the principal's spouse.] or, if the principal's spouse agrees to consent to splitting gifts pursuant to section 2513(a) of the Internal Revenue Code of 1986, in an amount per donee (other than the spouse) not to exceed twice the annual exclusion limit. The limits under this subparagraph may be exceeded if and to the extent the agent elects to equalize gifts among family units with each child of the principal and his or her descendants treated as a family unit.

(iii) (Deleted by amendment).

(iv) In addition to the gifts authorized by subparagraphs (i) and (ii), a gift made pursuant to such power may be for the tuition or medical care of any permissible donee to the extent that the gift is excluded from the Federal gift tax under section 2503(e) of the Internal Revenue Code of 1986 as a qualified transfer.

(v) The agent may consent, pursuant to section 2513(a) of the Internal Revenue Code of 1986, to the splitting of gifts made by the principal's spouse to the principal's issue or a spouse of the principal's issue in any amount and to the

splitting of gifts made by the principal's spouse to any other person in amounts not exceeding the aggregate annual gift tax exclusions for both spouses under section 2503(b) of the Internal Revenue Code of 1986.

(3) (Deleted by amendment).

(4) (Deleted by amendment).

(5) (Deleted by amendment).

\* \* \*

(d) Power to claim an elective share.--A power "to claim an elective share of the estate of my deceased spouse" shall mean that the agent may elect to take against the will and conveyances of the principal's deceased spouse, disclaim any interest in property which the principal is required to disclaim as a result of such election, retain any property which the principal has the right to elect to retain, file petitions pertaining to the election, including petitions to extend the time for electing and petitions for orders, decrees and judgments in accordance with section 2211(c) and (d) (relating to determination of effect of election; enforcement), and take all other actions which the agent deems appropriate in order to effectuate the election: Provided, however, That the election shall be made only upon the approval of the court having jurisdiction of the principal's estate in accordance with section 2206 (relating to right of election personal to surviving spouse) in the case of a principal who [has been adjudicated] is an incapacitated person, or upon the approval of the court having jurisdiction of the deceased spouse's estate in the case of a principal who [has not been adjudicated] is not an incapacitated person.

(e) Power to disclaim any interest in property.--A power "to disclaim any interest in property" shall mean that the agent may release or disclaim any interest in property on

behalf of the principal in accordance with Chapter 62 (relating to disclaimers) or section 6103 (relating to release or disclaimer of powers or interests), provided that any disclaimer under Chapter 62 shall be in accordance with the provisions of section 6202 (relating to disclaimers by fiduciaries or agents) in the case of a principal who [shall have been adjudicated] is an incapacitated person at the time of the execution of the disclaimer.

\* \* \*

[(h) Power to authorize admission to medical facility and power to authorize medical procedures.--

(1) A power “to authorize my admission to a medical, nursing, residential or similar facility, and to enter into agreements for my care” shall mean that the agent may apply for the admission of the principal to a medical, nursing, residential or other similar facility, execute any consent or admission forms required by such facility which are consistent with this paragraph, and enter into agreements for the care of the principal by such facility or elsewhere during his lifetime or for such lesser period of time as the agent may designate, including the retention of nurses for the principal.

(2) A power “to authorize medical and surgical procedures” shall mean that the agent may arrange for and consent to medical, therapeutical and surgical procedures for the principal, including the administration of drugs.]

\* \* \*

(k) Power to engage in stock, bond and other securities transactions.--A power to “engage in stock, bond and other securities transactions” shall mean that the agent may:

\* \* \*



(4) Join in any merger, reorganization, consolidation, dissolution, liquidation, voting-trust plan or other concerted action of security holders and make payments in connection therewith.

\* \* \*

(p) Power to engage in insurance and annuity transactions.--A power to “engage in insurance and annuity transactions” shall mean that the agent may:

(1) Purchase, continue, renew, convert or terminate any type of insurance (including, but not limited to, life, accident, health, disability or liability insurance) or annuity and pay premiums and collect benefits and proceeds under [insurance] these policies.

(2) Exercise nonforfeiture provisions under insurance policies and annuity contracts.

(3) In general, exercise all powers with respect to insurance and annuities that the principal could if present[; however, the agent cannot designate himself beneficiary of a life insurance policy unless the agent is the spouse, child, grandchild, parent, brother or sister of the principal], including the designation of a beneficiary, but only as permitted under section 5601.2(c.1) and (c.2) (relating to special rules for gifts and changes to principal’s estate plan).

(q) Power to engage in retirement plan transactions.--A power to “engage in retirement plan transactions” shall mean that the agent may contribute to, withdraw from and deposit funds in any type of retirement plan (including, but not limited to, any tax qualified or nonqualified pension, profit sharing, stock bonus, employee savings and retirement plan, deferred compensation plan or individual retirement account), select and

change payment options for the principal, make roll-over contributions from any retirement plan to other retirement plans and, in general, exercise all powers with respect to retirement plans that the principal could if present, including the designation of a beneficiary, but only as permitted under section 5601.2(c.1) and (c.2).

\* \* \*

[(u.1) Power to make anatomical gift.--A power “to make an anatomical gift of all or part of my body” shall mean that the agent may arrange and consent, either before or after the death of the principal, to procedures to make an anatomical gift in accordance with Chapter 86 (relating to anatomical gifts).]

(u.2) Power to operate a business or entity.--A power “to operate a business or entity” shall mean that the agent may:

(1) Continue or participate in the operation of any business or other entity in which the principal holds an interest, whether alone or with others, by making and implementing decisions regarding its financing, operations, employees and all other matters pertinent to the business or entity.

(2) Change the form of ownership of the business or entity to a corporation, partnership, limited liability company or other entity, and initiate or take part in a corporate reorganization, including a merger, consolidation, dissolution or other change in organizational form.

(3) Compensate an agent actively managing, supervising or engaging in the operation of a business or entity, as appropriate, from the principal’s assets or from the business or entity, provided the compensation is reasonably based upon the actual responsibilities assumed and performed.

(4) In general, exercise all powers with respect to operating a business or entity that the principal could if present.

(u.3) Power to provide for personal and family maintenance.--

(1) A power “to provide for personal and family maintenance” shall mean that the agent may provide for the health, education, maintenance and support, in order to maintain the customary standard of living of the principal’s spouse and the following individuals, whether living when the power of attorney is executed or later born:

(i) The principal’s minor children.

(ii) Other individuals legally entitled to be supported by the principal.

(iii) The individuals whom the principal has customarily supported.

(2) In acting under this subsection, the agent shall:

(i) Take into account the long-term needs of the principal.

(ii) Consider any independent means available to those individuals apart from the support provided by the principal.

(3) Authority with respect to personal and family maintenance is in addition to and not limited by authority that an agent may or may not have, or court approval that may be necessary, with respect to gifts under this chapter.

\* \* \*

#### **Note**

**The amendment of subsection (k)(4) is intended to make the provision more parallel to § 7780.6(a)(13).**

#### **Comment**

**The change as to gift splitting in subsection (a)(2)(ii) is to clarify that an agent can make a gift of the principal’s assets up to twice the amount of the annual exclusion if the principal’s spouse indicates a**

willingness to “split” gifts. The last sentence of subsection (a)(2)(ii) is a new provision so that limited gifts to a “family unit” can be equalized even if this means exceeding the available annual exclusions and thus using a portion of the principal’s cumulative lifetime gift exemption (currently \$1,000,000) or paying gift tax if there is an insufficient amount of such exemption remaining.

References to “adjudication” in subsections (d) and (e) have been deleted as unnecessary. The deletions are not intended to change existing law. An incapacitated person is defined in § 102 as “a person determined to be an incapacitated person under the provisions of Chapter 55 (relating to incapacitated persons).”

Subsections (h) and (u.1) are repealed in light of the repeal of § 5602(8), (9) and (23). The substance of the repealed provisions has been moved to the definition of “health care decision” in § 5422 and to § 5456(a).

Subsections (p)(3) and (q) as amended make beneficiary designations subject to § 5601(c.1) and (c.2). The amendments clarify that the General Assembly intends that the same powers and protections should apply to both subsections and statutorily reverse the effect of the 2009 Pennsylvania Supreme Court decision of *In re Estate of Slomski*, 987 A.2d 141 (Pa. 2009).

Subsection (u.2) is intended to encompass all modern business and entity forms, including limited liability companies, limited liability partnerships and entities that may be organized other than for a business purpose.

Subsection (u.3) is in addition to the common law authority, as well as a matter of common sense, that the agent may maintain the principal, which is consistent with the agent’s duty under § 5601(e)(1) to exercise the powers under the power of attorney for the benefit of the principal. Although payments made for the benefit of persons under this section may in fact be subject to gift tax treatment, subsection (u.3)(3) clarifies that the authority for personal and family maintenance payments by an agent emanates from this subsection rather than § 5601.2. This is an important distinction because § 5601.2 has special rules that are applicable to authorize gift making. The authority to make payments under subsection (u.3) is not limited by the provisions of § 5601.2. However, the equity and justice provision of § 5601(e.3) applies.

**§ 5604. Durable powers of attorney.**

\* \* \*

(c) Relation of agent to court-appointed guardian.--

(1) If, following execution of a durable power of attorney, the principal [is adjudicated] becomes an incapacitated person and a guardian is appointed for his estate, the agent is accountable to the guardian as well as to the principal. [The guardian shall have the same power to revoke or amend the power of attorney that the principal would have had if he were not an incapacitated person.]

\* \* \*

(3) In its guardianship order and determination of a person's incapacity, the court shall determine whether and the extent to which the incapacitated person's durable power of attorney remains in effect.

\* \* \*

(d.1) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements or transactions conducted on behalf of the principal unless:

(1) ordered by a court; or

(2) requested by:

(i) the principal;

(ii) the principal's guardian;

(iii) another fiduciary acting for the principal;

(iv) a governmental agency having authority to protect the welfare of the principal as set forth in subsection (d); or

(v) the personal representative or successor in interest of the principal's estate, upon the death of the principal.

### **Comment**

**A corollary of subsection (c)(1) for health care powers of attorney appears in § 5460(a).**

**The second sentence of subsection (c)(1) is deleted because a guardian of the estate should not be able to revoke a power of attorney or modify the agent's power. Even with the sentence deleted, a guardian of the estate may still request that the court revoke the appointment of an agent or modify the agent's powers.**

**The appointment of a guardian of the estate for an incapacitated person does not automatically revoke the person's power of attorney. The court in its appointment of a guardian of the estate should determine whether and to what extent the powers of the agent remain in effect. If the court is unaware of the existence of the incapacitated person's power of attorney when it appoints a guardian of the estate for the incapacitated person, the court has equitable authority to later determine which provisions of the incapacitated person's power of attorney remain in effect during the guardianship.**

**The reference to "adjudication" in subsection (c)(1) has been deleted as unnecessary. The deletion is not intended to change existing law. An incapacitated person is defined in § 102 as "a person determined to be an incapacitated person under the provisions of Chapter 55 (relating to incapacitated persons)."**

**Subsection (d.1)(2)(v) includes a residuary beneficiary of the principal's estate, whether under a will or revocable trust, or a beneficiary of the principal's nonprobate assets.**

### **§ 5610. Account.**

An agent shall file an account of his administration whenever directed to do so by the court and may file an account at any other time. All accounts shall be filed in the office of the clerk in the county where the principal resides. The court may assess the costs of

the accounting proceeding as it deems appropriate, including the costs of preparing and filing the account.

**§ 5612. Investigation of financial abuse and mismanagement.**

The court may order an investigation, appoint a guardian ad litem, make a referral to an appropriate agency or take any other appropriate action regarding allegations that a principal is suffering from financial abuse or mismanagement by his or her agent under a power of attorney:

(1) upon petition by an appropriate party and a reasonable showing of the financial abuse or mismanagement; or

(2) after the court is otherwise informed of the financial abuse or mismanagement.

**Comment**

**This section reflects current Pennsylvania practice and procedure regarding the principles that a court would apply in entertaining a proceeding involving alleged financial abuse or mismanagement of the affairs of a principal under a power of attorney. This section specifically leaves the determination of standing to the discretion of the court. It also enables the court to consider information from a report (such as one from a social service agency) or other communication apart from the filing of a formal petition. The court would need to evaluate whether (1) the person submitting the report or communication is genuinely motivated by the best interests of the principal and (2) the assertions or allegations contained in the report or communication are credible and made in good faith.**

**§ 5613. Jurisdiction and venue.**

(a) County having venue.--Venue of any matter pertaining to the exercise of a power by an agent acting under a power of attorney as provided in this chapter shall be in the

county in which the principal is domiciled, a resident or residing in a long-term care facility.

(b) Declining jurisdiction.--

(1) A court having jurisdiction may decline to exercise jurisdiction if at any time it determines that a court of another county or state is a more appropriate forum.

(2) If a court of this Commonwealth declines to exercise jurisdiction, it shall either dismiss the proceeding or stay the proceeding upon condition that a proceeding be promptly commenced in another county or state. A court may impose any other condition that it deems appropriate.

#### **Comment**

**This section is designed to provide the court with maximum flexibility regarding the relevant and important factors to be used in determining whether to exercise jurisdiction.**

#### **§ 5614. Principles of law and equity.**

Except as otherwise provided by this chapter or another statute of this Commonwealth, common law and the principles of equity supplement this chapter.



## **TRANSITIONAL LANGUAGE**

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### **APPLICABILITY**

This act shall apply to all powers of attorney executed on or after the date of enactment of this act, provided that:

(i) Nothing in this act shall be construed to limit the effectiveness of powers of attorney in effect prior to the date of enactment of this act.

(ii) Any provision in a power of attorney incorporating by reference a power under 20 Pa.C.S. § 5602(a)(8), (9) or (23) (relating to form of power of attorney) prior to the repeal of 20 Pa.C.S. § 5602(a)(8), (9) or (23) shall continue to be governed by the respective paragraph of § 5602(a) as if no repeal occurred.

### **EFFECTIVE DATES**

(1) Except as provided in paragraph (2), the amendment of 20 Pa.C.S. Chapters 54 and 56 shall take effect in six months.

(2) The following shall take effect immediately:

(i) The addition of 20 Pa.C.S. § 5601(e.3).

(ii) The repeal of 20 Pa.C.S. § 5601.2(e).



## STATUTORY COMPARISON CHARTS

The following two charts list the analogous provisions of the UPAA and 20 Pa.C.S. Chapter 56. Although the analogous provisions may concern the same subject matter, they are structurally dissimilar and may differ substantively in certain aspects.

<b>SUBJECT</b>	<b>UPAA Section</b>	<b>20 Pa.C.S. Section</b>
Definitions	102	5601(f) (agent) 5604(a) (durable power of attorney)
Applicability	103	5601(e.1) and (e.2)
Durability	104	5601.1 5604(b)
Execution	105	5601(b)
Validity	106(a) - (c)	5611
Copies	106(d)	--
Meaning and Effect	107	5611
Guardians and Agents (nomination)	108(a)	5604(c)(2)
Guardians and Agents (relationship)	108(b)	5604(c)(1)
Effectiveness	109	5604(a) (specified time or contingency)
Termination	110	5605
Co-Agents and Successor Agents (designation)	111(a) and (b)	5602(b)
Co-Agents and Successor Agents (liability)	111(c) and (d)	--
Reimbursement and Compensation	112	5609
Acceptance of Appointment	113	--
Duties (good faith; loyalty; care, competence, diligence)	114(a) and (b)	5601(e) (fiduciary relationship)
Liability	114(c) - (g) 117	--
Records and Disclosure	114(h)	5604(c) and (d) (See 5604(e) for specific definitions) 5610
Exoneration	115	--
Judicial Relief	116	--
Resignation	118	--

<b>SUBJECT</b>	<b>UPAA Section</b>	<b>20 Pa.C.S. Section</b>
Acceptance of and Reliance on a Power of Attorney; Third Party Liability	119 and 120	5606 (proof of continuance by affidavit) 5608 (third party liability and immunity)
Law and Equity	121	--
Financial Entities	122	5607
Other Remedies	123	--
Grants of Authority	201	--
Incorporation of Authority	202	5601(a) 5602(a) 5603(v)
Construction of Authority	203	--
Real Property	204	5603(i)
Tangible Personal Property	205	5603(j)
Stocks and Bonds	206	5603(k)
Commodities and Options	207	5603(l)
Banks and Other Financial Institutions	208	5603(m) (banking and financial transactions) 5603(n) (borrow money) 5603(o) (enter safe deposit boxes)
Operation of an Entity or Business	209	--
Insurance and Annuities	210	5603(p)
Estates, Trusts and Beneficial Interests	211	5603(b) (create a trust) 5603(c) (make additions to an existing trust) 5603(g) (withdraw and receive) 5603(r) (handle interests in estates and trusts)
Claims and Litigation	212	5603(s)
Personal and Family Maintenance	213	--
Benefits from Governmental Programs or Civil or Military Service	214	5603(t)
Retirement Plans	215	5603(q)
Taxes	216	5603(u)
Gifts	217	5601.2 5603(a)
Statutory Forms	301 and 302	5601(c) (notice) 5601(d) (acknowledgment) 5601(e.1) and (e.2) (applicability limitations)
Uniformity	401	<i>See</i> 1 Pa.C.S. § 1927
Electronic Signatures	402	<i>See</i> Act of Dec. 19, 1999, P.L. 971, No. 69 (73 P.S. § 2260.101, <i>et seq.</i> )
Effect on Existing Powers of Attorney	403	--

<b>20 Pa.C.S. Section</b>	<b>UPAA Section</b>
5601(a) (general rule)	202
5601(b) (execution)	105
5601(c) and (d) (notice and acknowledgment)	<i>See</i> 301-302
5601(e) (fiduciary relationship)	<i>See</i> 114(a) and (b)
5601(e.1) and (e.2) (applicability limitation)	<i>See</i> 103 <i>See</i> 301-302
5601(f) (definition of agent)	102
5601.1 (presumption of durability)	104
5601.2 (rules for gifts)	217
5602 (specification of powers)	202
5602(b) (co-agents and successor agents)	111(a) and (b)
5602(c) (filing of power of attorney)	--
5603(a) (power to make limited gifts)	217
5603(b) (power to create a trust)	211
5603(c) (power to make additions to an existing trust)	211
5603(d) (power to claim an elective share)	--
5603(e) (power to disclaim any interest in property)	--
5603(f) (power to renounce fiduciary position)	--
5603(g) (power to withdraw and receive)	211
5603(h) (power to authorize admission to medical facility and power to authorize medical procedures)	--
5603(i) (power to engage in real property transactions)	204
5603(j) (power to engage in tangible personal property transactions)	205
5603(k) (power to engage in stock, bond and other securities transactions)	206
5603(l) (power to engage in commodity and option transactions)	207
5603(m) (power to engage in banking and financial transactions)	208
5603(n) (power to borrow money)	208
5603(o) (power to enter safe deposit boxes)	208
5603(p) (power to engage in insurance transactions)	210
5603(q) (power to engage in retirement plan transactions)	215
5603(r) (power to handle interests in estates and trusts)	211
5603(s) (power to pursue claims and litigation)	212
5603(t) (power to receive government benefits)	214
5603(u) (power to pursue tax matters)	216
5603(u.1) (power to make anatomical gift)	--
5603(v) (powers generally)	202
5604(a) (definition of durable power of attorney)	102 and 109
5604(b) (durable power of attorney not affected by disability or lapse of time)	104
5604(c)(1) (relationship of agent to court-appointed guardian)	108(b) and 114(h)
5604(c)(2) (nomination of guardian in durable power of attorney)	108(a)
5604(d) (discovery of information and records regarding actions of agent)	114(h)
5604(e) (definitions of abandonment, abuse, agency, exploitation, neglect and older adult principal)	<i>See</i> 114(h)
5605 (power of attorney not revoked until notice)	110

<b>20 Pa.C.S. Section</b>	<b>UPAA Section</b>
5606 (proof of continuance of powers of attorney by affidavit)	119 and 120
5607 (corporate agent)	122
5608 (liability)	119 and 120
5609 (compensation and reimbursement for expenses)	112
5610 (account)	114(h)
5611 (validity)	106(a)-(c) and 107

# UNIFORM POWER OF ATTORNEY ACT

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## [ARTICLE] 1 GENERAL PROVISIONS

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

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

(1) “Agent” means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to which an agent’s authority is delegated.

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

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

(4) “Good faith” means honesty in fact.

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

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

(B) is:

(i) missing;

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

**SECTION 105. EXECUTION OF POWER OF ATTORNEY.** A power of attorney must be signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney. A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments.

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

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

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

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

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

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

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

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

**SECTION 107. MEANING AND EFFECT OF POWER OF ATTORNEY.** The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) A power of attorney terminates when:

(1) the principal dies;

(2) the principal becomes incapacitated, if the power of attorney is not durable;

(3) the principal revokes the power of attorney;

(4) the power of attorney provides that it terminates;

(5) the purpose of the power of attorney is accomplished; or

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

(b) An agent's authority terminates when:

(1) the principal revokes the authority;

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

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

(4) the power of attorney terminates.

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

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

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

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

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

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

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

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

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

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

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

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

**SECTION 112. REIMBURSEMENT AND COMPENSATION OF AGENT.** Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances.

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

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

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

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

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

- (1) act loyally for the principal's benefit;
- (2) act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
- (3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;

(4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

(5) cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and

(6) attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

(A) the value and nature of the principal's property;

(B) the principal's foreseeable obligations and need for maintenance;

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

(D) eligibility for a benefit, a program, or assistance under a statute or regulation.

(c) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

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

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

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

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

(h) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the

principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.

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

(1) relieves the agent of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or

(2) was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

**SECTION 116. JUDICIAL RELIEF.**

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

(1) the principal or the agent;

(2) a guardian, conservator, or other fiduciary acting for the principal;

(3) a person authorized to make health-care decisions for the principal;

(4) the principal's spouse, parent, or descendant;

(5) an individual who would qualify as a presumptive heir of the principal;

(6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;

(7) a governmental agency having regulatory authority to protect the welfare of the principal;

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

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

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

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

(1) restore the value of the principal's property to what it would have been had the violation not occurred; and

(2) reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.

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

(1) to the [conservator or guardian], if one has been appointed for the principal, and a coagent or successor agent; or

(2) if there is no person described in paragraph (1), to:

(A) the principal's caregiver;

(B) another person reasonably believed by the agent to have sufficient interest in the principal's welfare; or

(C) a governmental agency having authority to protect the welfare of the principal.

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

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

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

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



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

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

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

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

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

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

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

#### **Alternative A**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Alternative B**

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

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

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

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

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

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

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

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

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

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

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

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

(6) the person makes, or has actual knowledge that another person has made, a report to the [local adult protective services office] stating a good faith

belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

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

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

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

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

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

#### **End of Alternatives**

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

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

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

#### **[ARTICLE] 2 AUTHORITY**

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

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

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

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

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

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

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

(f) Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in this state and whether or not the authority is exercised or the power of attorney is executed in this state.

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

***Legislative Note:*** The phrase "or disclaim property, including a power of appointment" is in brackets in subsection (a) and should be deleted if under the law of the enacting

*jurisdiction a fiduciary has authority to disclaim an interest in, or power over, property and the jurisdiction does not wish to restrict that authority by the Uniform Power of Attorney Act. See Unif. Disclaimer of Property Interests Acts § 5(b) (2006) (providing, “[e]xcept to the extent a fiduciary’s right to disclaim is expressly restricted or limited by another statute of this State or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or part, any interest in or power over property, including a power of appointment . . .”). See also Section 301 Legislative Note.*

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

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

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

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

**SECTION 203. CONSTRUCTION OF AUTHORITY GENERALLY.** Except as otherwise provided in the power of attorney, by executing a power of attorney that incorporates by reference a subject described in Sections 204 through 217 or that grants to an agent authority to do all acts that a principal could do pursuant to Section 201(c), a principal authorizes the agent, with respect to that subject, to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) selling or otherwise disposing of them;

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

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

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

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

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

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

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

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



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

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

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

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

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

(D) moving the property from place to place;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (1) operate, buy, sell, enlarge, reduce, or terminate an ownership interest;
- (2) perform a duty or discharge a liability and exercise in person or by proxy a right, power, privilege, or option that the principal has, may have, or claims to have;
- (3) enforce the terms of an ownership agreement;
- (4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party because of an ownership interest;
- (5) exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds;
- (6) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party concerning stocks and bonds;
- (7) with respect to an entity or business owned solely by the principal:
  - (A) continue, modify, renegotiate, extend, and terminate a contract made by or on behalf of the principal with respect to the entity or business before execution of the power of attorney;
  - (B) determine:
    - (i) the location of its operation;
    - (ii) the nature and extent of its business;
    - (iii) the methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation;
    - (iv) the amount and types of insurance carried; and

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

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

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

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

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

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

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

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

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

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

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

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

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

- (4) apply for and receive a loan secured by a contract of insurance or annuity;
- (5) surrender and receive the cash surrender value on a contract of insurance or annuity;
- (6) exercise an election;
- (7) exercise investment powers available under a contract of insurance or annuity;
- (8) change the manner of paying premiums on a contract of insurance or annuity;
- (9) change or convert the type of insurance or annuity with respect to which the principal has or claims to have authority described in this section;
- (10) apply for and procure a benefit or assistance under a statute or regulation to guarantee or pay premiums of a contract of insurance on the life of the principal;
- (11) collect, sell, assign, hypothecate, borrow against, or pledge the interest of the principal in a contract of insurance or annuity;
- (12) select the form and timing of the payment of proceeds from a contract of insurance or annuity; and
- (13) pay, from proceeds or otherwise, compromise or contest, and apply for refunds in connection with, a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

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

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

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

- (1) accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from an estate, trust, or other beneficial interest;
- (2) demand or obtain money or another thing of value to which the principal is, may become, or claims to be, entitled by reason of an estate, trust, or other beneficial interest, by litigation or otherwise;

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

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

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

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

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

(8) reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust, or other beneficial interest].

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

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

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

eliminate or modify tax liability, or seek an injunction, specific performance, or other relief;

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

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

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

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

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

(7) act for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal or some other person, or with respect to a reorganization, receivership, or application for the appointment of a receiver or trustee which affects an interest of the principal in property or other thing of value;

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

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

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

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

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

(A) the principal's children;

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

#### **SECTION 215. RETIREMENT PLANS.**

(a) In this section, “retirement plan” means a plan or account created by an employer, the principal, or another individual to provide retirement benefits or deferred

compensation of which the principal is a participant, beneficiary, or owner, including a plan or account under the following sections of the Internal Revenue Code:

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

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

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

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

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

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

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

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

(1) select the form and timing of payments under a retirement plan and withdraw benefits from a plan;

(2) make a rollover, including a direct trustee-to-trustee rollover, of benefits from one retirement plan to another;

(3) establish a retirement plan in the principal's name;

(4) make contributions to a retirement plan;

(5) exercise investment powers available under a retirement plan; and

(6) borrow from, sell assets to, or purchase assets from a retirement plan.

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

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

(2) pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the Internal Revenue Service or other taxing authority;

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

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

## **SECTION 217. GIFTS.**

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

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

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

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

(c) An agent may make a gift of the principal’s property only as the agent determines is consistent with the principal’s objectives if actually known by the agent

and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors, including:

- (1) the value and nature of the principal's property;
- (2) the principal's foreseeable obligations and need for maintenance;
- (3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;
- (4) eligibility for a benefit, a program, or assistance under a statute or regulation; and
- (5) the principal's personal history of making or joining in making gifts.

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

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

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

**[INSERT NAME OF JURISDICTION]**

#### **STATUTORY FORM POWER OF ATTORNEY**

##### **IMPORTANT INFORMATION**

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

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

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

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

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

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

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

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

**DESIGNATION OF AGENT**

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

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

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

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

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

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

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

## **GRANT OF GENERAL AUTHORITY**

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

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

- Real Property
- Tangible Personal Property
- Stocks and Bonds
- Commodities and Options
- Banks and Other Financial Institutions
- Operation of Entity or Business
- Insurance and Annuities
- Estates, Trusts, and Other Beneficial Interests
- Claims and Litigation
- Personal and Family Maintenance
- Benefits from Governmental Programs or Civil or Military Service
- Retirement Plans
- Taxes
- All Preceding Subjects

## **GRANT OF SPECIFIC AUTHORITY (OPTIONAL)**

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

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

- Create, amend, revoke, or terminate an inter vivos trust
- Make a gift, subject to the limitations of the Uniform Power of Attorney Act [insert citation to Section 217 of the act] and any special instructions in this power of attorney
- Create or change rights of survivorship
- Create or change a beneficiary designation
- Authorize another person to exercise the authority granted under this power of attorney
- Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
- Exercise fiduciary powers that the principal has authority to delegate
- Disclaim or refuse an interest in property, including a power of appointment]

**LIMITATION ON AGENT'S AUTHORITY**

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

**SPECIAL INSTRUCTIONS (OPTIONAL)**

You may give special instructions on the following lines:

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**EFFECTIVE DATE**

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

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

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

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

---

Nominee's Address:

---

Nominee's Telephone Number:

---

Name of Nominee for [guardian] of my person:

---

Nominee's Address:

---

Nominee's Telephone Number:

---

**RELIANCE ON THIS POWER OF ATTORNEY**

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

**SIGNATURE AND ACKNOWLEDGMENT**

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

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

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

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

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

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

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

\_\_\_\_\_  
Signature of Notary (Seal, if any)

My commission expires: \_\_\_\_\_

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

**IMPORTANT INFORMATION FOR AGENT**

**Agent's Duties**

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon



you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

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

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

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

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

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

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

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

### **Liability of Agent**

The meaning of the authority granted to you is defined in the Uniform Power of Attorney Act [insert citation]. If you violate the Uniform Power of Attorney Act [insert citation] or

act outside the authority granted, you may be liable for any damages caused by your violation.

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

*Legislative Note:* The brackets which precede the words “Statutory Form Power of Attorney” indicate where the enacting jurisdiction should insert the name of the jurisdiction. An indication of the jurisdiction in a power of attorney is important to establish what law supplies the default rules and statutory definitions for interpretation of the power of attorney (see Section 107 and Comment). Likewise, the brackets in the first paragraph of the “Important Information” section of the form indicate where the enacting jurisdiction should insert the citation for its codification of the Uniform Power of Attorney Act.

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

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

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

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

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

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

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

I further [certify] that to my knowledge:

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

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

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

(4)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Insert other relevant statements)

### **SIGNATURE AND ACKNOWLEDGMENT**

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

\_\_\_\_\_  
Date

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

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

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

This document was acknowledged before me on \_\_\_\_\_,

(Date)

by \_\_\_\_\_.

(Name of Agent)

(Seal, if any)

\_\_\_\_\_  
Signature of Notary

My commission expires: \_\_\_\_\_

[This document prepared by:

\_\_\_\_\_ ]

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

**[ARTICLE] 4  
MISCELLANEOUS PROVISIONS**

**SECTION 401. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

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

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

- (1) this [act] applies to a power of attorney created before, on, or after [the effective date of this [act]];
- (2) this [act] applies to a judicial proceeding concerning a power of attorney commenced on or after [the effective date of this [act]];
- (3) this [act] applies to a judicial proceeding concerning a power of attorney commenced before [the effective date of this [act]] unless the court finds that application of a provision of this [act] would substantially interfere with the effective conduct of the

judicial proceeding or prejudice the rights of a party, in which case that provision does not apply and the superseded law applies; and

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

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

- (1) [Uniform Durable Power of Attorney Act]
- (2) [Uniform Statutory Form Power of Attorney Act]
- (3) [Article 5, Part 5 of the Uniform Probate Code]

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



# UNIFORM POWER OF ATTORNEY ACT COMMENTS

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## UNIFORM POWER OF ATTORNEY ACT

### Prefatory Note

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

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

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

- (1) provide for confirmation that contingent powers are activated;
- (2) revoke a spouse-agent’s authority upon the dissolution or annulment of the marriage to the principal;
- (3) include a portability provision;
- (4) require gift making authority to be expressly stated in the grant of authority;
- (5) provide a default standard for fiduciary duties;
- (6) permit the principal to alter the default fiduciary standard;

- (7) require notice by an agent when the agent is no longer willing or able to act;
- (8) include safeguards against abuse by the agent;
- (9) include remedies and sanctions for abuse by the agent;
- (10) protect the reliance of other persons on a power of attorney; and
- (11) include remedies and sanctions for refusal of other persons to honor a power of attorney.

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

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

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

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



## Overview of the Uniform Power of Attorney Act

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

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

Another innovation is the default rule in Section 104 that a power of attorney is durable unless it contains express language indicating otherwise. This change from the Original Act reflects the view that most principals prefer their powers of attorney to be durable as a hedge against the need for guardianship. While the Original Act was silent on execution requirements for a power of attorney, Section 105 requires the principal’s signature and provides that an acknowledged signature is presumed genuine. Section 106 recognizes military powers of attorney and powers of attorney properly executed in other states or countries, or which were properly executed in the state of enactment prior to the Act’s effective date. Section 107 states a choice of law rule for determining the law that governs the meaning and effect of a power of attorney.

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

The default rule for when a power of attorney becomes effective is stated in Section 109. Unless the principal specifies that it is to become effective upon a future date, event, or contingency, the authority of an agent under a power of attorney becomes effective when the power is executed. Section 109 permits the principal to designate who may determine when contingent powers are triggered. If the trigger for contingent powers is the principal’s incapacity, Section 109 provides that the person designated to

make that determination has the authority to act as the principal's personal representative under the Health Insurance Portability and Accountability Act (HIPAA) for purposes of accessing the principal's health-care information and communicating with the principal's health-care provider. This provision does not, however, confer on the designated person the authority to make health-care decisions for the principal. If the trigger for contingent powers is incapacity but the principal has not designated anyone to make the determination, or the person authorized is unable or unwilling to make the determination, the determination may be made by a physician or licensed psychologist, who must find that the principal's ability to manage property or business affairs is impaired, or by an attorney at law, judge, or appropriate governmental official, who must find that the principal is missing, detained, or unable to return to the United States.

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

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

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

Sections 121 through 123 address the relationship of the Act to other law. Section 121 clarifies that the Act is supplemented by the principles of common law and equity to the extent those principles are not displaced by a specific provision of the Act, and Section 122 further clarifies that the Act is not intended to supersede any law applicable to financial institutions or other entities. With respect to remedies, Section 123 provides that the remedies under the Act are not exclusive and do not abrogate any other cause of action or remedy that may be available under the law of the enacting jurisdiction.

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

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

**Article 3 – Statutory Forms** – The optional form in Article 3 is designed for use by lawyers as well as lay persons. It contains, in plain language, instructions to the principal and agent. Step-by-step prompts are given for designation of the agent and successor agents, and grant of general and specific authority. In the section of the form addressing general authority, the principal must initial the subjects over which the principal wishes to delegate general authority to the agent. In the section of the form addressing specific authority, the Section 201(a) categories of specific authority are listed, preceded by a warning to the principal about the potential consequences of granting such authority to an agent. The principal is instructed to initial only the specific categories of actions that the principal intends to authorize. Article 3 also contains a sample agent certification form.

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

**[ARTICLE] 1**  
**GENERAL PROVISIONS**

**General Comment**

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

In addition to providing greater detail than the Uniform Durable Power of Attorney Act, this Act changes two presumptions in the earlier act: 1) that a power of attorney is not durable unless it contains language to make it durable; and 2) that a later court-appointed fiduciary for the principal has the power to revoke or amend a previously executed power of attorney. Section 104 of this Article reverses the non-durability presumption by stating that a power of attorney is durable unless it expressly provides that it is terminated by the incapacity of the principal. Section 108 gives deference to the principal’s choice of agent by providing that if a court appoints a fiduciary to manage some or all of the principal’s property, the agent’s authority continues unless limited, suspended, or terminated by the court.

Although the Act is primarily a default statute, Article 1 also contains rules that govern all powers of attorney subject to the Act. Examples of these rules include imposition of certain minimum fiduciary duties on an agent who has accepted appointment (Section 114(a)), recognition of persons who have standing to request judicial construction of the power of attorney or review of the agent’s conduct (Section 116), and protections for persons who accept an acknowledged power of attorney without actual knowledge that the power of attorney or the agent’s authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the power (Section 119). In contrast with the rules of general application in Article 1, the default provisions are clearly indicated by signals such as “unless the power of attorney otherwise provides,” or “except as otherwise provided in the power of attorney.” These signals

alert the drafts person to options for enlarging or limiting the Act's default terms. For example, default provisions in Article 1 state that, unless the power of attorney otherwise provides, the power of attorney is effective immediately (Section 109), coagents may exercise their authority independently (Section 111), and an agent is entitled to reimbursement of expenses reasonably incurred and to reasonable compensation (Section 112).

### **Comment to Section 101 (Short Title)**

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

### **Comment to Section 102 (Definitions)**

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

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

"Incapacity" replaces the term "disability" used in the Uniform Durable Power of Attorney Act in recognition that disability does not necessarily render an individual incapable of property and business management. The definition of incapacity stresses the operative consequences of the individual's impairment—inability to manage property and business affairs—rather than the impairment itself. The definition of incapacity in the Act is also consistent with the standard for appointment of a conservator under Section 401 of the Uniform Guardianship and Protective Proceedings Act as amended in 1997.

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

"Presently exercisable general power of appointment" is defined to clarify that where the phrase appears in the Act it does not include a power exercisable by the principal in a fiduciary capacity or exercisable only by will. *Cf.* Restatement (Third) of Property (Wills and Don. Trans.) § 19.8 cmt. d (Tentative Draft No. 5, approved 2006) (noting that unless the donor of a presently exercisable power of attorney has manifested a contrary intent, it is assumed that the donor intends that the donee's agent be permitted to exercise the power for the benefit of the donee). Including in a power of attorney the authority to exercise a presently exercisable general power of appointment held by the

principal is consistent with the objective of giving an agent comprehensive management authority over the principal's property and financial affairs. The term appears in Section 211 (Estates, Trusts, and Other Beneficial Interests) in the context of authority to exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal (*see* Section 211(b)(3)), and in Section 217 (Gifts) in the context of authority to exercise for the benefit of someone else a presently exercisable general power of appointment held by the principal (*see* Section 217(b)(1)). The term is also incorporated by reference when using the statutory form in Section 301 to grant authority with respect to "Estates, Trusts, and Other Beneficial Interests" or authority with respect to "Gifts." If a principal wishes to delegate authority to exercise a power that the principal holds in a fiduciary capacity, Section 201(a)(7) requires that the power of attorney contain an express grant of such authority. Furthermore, delegation of a power held in a fiduciary capacity is possible only if the principal has authority to delegate the power, and the agent's authority is necessarily limited by whatever terms govern the principal's ability to exercise the power.

### **Comment to Section 103 (Applicability)**

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

Paragraph (1) excludes a power to the extent that it is coupled with an interest in the subject of the power. This exclusion addresses situations where, due to the agent's interest in the subject matter of the power, the agent is not intended to act as the principal's fiduciary. *See* Restatement (Third) of Agency § 3.12 (2006) and M.T. Brunner, Annotation, *What Constitutes Power Coupled with Interest within Rule as to Termination of Agency*, 28 A.L.R.2d 1243 (1953). Common examples of powers coupled with an interest include powers granted to a creditor to perfect or protect title in, or to sell, pledged collateral. While the example of "a power given to or for the benefit of a creditor in connection with a credit transaction" is highlighted in paragraph (1), it is not meant to exclude application of paragraph (1) to other contexts in which a power may be coupled with an interest, such as a power held by an insurer to settle or confess judgment on behalf of an insured. *See, e.g., Hayes v. Gessner*, 52 N.E.2d 968 (Mass. 1944).

Paragraph (2) excludes from the Act delegations of authority to make health-care decisions for the principal. Such delegations are covered under other law of the

jurisdiction. The Act recognizes, however, that matters of financial management and health-care decision making are often interdependent. The Act consequently provides in Section 114(b)(5) a default rule that an agent under the Act must cooperate with the principal's health-care decision maker.

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

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

#### **Comment to Section 104 (Power of Attorney Is Durable)**

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

**Comment to Section 105**  
**(Execution of Power of Attorney)**

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

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

**Comment to Section 106**  
**(Validity of Power of Attorney)**

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

This section also provides that unless another law in the jurisdiction requires presentation of the original power of attorney, a photocopy or electronically transmitted copy has the same effect as the original. An example of another law that might require presentation of the original power of attorney is the jurisdiction's recording act. *See, e.g., Restatement (Third) of Property (Wills & Don. Trans.) § 6.3 cmt. e (2003)* (noting that in



order to record a deed, “some states require that the document of transfer be signed, sealed, attested, and acknowledged”).

**Comment to Section 107**  
**(Meaning and Effect of Power of Attorney)**

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

This section also establishes an objective means for determining what jurisdiction’s law the principal intended to govern the meaning and effect of a power of attorney. The phrase, “the law of the jurisdiction indicated in the power of attorney,” is intentionally broad, and includes any statement or reference in a power of attorney that indicates the principal’s choice of law. Examples of an indication of jurisdiction include a reference to the name of the jurisdiction in the title or body of the power of attorney, citation to the jurisdiction’s power of attorney statute, or an explicit statement that the power of attorney is created or executed under the laws of a particular jurisdiction. In the absence of an indication of jurisdiction in the power of attorney, Section 107 provides that the law of the jurisdiction in which the power of attorney was executed controls. The distinction between “the law of the jurisdiction indicated in the power of attorney” and “the law of the jurisdiction in which the power of attorney was executed” is an important one. The common practice of property ownership in more than one jurisdiction increases the likelihood that a principal may execute in one jurisdiction a power of attorney that was created and intended to be interpreted under the laws of another jurisdiction. A clear indication of the jurisdiction’s law that is intended to govern the meaning and effect of a power of attorney is therefore advisable in all powers of attorney. *See, e.g.*, Section 301 (providing for the name of the jurisdiction to appear in the title of the statutory form power of attorney).

**Comment to Section 108**  
**(Nomination of [Conservator or Guardian];**  
**Relation of Agent to Court-Appointed Fiduciary)**

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

Atty. Act § 3(a) (1987). In contrast, this Act gives deference to the principal's choice of agent by providing that the agent's authority continues, notwithstanding the later court appointment of a fiduciary, unless the court acts to limit or terminate the agent's authority. This approach assumes that the later-appointed fiduciary's authority should supplement, not truncate, the agent's authority. If, however, a fiduciary appointment is required because of the agent's inadequate performance or breach of fiduciary duties, the court, having considered this evidence during the appointment proceedings, may limit or terminate the agent's authority contemporaneously with appointment of the fiduciary. Section 108(b) is consistent with the state legislative trend that has departed from the Uniform Durable Power of Attorney Act. *See, e.g.*, 755 Ill. Comp. Stat. Ann. 45/2-10 (West 1992); Ind. Code Ann. § 30-5-3-4 (West 1994); Kan. Stat. Ann. § 58-662 (2005); Mo. Ann. Stat. § 404.727 (West 2001); N.J. Stat. Ann. § 46:2B-8.4 (West 2003); N.M. Stat. Ann. § 45-5-503A (LexisNexis 2004); Utah Code Ann. § 75-5-501 (Supp. 2006); Vt. Stat. Ann. tit. 14, § 3509(a) (2002); Va. Code Ann. § 11-9.1B (2006). Section 108(b) is also consistent with the Uniform Health-Care Decisions Act § 6(a) (1993), which provides that a guardian may not revoke the ward's advance health-care directive unless the court appointing the guardian expressly so authorizes. Furthermore, it is consistent with the Uniform Guardianship and Protective Proceedings Act (1997), which provides that a guardian or conservator may not revoke the ward's or protected person's power of attorney for health-care or financial management without first obtaining express authority of the court. *See* Unif. Guardianship & Protective Proc. Act § 316(c) (guardianship), § 411(d) (protective proceedings).

Deference for the principal's autonomous choice is evident both in the presumption that an agent's authority continues unless limited or terminated by the court, and in the directive that the court shall appoint a fiduciary in accordance with the principal's most recent nomination (*see* subsection (a)). Typically, a principal will nominate as conservator or guardian the same individual named as agent under the power of attorney. Favoring the principal's choice of agent and nominee, an approach consistent with most statutory hierarchies for guardian selection (*see* Unif. Guardianship & Protective Proc. Act § 310(a)(2) (1997)), also discourages guardianship petitions filed for the sole purpose of thwarting the agent's authority to gain control over a vulnerable principal. *See* Unif. Guardianship & Protective Proc. Act § 310 cmt. (1997). *See also* Linda S. Ershow-Levenberg, *When Guardianship Actions Violate the Constitutionally-Protected Right of Privacy*, NAELA News, Apr. 2005, at 1 (arguing that appointment of a guardian when there is a valid power of attorney in place violates the alleged incapacitated person's constitutionally protected rights of privacy and association).

### **Comment to Section 109 (When Power of Attorney Effective)**

This section establishes a default rule that a power of attorney is effective when executed. If the principal chooses to create what is commonly known as a "springing" or contingent power of attorney—one that becomes effective at a future date or upon a future event or contingency—the principal may authorize the agent or someone else to provide written verification that the event or contingency has occurred (subsection (b)). Because

the person authorized to verify the principal's incapacitation will likely need access to the principal's health information, subsection (d) qualifies that person to act as the principal's "personal representative" for purposes of the Health Insurance Portability and Accountability Act (HIPAA). *See* 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that for purposes of disclosing an individual's protected health information, "a covered entity must . . . treat a personal representative as the individual"). Section 109 does not, however, empower the agent to make health-care decisions for the principal. *See* Section 103 and comment (discussing exclusion from this Act of powers to make health-care decisions).

The default rule reflects a "best practices" philosophy that any agent who can be trusted to act for the principal under a springing power of attorney should be trustworthy enough to hold an immediate power. Survey evidence suggests, however, that a significant number of principals still prefer springing powers, most likely to maintain privacy in the hope that they will never need a surrogate decision maker. *See* Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis*, National Conference of Commissioners on Uniform State Laws, 6-7 (2002), <http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm> (reporting that 23% of lawyer respondents found their clients preferred springing powers, 61% reported a preference for immediate powers, and 16% saw no trend; however, 89% stated that a power of attorney statute should authorize springing powers).

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

### **Comment to Section 110 (Termination of Power of Attorney or Agent's Authority)**

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

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

Subsections (d) and (e) emphasize that even a termination event is not effective as to the agent or person who, without actual knowledge of the termination event, acts in good faith under the power of attorney. For example, the principal’s death terminates a power of attorney (*see* subsection (a)(1)), but an agent who acts in good faith under a power of attorney without actual knowledge of the principal’s death will bind the principal’s successors in interest with that action (*see* subsection (d)). The same result is true if the agent knows of the principal’s death, but the person who accepts the agent’s apparent authority has no actual knowledge of the principal’s death. *See* Restatement (Third) of Agency § 3.11 (2006) (stating that “termination of actual authority does not by itself end any apparent authority held by an agent”). *See also* Section 119(c) (stating that “[a] person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is . . . terminated . . . may rely upon the power of attorney as if the power of attorney were . . . still in effect . . .”). These concepts are also carried forward from the Uniform Durable Power of Attorney Act. *See* Unif. Durable Power Atty. Act § 4 (1987).

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

**Comment to Section 111  
(Coagents and Successor Agents)**

This section provides several default rules that merit careful consideration by the principal. Subsection (a) states that if a principal names coagents, each coagent may exercise its authority independently unless otherwise directed in the power of attorney. The Act adopts this default position to discourage the practice of executing separate, co-extensive powers of attorney in favor of different agents, and to facilitate transactions with persons who are reluctant to accept a power of attorney from only one of two or more named agents. This default rule should not, however, be interpreted as encouraging the practice of naming coagents. For a principal who can still monitor the activities of an agent, naming coagents multiplies monitoring responsibilities and significantly increases the risk that inconsistent actions will be taken with the principal's property. For the incapacitated principal, the risk is even greater that coagents will use the power of attorney to vie for control of the principal and the principal's property. Although the principal can override the default rule by requiring coagents to act by majority or unanimous consensus, such a requirement impedes use of the power of attorney, especially among agents who do not share close physical or philosophical proximity. A more prudent practice is generally to name one original agent and one or more successor agents. If desirable, a principal may give the original agent authority to delegate the agent's authority during periods when the agent is temporarily unavailable to serve (*see* Section 201(a)(5)).

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

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

**Comment to Section 112**  
**(Reimbursement and Compensation of Agent)**

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

**Comment to Section 113**  
**(Agent's Acceptance)**

This section establishes a default rule for agent acceptance of appointment under a power of attorney. Unless a different method is provided in the power of attorney, an agent's acceptance occurs upon exercise of authority, performance of duties, or any other assertion or conduct indicating acceptance. Acceptance is the critical reference point for commencement of the agency relationship and the imposition of fiduciary duties (see Section 114(a)). Because a person may be unaware that the principal has designated the person as an agent in a power of attorney, clear demarcation of when an agency relationship commences is necessary to protect both the principal and the agent. *See* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 41 (2001) (noting that "fiduciary duties should be imposed only to the extent the attorney-in-fact knows of the role, is able to accept responsibility, and affirmatively accepts"). The Act also provides a default method for agent resignation (*see* Section 118), which terminates the agency relationship (*see* Section 110(b)(2)).

**Comment to Section 114**  
**(Agent's Duties)**

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

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

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

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

Two default duties in this section protect the principal’s previously-expressed choices. These are the duty to cooperate with the person authorized to make health-care decisions for the principal (subsection (b)(5)) and the duty to preserve the principal’s estate plan (subsection (b)(6)). However, an agent has a duty to preserve the principal’s estate plan only to the extent the plan is actually known to the agent and only if preservation of the estate plan is consistent with the principal’s best interest. Factors relevant to determining whether preservation of the estate plan is in the principal’s best interest include the value of the principal’s property, the principal’s need for maintenance, minimization of taxes, and eligibility for public benefits. The Act protects an agent from liability for failure to preserve the estate plan if the agent has acted in good faith (subsection (c)).

Subsection (d) provides that an agent acting with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has a conflict of interest. This position is a departure from the traditional common law duty of loyalty which required an agent to act solely for the benefit of the

principal. *See* Restatement (Second) of Agency § 387 (1958); *see also* Unif. Trust Code § 802(a) (2003) (requiring a trustee to administer a trust “solely in the interests” of the beneficiary). Subsection (d) is modeled after state statutes which provide that loyalty to the principal can be compatible with an incidental benefit to the agent. *See* Cal. Prob. Code § 4232(b) (West Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/2-7 (West 1992); Ind. Code Ann. § 30-5-9-2 (West 1994 & Supp. 2005). The Restatement (Third) of Agency § 8.01 (2006) also contemplates that loyal service to the principal may be concurrently beneficial to the agent (*see* Reporter’s note a). *See also* John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 943 (2005) (arguing that the sole interest test for loyalty should be replaced by the best interest test). The public policy which favors best interest over sole interest as the benchmark for agent loyalty comports with the practical reality that most agents under powers of attorney are family members who have inherent conflicts of interest with the principal arising from joint property ownership or inheritance expectations.

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

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

Subsection (h) codifies the agent’s common law duty to account to a principal (*see* Restatement (Third) of Agency § 8.12 (2006); Restatement (First) of Agency § 382 (1933)). Rather than create an affirmative duty of periodic accounting, subsection (h) states that the agent is not required to disclose receipts, disbursements or transactions unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal. If the principal is deceased, the principal’s personal representative or successor in interest may request an agent to account. While there is no affirmative duty to account unless ordered by the court or requested by one of the foregoing persons, subsection (b)(4) does create a default duty to keep records.

The narrow categories of persons that may request an agent to account are consistent with the premise that a principal with capacity should control to whom the details of financial transactions are disclosed. If a principal becomes incapacitated or dies, then the principal’s fiduciary or personal representative may succeed to that



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

### **Comment to Section 115 (Exoneration of Agent)**

This section permits a principal to exonerate an agent from liability for breach of fiduciary duty, but prohibits exoneration for a breach committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal. The mandatory minimum standard of conduct required of an agent is equivalent to the good faith standard applicable to trustees. A trustee’s failure to adhere to that standard cannot be excused by language in the trust instrument. *See* Unif. Trust Code § 1008 cmt. (2003) (noting that “a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries”). *See also* Section 102(4) (defining good faith for purposes of the Act as “honesty in fact”). Section 115 provides, as an additional measure of protection for the principal, that an exoneration provision is not binding if it was inserted as the result of abuse of a confidential or fiduciary relationship with the principal. While as a matter of good practice an exoneration provision should be the exception rather than the rule, its inclusion in a power of attorney may be useful in meeting particular objectives of the principal. For example, if the principal is concerned that contentious family members will attack the agent’s conduct in order to gain control of the principal’s assets, an exoneration provision may deter such action or minimize the likelihood of success on the merits.

### **Comment to Section 116 (Judicial Relief)**

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

§ 404.727 (West 2001); N.H. Rev. Stat. Ann. § 506:7 (LexisNexis 1997 & Supp. 2005); Wash. Rev. Code Ann. § 11.94.100 (Supp. 2006); Wis. Stat. Ann. § 243.07(6r) (West 2001). *But cf.* 20 Pa. Cons. Stat. Ann. § 5604 (West 2005) (limiting standing to an agency acting pursuant to the Older Adults Protective Services Act); Vt. Stat. Ann. tit.14, § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228) (limiting standing to the commissioner of disabilities, aging, and independent living).

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

#### **Comment to Section 117 (Agent's Liability)**

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

#### **Comment to Section 118 (Agent's Resignation; Notice)**

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

Paragraph (1) provides that notice must be given to a fiduciary, if one has been appointed, and to a coagent or successor agent, if any. If the principal does not have an

appointed fiduciary and no coagent or successor agent is named in the power of attorney, then the agent may choose among the notice options in paragraph (2). Paragraph (2) permits the resigning agent to give notice to the principal's caregiver, a person reasonably believed to have sufficient interest in the principal's welfare, or a governmental agency having authority to protect the welfare of the principal. The choice among these options is intentionally left to the agent's discretion and is governed by the same standards as apply to other agent conduct. See Section 114(a) (requiring the agent to act in accordance with the principal's reasonable expectations, if known, and otherwise in the principal's best interest).

**Comment to Section 119  
(Acceptance and Reliance Upon  
Acknowledged Power of Attorney)**

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

Section 119 permits a person to rely in good faith on the validity of the power of attorney, the validity of the agent's authority, and the propriety of the agent's exercise of authority, unless the person has actual knowledge to the contrary (subsection (c)). Although a person is not required to investigate whether a power of attorney is valid or the agent's exercise of authority proper, subsection (d) permits a person to request an agent's certification of any factual matter (*see* Section 302 for a sample certification form) and an opinion of counsel as to any matter of law. If the power of attorney contains, in whole or part, language other than English, an English translation may also be requested. Further protection is provided in subsection (f) for persons that conduct activities through employees. Subsection (f) states that for purposes of Sections 119 and

120, a person is without actual knowledge of a fact if the employee conducting the transaction is without actual knowledge of the fact.

**Comment to Section 120 Alternative A  
(Liability for Refusal to Accept  
Acknowledged Power of Attorney)**

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

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

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

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

**Comment to Section 120 Alternative B  
(Liability for Refusal to Accept Acknowledged  
Statutory Form Power of Attorney)**

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

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

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

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

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

(McKinney 2001); N.C. Gen. Stat. § 32A-41 (2005); 20 Pa. Cons. Stat. Ann. § 5608 (West 2005); S.C. Code Ann. § 62-5-501(F)(1) (Supp. 2005).

**Comment to Section 121**  
**(Principles of Law and Equity)**

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

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

**Comment to Section 122**  
**(Laws Applicable to Financial Institutions and Entities)**

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

**Comment to Section 123**  
**(Remedies Under Other Law)**

The remedies under the Act are not intended to be exclusive with respect to causes of action that may accrue in relation to a power of attorney. The Act applies to many persons, individual and entity (see Section 102(6) (defining “person” for purposes of the Act)), that may serve as agents or that may be asked to accept a power of attorney. Likewise, the Act applies to many subject areas (see Article 2) over which principals may delegate authority to agents. Remedies under other laws which govern such persons and

subject matters should be considered by aggrieved parties in addition to remedies available under this Act. *See, e.g.*, Section 117 Comment.

## **[ARTICLE] 2 AUTHORITY**

### **General Comment**

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

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

### **Comment to Section 201 (Authority that Requires Specific Grant; Grant of General Authority)**

This section distinguishes between grants of specific authority that require express language in a power of attorney and grants of general authority. Section 201(a) enumerates the acts that require an express grant of specific authority and which may not be inferred from a grant of general authority. This approach follows a growing trend among states to require express specific authority for such actions as making a gift, creating or revoking a trust, and using other non-probate estate planning devices such as survivorship interests and beneficiary designations. *See, e.g.*, Cal. Prob. Code § 4264 (West Supp. 2006); Kan. Stat. Ann. § 58-654(f) (2005); Mo. Ann. Stat. § 404.710 (West

2001); Wash. Rev. Code Ann. § 11.94.050 (West Supp. 2006). The rationale for requiring a grant of specific authority to perform the acts enumerated in subsection (a) is the risk those acts pose to the principal's property and estate plan. Although risky, such authority may nevertheless be necessary to effectuate the principal's property management and estate planning objectives. Ideally, these are matters about which the principal will seek advise before granting authority to an agent.

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

With respect to other acts listed in Section 201(a), the Act contemplates that the principal will specify any special instructions in the power of attorney to further define or limit the authority granted. For example, if a principal grants authority to create or change rights of survivorship (subsection (a)(3)) or beneficiary designations (subsection (a)(4)) the principal may choose to restrict that authority to specifically identified property interests, accounts, or contracts. Principals should carefully consider not only whether to authorize any of the acts listed in Section 201(a), but also whether to limit the scope of such actions.

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

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

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



under the Act as including all of the subject matters and authority described in Sections 204 through 216 (*see* subsection (c)).

**Comment to Section 202**  
**(Incorporation of Authority)**

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

**Comment to Section 203**  
**(Construction of Authority Generally)**

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

**Comment to Section 206**  
**(Stocks and Bonds)**

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

**Comment to Section 209**  
**(Operation of Entity or Business)**

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

**Comment to Section 210**  
**(Insurance and Annuities)**

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

**Comment to Section 211**  
**(Estates, Trusts, and Other Beneficial Interests)**

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

**Comment to Section 213**  
**(Personal and Family Maintenance)**

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

The second important addition to Section 213 is the inclusion of paragraph (6) in subsection (a) which qualifies the agent to act as the principal's "personal representative" for purposes of the Health Insurance Portability and Accountability Act (HIPAA) so that the agent can communicate with health care providers in order to pay medical bills. *See* 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that for purposes of disclosing an individual's protected health information, "a covered entity must . . . treat a personal representative as the individual"). Section 213 does not, however, empower the agent to make health-care decisions for the principal. *See* Section 103 and comment (discussing exclusion from this Act of powers to make health-care decisions).

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

#### **Comment to Section 215 (Retirement Plans)**

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

#### **Comment to Section 217 (Gifts)**

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

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

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

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

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

### **General Comment**

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

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

### **Comment to Section 301 (Statutory Form Power of Attorney)**

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

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

The grant of authority provisions in the form are divided into two sections: “Grant of General Authority,” which corresponds to the subject areas defined in Sections 204 through 216 of the Act, and “Grant of Specific Authority,” which corresponds to the actions for which Section 201(a) requires an express grant of authority in a power of attorney. Article 2 of the Act provides statutory construction with respect to all of the subject matters in the Grant of General Authority section and for the authority to make a gift listed in the Grant of Specific Authority section. The principal may modify any authority granted in the form by using the “Special Instructions” section of the form. For example, the scope of authority to make a gift is defined by the default provisions of Section 217 unless the principal expands or narrows that authority in the Special Instructions.

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

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

The statutory form is drafted to follow the Act’s default provisions, but it does not preclude alteration of the default rules or the exercise of other options available under the

Act. For example, if not altered by the Special Instructions, the default rules embodied in a statutory form power of attorney include:

- (1) the power of attorney is durable (Section 104);
- (2) the power of attorney is effective when executed (Section 109);
- (3) a spouse-agent's authority terminates upon the filing of an action for dissolution, annulment, or legal separation (Section 110(b)(3));
- (4) lapse of time does not affect an agent's authority (Section 110(c));
- (5) a successor agent has the same authority as the original agent (Section 111(b));
- (6) a successor agent may not act until all predecessors have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve (Section 111(b));
- (7) an agent is entitled to reimbursement of expenses reasonably incurred (Section 112);
- (8) an agent is entitled to reasonable compensation (Section 112);
- (9) the agent accepts appointment by exercising authority or performing duties, or by any assertion or conduct indicating acceptance (Section 113);
- (10) an agent has a duty to act loyally for the principal's benefit; to act so as not to create a conflict of interest that impairs the ability to act impartially in the principal's best interest; to act with care, competence, and diligence; to keep a record of receipts, disbursements, and transactions; to cooperate with the principal's health-care agent; to attempt to preserve the principal's estate plan to the extent the plan is known to the agent and if preservation is consistent with the principal's best interest; and to account if ordered by a court or requested by the principal, a fiduciary acting for the principal, a governmental agency with authority to protect the principal, or the personal representative or successor in interest of the principal's estate (Section 114);
- (11) an agent must give notice of resignation as specified in Section 118; and
- (12) an agent that is not the principal's ancestor, spouse, or descendant may not exercise authority to create in the agent, or an individual to whom the agent owes support, an interest in the principal's property (Section 201(b)).

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

### **Comment to Section 302 (Agent's Certification)**

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

**APPENDIX**

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**STATUTORY HISTORY - GIFTING UNDER POWERS OF ATTORNEY - PEF CODE CHAPTER 56**

	<i><b>TO MAKE GIFTS</b></i>	<i><b>TO MAKE LIMITED GIFTS</b></i>
<p align="center"><u><b>Act No. 26 of 1982</b></u></p> <p>For the first time, enumerated powers (nine) can be incorporated by reference per § 5602(a); powers defined in § 5603</p> <p>Enactment: 2/18/82</p> <p>Effective: Immediately</p> <p>Applicability: All powers executed on or after date of enactment, no limit on effectiveness of prior powers, complete repeal and replacement of prior Chapter 56</p>	<p>§ 5603(a)(1): “to any donees ... and in such amounts as the attorney-in-fact may decide”</p> <ul style="list-style-type: none"> <li>● Attorney-in-fact can be donee</li> </ul>	<p>§ 5603(a)(2):</p> <p>(i) only to spouse and issue</p> <p>(ii) limited to annual exclusion amount; but no splitting</p> <p>(iii) “attorney-in-fact responsible as equity and justice may require” if exceed class of donees or amount</p> <ul style="list-style-type: none"> <li>● Attorney-in-fact can be donee, as long as he or she is spouse or issue of the principal</li> </ul>
	<ul style="list-style-type: none"> <li>● § 5603(a)(3) gifting powers construed: <ul style="list-style-type: none"> <li>○ Outright or in trust (can create a trust)</li> <li>○ To an UTMA Account</li> <li>○ Do not have to treat the donees equally or proportionately</li> <li>○ May entirely exclude a permissible donee</li> <li>○ Do not have to follow a “pattern”</li> </ul> </li> <li>● § 5603(a)(4) - attorney-in-fact <i>and</i> donee responsible under <i>equity and justice</i> if gift inconsistent with: <ul style="list-style-type: none"> <li>○ “prudent estate planning for the principal” or “financial management for the principal”</li> </ul> <p align="center">OR</p> <ul style="list-style-type: none"> <li>○ “the known or probable intent of the principal with respect to disposition of his estate”</li> </ul> </li> <li>● § 5603(a)(5) third parties not liable if rely in good faith, i.e., no responsibility to police the agent.</li> </ul>	
<p align="center"><u><b>Act No. 152 of 1992</b></u></p> <p>Enactment: 12/16/92</p> <p>Effective: Immediately</p> <p>Applicability: As of the effective date</p>	<p>Thirteen Additional enumerated powers added to §§ 5602 and 5603</p>	
<p><b>Original Nine Powers - 1982</b></p> <p>(1) Either:</p> <p style="padding-left: 20px;">(i) “to make gifts”; or [<b>Repealed 1999</b>]</p> <p style="padding-left: 20px;">(ii) “to make limited gifts.”</p> <p>(2) “To create a trust for my benefit.”</p> <p>(3) “To make additions to an existing trust for my benefit.”</p> <p>(4) “To claim an elective share of the estate of my deceased spouse.”</p> <p>(5) “To disclaim any interest in property.”</p> <p>(6) “To renounce fiduciary positions.”</p> <p>(7) “To withdraw and receive the income or corpus of a trust.”</p> <p>(8) “To authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care.”</p> <p>(9) “To authorize medical and surgical procedures.”</p>	<p><b>Thirteen additional Powers - 1992</b></p> <p>(10) “To engage in real property transactions.”</p> <p>(11) “To engage in tangible personal property transactions.”</p> <p>(12) “To engage in stock, bond and other securities transactions.”</p> <p>(13) “To engage in commodity and option transactions.”</p> <p>(14) “To engage in banking and financial transactions.”</p> <p>(15) “To borrow money.”</p> <p>(16) “To enter safe deposit boxes.”</p> <p>(17) “To engage in insurance transactions.”</p> <p>(18) “To engage in retirement plan transactions.”</p> <p>(19) “To handle interests in estates and trusts.”</p> <p>(20) “To pursue claims and litigation.”</p> <p>(21) “To receive government benefits.”</p> <p>(22) “To pursue tax matters.”</p>	<p align="center"><u><b>1994</b></u></p> <p>(23) “To make an anatomical gift of all or part of my body.”</p> <p align="center"><u><b>Proposed 2010</b></u></p> <p>(17) “To engage in insurance <b>and annuity</b> transactions”</p> <p><b>(24) “To operate a business or entity”</b></p> <p><b>(25) “To provide for personal and family maintenance”</b></p> <p><b>(8), (9) and (23) to be moved to Chapter 54</b></p>

**STATUTORY HISTORY - GIFTING UNDER POWERS OF ATTORNEY - PEF CODE CHAPTER 56**

	<i>Reifsneider</i> and other cases found authority to claim elective share, make gifts, etc., even when did not use “to make gifts” or “to make limited gifts,” if general grant of broad authority; or approved gift of real estate if used “to engage in real property transactions” in the power, etc.	
	<b><i>TO MAKE GIFTS</i></b>	<b><i>TO MAKE LIMITED GIFTS</i></b>
<p align="center"><b><u>Act No. 39 of 1999</u></b></p> <p>Enactment: 10/12/99</p> <p>Effective: 60 days, except that § 5601(c) (Notice) and (d) (Acknowledgement) effective in six months (4/12/00)</p> <p>Applicability: Generally as to powers executed on or after effective date; but in addition applies to powers executed before as to §§ 5601.2(d) and (e), 5603(a)(2)(i), (ii), (iv) and (v) and (vi)</p>	<p>Repeals ability under § 5603(a)(1) to authorize <i>unlimited gifts</i> by including in the power of attorney the phrase “to make gifts”; must now specifically grant authority, under new § 5601.2(c) described on the next page, for gifts broader than <i>limited gifts</i>.</p>	<p>Modified § 5603(a)(2):</p> <p>(i) adds spouses of issue to class of permitted donees: spouse and issue</p> <p>(ii) agent can double annual exclusion gift if spouse agrees to split</p> <p>(iii) moves <i>equity and justice</i> from § 5603(a)(4) to new § 5601.2(e)</p> <p>(iv) adds gifts for tuition and medical care to the scope of a limited gift - Internal Revenue Code § 2503(e)</p> <p>(v) agent can consent to split gifts made by principal’s spouse to issue or their spouses in any amount, but not exceeding twice the annual exclusion amount for other donees</p>
	<b><u>New in 1999</u></b>	
	<ul style="list-style-type: none"> <li>● § 5601(c) added first page “consumer” <i>notice</i> requirement; if not used, burden on agent “of demonstrating that the exercise of this authority [to exercise a power under the power of attorney] is proper”<sup>1</sup></li> <li>● § 5601(d) added <i>Acknowledgement</i> for agent so “that in the absence of a specific provision to the contrary in the power or in 20 Pa.C.S.”: <ul style="list-style-type: none"> <li>○ I shall exercise the powers for the benefit of the principal.</li> <li>○ I shall keep the assets of the principal separate from my assets.</li> <li>○ I shall exercise reasonable caution and prudence.</li> <li>○ I shall keep a full and accurate record of all the actions, receipts and disbursements on behalf of the principal</li> </ul> </li> <li>● § 5601(e) codified the fiduciary duties of an agent. “In the absence of a specific provision to the contrary in the power of attorney, the fiduciary relationship includes” the four duties set forth in the acknowledgement</li> </ul>	
<p align="center"><b><u>Act No. 50 of 2002</u></b></p> <p>Enactment: 5/16/2002</p> <p>Effective: <i>Retroactive</i> to April 12, 2000</p>	<ul style="list-style-type: none"> <li>● § 5601(e.1) <i>Limitation on applicability in commercial transactions</i></li> <li>● § 5601(e.2) <i>Limitation on applicability in [exclusively a] healthcare power of attorney</i> <ul style="list-style-type: none"> <li>○ Notice, acknowledgment and fiduciary duties of § 5601(c), (d) and (e), do not apply</li> </ul> </li> </ul>	
<p align="center"><b><u>Act No. 36 of 2003</u></b></p> <p>Enactment: 11/25/03</p> <p>Effective: 1/26/04</p>	<ul style="list-style-type: none"> <li>● § 5601(e.1)(1)(v) added re: dealers of new or used cars using a power in conjunction with a sale, purchase or transfer of title. <ul style="list-style-type: none"> <li>○ Notice, acknowledgment and fiduciary duties of § 5601(c), (d) and (e), do not apply</li> </ul> </li> </ul>	

<sup>1</sup>The Advisory Committee felt it would be too harsh to invalidate a power that lacked the required notice.

**STATUTORY HISTORY - GIFTING UNDER POWERS OF ATTORNEY - PEF CODE CHAPTER 56**

<p align="center"><b><u>Act No. 39 of 1999</u></b></p> <p><i>Official Comment</i></p> <p>“It is the intent of subsections (a), (b) and (c) to overrule <i>Estate of Reifsnieder</i>...to the extent that <i>Reifsnieder</i> would permit an agent to make a gift under a power of attorney which does not specifically provide for that power. The purpose of these subsections is to provide that when the principal intends to authorize the agent to make a gift under the power of attorney, that authorization is specifically stated in the power of attorney. The principal may no longer authorize the agent to make an unlimited gift by incorporation by reference. See repeal of §5602(a)(1)(i) (form of power of attorney).”</p>	<p>§ 5601.2 Specific rules for gifts and changes to principal’s estate plan. [2010 proposed changes set forth in bold]</p> <p>(a) <i>General Rule</i> - “A principal may empower an agent to make a gift or make changes to the principal’s estate plan in a power of attorney <i>only as provided in this section</i>” (emphasis added) <b>A general grant of authority<sup>2</sup> cannot “trump” requirement for express grant of authority to make gifts or change the principal’s estate plan, except as to the new power for personal and family maintenance under § 5603(u.3) (which maintenance may be a gift).</b></p> <p>(b) <i>Limited gifts not requiring court approval.</i></p> <p>(c) <i>Unlimited gifts<sup>3</sup></i> - “only by specifically providing for and defining the agent’s authority in the power of attorney” - later cases held the use of the repealed term, “to make gifts,” is no longer sufficient <b>2010: replaced entirely, see new (c) just below.</b></p> <p><b>2010: (c) Other gifts specifically authorized not requiring court approval</b></p> <ul style="list-style-type: none"> <li>• <b>Must specifically identify:</b> <ul style="list-style-type: none"> <li>○ donee - but cannot use “any donee”</li> <li>○ property to be gifted or dollar amount</li> </ul> </li> <li>• <b>See proposed Comment for some examples<sup>4</sup></b></li> </ul> <p><b>2010: (c.1) Other actions not requiring court approval</b></p> <ul style="list-style-type: none"> <li>• <b>If Power of Attorney expressly “authorizes” the agent, the agent may take actions to maintain or that are consistent with principal’s estate plan:</b> <ul style="list-style-type: none"> <li>○ such as creating joint ownership, ITF, POD, TOD accounts or designating a beneficiary</li> <li>○ provided the action does not “prejudice” beneficiaries at death AND provided the action cannot change “in trust” to outright, or vice versa</li> </ul> </li> </ul> <p><b>2010: (c.2) Court - approved gifts and changes to estate plan</b></p> <ul style="list-style-type: none"> <li>• <b>If Power of Attorney authorizes agent AND court approves, agent may:</b> <ul style="list-style-type: none"> <li>○ make gifts, other than limited gifts or gifts under (c)</li> <li>○ create or change rights of survivorship</li> <li>○ create or change a beneficiary designation</li> <li>○ create, amend, revoke or terminate inter vivos trust (other than § 5603(b)or (c))</li> <li>○ waive principal’s spousal rights under ERISA</li> </ul> </li> <li>• <b>Court must find proposed action consistent with</b> <ul style="list-style-type: none"> <li>○ prudent estate planning or financial management for the principal AND</li> <li>○ probable intent of the principal with respect to the disposition of the principal’s property</li> </ul> </li> </ul> <p>(d) <i>Nature of gifts</i> - concepts and language from former § 5603(a)(3); <b>(d) (1) expanded from limited gifts to also apply to “other gifts specifically authorized” under new (c) and to permit both type of gifts to a 529 account in addition to being outright or in trust.</b></p> <p>(e) <i>Equity</i> - concepts and language from former § 5603(a)(2)(iii) and § 5603(a)(4) - <b>Moved to § 5601(e.3)</b></p> <p>(f) <i>Third party</i> - based on former § 5603(a)(5)</p> <p><b>2010: (g) Court proceeding - when court approval is required for an agent’s action under subsection (c.2):</b></p> <ol style="list-style-type: none"> <li>(1) clear and convincing burden on agent</li> <li>(2) notice - intestate heirs; any person who would be prejudiced by the agent’s action; others as court directs</li> <li>(3) hearing may be closed - similar to Chapter 55</li> <li>(4) court may seal or redact record - similar to Chapter 55</li> </ol>
<p align="center"><b><u>2010 Proposal</u></b></p> <p>In response to House Resolution No. 484 (Session of 2007) to study UPAA and Ch. 56 - to be effective six months after enactment and be prospective only; except that new § 5601(e.3), which will replace the to be repealed § 5601.2(e), will take effect immediately</p>	<ul style="list-style-type: none"> <li>• New “duty” for agent - § 5601(d) (Acknowledgement) and (e)(5) “<i>I shall preserve the estate plan of the principal, including the effect of intestacy if the principal does not have a Will.</i>”</li> <li>• Equity and Justice to apply to all actions of agent. Former § 5601.2(e) moved to new § 5601(e.3) and then added to (e.3): “<i>An agent who in good faith exercises reasonable caution and prudence shall not be personally liable.</i>”</li> <li>• § 5603(a)(2)(ii) expands scope of limited gift: “<i>the limits under this subparagraph [the annual exclusion amount] may be exceeded if and to the extent the agent elects to equalize gifts among family units with each child of the principal and his or her descendants treated as family unit.</i>”</li> <li>• § 5601.2 modified and expanded. <b>See top of this page for specifics of the 2010 proposed changes to § 5601.2</b></li> <li>• Modify § 5603(p) (insurance/annuity) and (q) (retirement plans) to make a beneficiary designation subject to the requirements of § 5601.2(c.1) and (c.2) that reverse the 2009 Pennsylvania Supreme Court decision in <i>Slomski</i></li> </ul>

Footnotes

<sup>2</sup>Such as, “In general, exercise all powers with respect to real property that the principal could if present” § 5603(i)(6)

<sup>3</sup>Perhaps unfortunate choice of a label, but being deleted in 2010 proposal

<sup>4</sup>Comments can be cited to as legislative history - 1 Pa.C.S. § 1927





1       WHEREAS, The National Conference of Commissioners on Uniform  
2 State Laws promulgated the Uniform Power of Attorney Act in 2006  
3 for consideration and enactment by the states; and

4       WHEREAS, The Uniform Power of Attorney Act has been enacted  
5 in one state, New Mexico, and has been introduced in four other  
6 states, Maine, Maryland, Michigan and Minnesota; and

7       WHEREAS, The Uniform Power of Attorney Act was promulgated  
8 after a study of the power of attorney statutes in the 50  
9 states, which indicated that the state statutes were  
10 increasingly different from each other and that new and  
11 unforeseen issues had arisen since earlier uniform power of  
12 attorney statutes had been promulgated; and

13       WHEREAS, It has been approximately ten years since the Joint  
14 State Government Commission last reviewed Pennsylvania's power  
15 of attorney statute and recommended amendments; therefore be it

16       RESOLVED, That the House of Representatives direct the Joint  
17 State Government Commission to have its Advisory Committee on  
18 Decedents' Estates Laws study the Uniform Power of Attorney Act  
19 and Pennsylvania's current power of attorney statute to  
20 determine whether any amendments should be made to  
21 Pennsylvania's current statute; and be it further

22       RESOLVED, That the Joint State Government Commission report  
23 its recommendations to the House of Representatives within 18  
24 months of the adoption of this resolution.