The Uniform Power of Attorney Act: Not a One-Size-Fits-All Solution

Angela M. Vallario
University of Baltimore School of Law, avallario@ubalt.edu

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THE UNIFORM POWER OF ATTORNEY ACT:
NOT A ONE-SIZE-FITS-ALL SOLUTION

Angela M. Vallario*

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I. INTRODUCTION

A power of attorney is a staple of the modern estate plan, providing a simple way to avoid a guardianship and allowing an agent to manage a principal's assets when necessity or incapacity requires it. The nature of the power of attorney is to give an agent legal authority to act on the principal's behalf for financial matters. However, abuse by agents has caused reluctance among third parties to accept power of attorney documents, and this, in turn, has caused uproar for estate planners and their clients.

In response to this agent abuse and subsequent third party reluctance to accept power of attorney documents, the nation's attorneys have been forced to share war stories, as well as tricks and solutions, in an effort to minimize the problems and embarrassment created when power of attorney documents are prepared and executed.

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* Angela M. Vallario is an Associate Professor at the University of Baltimore School of Law; B.S. (University of Florida); J.D. (University of Baltimore School of Law); L.L.M (Georgetown Law Center). I am grateful for my wonderful research assistant Nicholas Young, who assisted with both research and citation. Additionally, I am grateful to Brooke Shemer, Brittany Ellwanger, and Christian Kintigh for their research assistance.

4. Michael W. Davis & Richard F. Lindstrom, Carrots, Sticks and Landmines: Uniform Power of Attorney Act, 41 Md. B.J. 38, 38, 40 (2008) (stating that, under prior Maryland law, “third parties, such as banks, brokerages and insurance companies [were] not obligated to accept an agent’s authority under any written power of attorney” and that there was very little legal recourse).
one day and not honored the next. In some cases, attorneys have even begun to advise their clients to use certain financial institutions likely to honor the legal-drafted document and to avoid those institutions reluctant to do so. Additionally, attorneys have been forced to contact the legal departments of banks, threaten suit, and in some situations use a costly and time-consuming alternative, the guardianship.

Third party refusal to accept the power of attorney was one factor that led to a national trend for codification. Since the power of attorney is a valuable estate-planning tool and an inexpensive way to avoid a guardianship, many jurisdictions took significant steps towards codification of the law. In 2002, the Uniform Law Commission (Commission) undertook significant efforts to amend the Uniform Durable Power of Attorney Act in an attempt to bring clarity and uniformity to state power of attorney legislation. As a

6. See Whitton, supra note 5, at 39.
8. Id. A power of attorney provides flexibility and informalities that are not offered with the guardianship alternative. See discussion infra Part II.A–D.
11. The Uniform Power of Attorney Act (UPOA Act) addresses several significant issues that were not fully contemplated previously. The Prefatory Note of the UPOA Act states: “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.” UNIF. POWER OF ATT’Y ACT prefatory note, 8B U.L.A. 62 (Supp. 2013). Unless otherwise noted, citations to the UPOA Act are to the 2013 Cumulative Supplement of the Uniform Laws Annotated.
result of years of effort, in 2006 the Commission promulgated the Uniform Power of Attorney Act.\(^{12}\)

The Uniform Power of Attorney Act (UPOA Act) provides a blueprint for modern reform across the nation.\(^{13}\) However, since its promulgation, only New Mexico, the Virgin Islands, and Montana have chosen to enact the UPOA Act in its entirety,\(^{14}\) with an additional twelve jurisdictions having adopted the UPOA Act with significant modifications (adopting jurisdictions).\(^{15}\) These jurisdictions have modified the UPOA Act in a variety of ways for a number of reasons.\(^{16}\) At the time of this article, there are only fifteen adopting jurisdictions that have enacted some version of the UPOA

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15. In addition to New Mexico and Montana, twelve other jurisdictions are considered to be enacting jurisdictions. Maryland is not listed as one of the enacting jurisdictions on the Uniform Law Commissioner’s UPOA Act Legislative Fact Sheet, and is not consistently considered by the Uniform Law Commissioners to have enacted the UPOA Act. Compare Legislative Fact Sheet - Power of Attorney, supra note 12, with UNIF. POWER OF ATT’Y ACT Table of Jurisdictions Wherein Act Has Been Adopted, 8B U.L.A. 61 (listing Maryland), and id. general statutory note, 8B U.L.A. 63 (stating “the Maryland act is a substantial adoption of the major provisions of the Uniform Act . . .”). Additionally, this author was personally involved in the drafting of the Maryland Power of Attorney Act, which modeled its legislation after the UPOA Act. See H.B. 483, 427th Leg., 1st Sess. (Md. 2010) titled “Uniform Power of Attorney Act.” The bill summary reads, “For the purpose of . . . establishing the Uniform Power of Attorney Act.” Id. Therefore, even though Maryland is not recognized as an enacting jurisdiction on the Uniform Law Commissioner’s website, Maryland will be counted as one of the fifteen jurisdictions that have adopted the UPOA Act for purposes of this article.

Act. It was the stated goal of the UPOA Act to bring uniformity to the “growing divergence [of power of attorney law] among states.” However, seven years since its promulgation, the UPOA Act is suffering from a distinct lack of support among the jurisdictions of the United States, and remains conclusively adopted in only three states. The articulated goal of uniformity has not been accomplished and is perhaps unrealistic. The majority of jurisdictions’ failure to adopt the UPOA Act coupled with the inconsistencies among the adopting jurisdictions suggests that the UPOA Act is not a one-size-fits-all solution.

This article will examine the UPOA Act and the legislation from the adopting jurisdictions. The Commission identified six specific matters to be addressed by the UPOA Act. In Part II of this Article, those specific matters are identified in the provisions of the UPOA Act and compared to the legislation from the adopting jurisdictions. In analyzing the adopting jurisdictions, the legislative trends and

17. Alabama, Arkansas, Colorado, Idaho, Maine, Montana, Nebraska, Nevada, New Mexico, Ohio, U.S Virgin Islands, Virginia, West Virginia, and Wisconsin. See ALA. CODE §§ 26-1A-101 to -404; ARK. CODE ANN. §§ 28-68-101 to -403; COLO. REV. STAT. ANN. §§ 15-14-701 to -745; IDAHO CODE ANN. §§ 15-12-101 to -403; ME. REV. STAT. ANN. tit. 18-A, §§ 5-901 to -964; MONT. CODE ANN. §§ 72-31-301 to -367; NEB. REV. STAT. §§ 30-4001 to -4045; NEV. REV. STAT. ANN. §§ 162A.010-.860; N.M. STAT. ANN. §§ 45-5B-101 to -403; OHIO REV. CODE ANN. §§ 1337.21-.64; VA. CODE ANN. §§ 64.2-1600 to -1642; W. VA. CODE ANN. §§ 39B-1-101 to -4-103; WIS. STAT. ANN. §§ 244.01-64; V.I. CODE ANN. tit. 15, §§ 5-501 to 5-523 (repealed 2012); see also Legislative Fact Sheet - Power of Attorney, supra note 12 (providing a comprehensive list of adopting jurisdictions). Maryland will also be considered to have adopted the UPOA Act for purposes of this article. See supra note 15.


20. See infra Part VII.

21. See infra Part VII.

22. See infra Parts V–VII.

23. UNIF. POWER OF ATT'Y ACT prefatory note, 8B U.L.A. 62 ("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."); see infra Part III (Specific Matters Addressed by the UPOA Act).
differences amongst the adopting jurisdictions will be identified. Part III of the Article addresses and compares other topics in the UPOA Act and makes additional comparisons and distinctions to the adopting jurisdictions. Part IV identifies further modifications to the UPOA Act by the adopting jurisdictions. The Article also acknowledges the area of complete uniformity between the UPOA Act and the adopting jurisdictions in Part V. Throughout the discussion of the various aspects of the UPOA Act, suggestions and recommendations are made to the Commission in an effort to achieve its stated goal.

II. THE UNIFORM POWER OF ATTORNEY ACT

The Commission took more than three years to approve the UPOA Act.24 The process began in 2002 and involved a review of current legislation and case law among jurisdictions, as well as a national survey25 and input from lawyers and financial institutions throughout the United States.26 As a result, the UPOA Act was approved and recommended for enactment in all states at the National Conference of Commissioners on Uniform State Laws (NCCUSL)27 annual conference in 2006.28

Following its approval in 2006, a power-of-attorney legislative trend began the next year, with New Mexico being the first to enact the UPOA Act in its entirety with no modifications in 2007. The New Mexico UPOA legislation became effective that same year.29 The following year, Idaho30 joined New Mexico, becoming the second state to enact the UPOA Act, with Idaho’s UPOA Act also going into effect in 2008. Starting in 2009, jurisdictions needed additional time to understand the comprehensive legislation, so

24. Linda S. Whitton, The Uniform Power of Attorney Act and Financial Institutions (Sept. 1, 2008) (unpublished manuscript) (on file with author). Professor Whitton, Reporter for the UPOA Act, noted in her memorandum the three-year drafting process and the extensive fact-finding mission, detailing the list of interest groups brought together in order to draft the comprehensive document. Id.

25. UNIF. POWER OF ATT’Y ACT prefatory note, 8B U.L.A. 62 (Supp. 2013) (explaining that an extensive survey was “conducted by the Joint Editorial Board for Uniform Trust and Estate Acts . . . to ascertain” current information from bar associations, the American College of Trusts and Estate Counsel, members from various sections of the American Bar Association, the National Academy of Elder Law Attorneys, and others).

26. Id.

27. See Legislative Fact Sheet - Power of Attorney, supra note 12.

28. Id.

29. N.M. STAT. ANN. §§ 45-5B-101 to -403 (LexisNexis 2012).

adopting jurisdictions began enacting in one year but having the effective date postponed.\textsuperscript{31} From this point forward, this chronological progression of enacting jurisdictions will identify the progression based on effective dates. The UPOA Act became effective in Nevada in 2009.\textsuperscript{32} In 2010, five more states joined the pack: Virginia,\textsuperscript{33} Maine,\textsuperscript{34} Wisconsin,\textsuperscript{35} Colorado,\textsuperscript{36} and Maryland.\textsuperscript{37} Next were the Virgin Islands\textsuperscript{38} and Montana\textsuperscript{39} in 2011. The following year, the UPOA Act was enacted by Alabama,\textsuperscript{40} Arkansas,\textsuperscript{41} West Virginia,\textsuperscript{42} Ohio,\textsuperscript{43} and Nebraska.\textsuperscript{44} No jurisdictions enacted the UPOA Act in 2013. Since 2006, fifteen jurisdictions have enacted power of attorney legislation modeled on the UPOA Act.

The UPOA Act has four articles.\textsuperscript{45} In general, Article 1 and Article 2 provide the law on the creation and effectiveness of the power of attorney.\textsuperscript{46} Articles 1 and 2 establish many of the statutory default provisions.\textsuperscript{47} The statutory defaults are provisions that come into

\textsuperscript{31} See, e.g., COLO. REV. STAT. ANN. §§ 15-14-701 to -745 (West 2011 & Supp. 2012) (becoming effective for power of attorneys created after January 1, 2010, but the law was enacted in 2009).
\textsuperscript{33} VA. CODE ANN. §§ 64.2-1600 to -1642 (2012). Although Virginia had originally enacted the legislation for a one-year period in 2009, the legislation was reenacted in 2010. See Andrew H. Hook & Lisa V. Johnson, The Virginia Uniform Power of Attorney Act, 44 U. RICH. L. REV. 107, 107–08 (2009) (noting that the UPOA Act “was introduced into the Virginia General Assembly in January 2009 and passed with a provision that require[d] the UPOAA . . . be reenacted in the 2010 Session in order to become effective.”).
\textsuperscript{34} ME. REV. STAT. ANN. tit. 18-A, §§ 5-901 to -964 (2012).
\textsuperscript{35} WIS. STAT. ANN. §§ 244.01–64 (West Supp. 2012).
\textsuperscript{36} COLO. REV. STAT. ANN. §§ 15-14-701 to -745.
\textsuperscript{38} V.I. CODE ANN. tit. 15, §§ 5-501 to -523 (repealed 2012). In its definitional section, the UPOA Act defines states to include the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. UNIF. POWER OF ATT'Y ACT § 102, 8B U.L.A. 64 (Supp. 2013). However, in 2012, the U.S. Virgin Islands repealed a good portion of its Probate Code; included in that repeal was the UPOA Act. V.I. CODE ANN. tit. 15, §§ 5-501 to -523 (repealed 2012).
\textsuperscript{39} MONT. CODE ANN. §§ 72-31-301 to -367 (2011).
\textsuperscript{40} ALA. CODE §§ 26-1A-101 to -404 (LexisNexis Supp. 2012).
\textsuperscript{41} ARK. CODE ANN. §§ 28-68-101 to -405 (2012).
\textsuperscript{42} W. VA. CODE ANN. §§ 39B-1-101 to -4-103 (LexisNexis Supp. 2013).
\textsuperscript{43} OHIO REV. CODE ANN. §§ 1337.21–64 (West 2013).
\textsuperscript{44} NEB. REV. STAT. §§ 30-4001 to -4045 (Supp. 2012).
\textsuperscript{45} UNIF. POWER OF ATT'Y ACT § 105, 8B U.L.A. 67 (Supp. 2013).
\textsuperscript{46} See id. § 101, 8B U.L.A. 67–124.
\textsuperscript{47} See infra Parts III, IV (discussing the default rules of the UPOA Act).
play “unless it expressly states otherwise” in the legal document.48 Article 3 is where the statutory power of attorney forms (Statutory Form) and Agent Certification forms are located.49 Article 4 includes a few items not otherwise included, such as the effect of the UPOA Act on pre-enactment powers of attorney, and the extent of repeal to existing power of attorney law.50

A. Article 1 General Provisions

Article 1 addresses substance with twenty-three sections addressing a number of default provisions as to the creation and use of the power of attorney.51 While most of the Article 1 provisions are default rules that can be altered by the power of attorney, certain mandatory provisions in Article 1 serve as safeguards for the protection of the principal,52 the agent,53 and third parties.54 The default provisions established in Article 1 are embodied in Article 3’s Statutory Form.55

48. See, e.g., UNIF. POWER OF ATT’Y ACT § 104 cmt., 8B U.L.A. 73 (addressing the power of attorney’s default of durability).
49. Id. §§ 301–302, 8B U.L.A. 125–33.
50. Id. § 403, 8B U.L.A. 135.
51. Id. art. 1 cmt., 8B U.L.A. 67. The default provisions of the UPOA Act are embedded in the statutory form and include: (1) that the power of attorney is durable, id. § 104, 8B U.L.A. 73; (2) the powers are effective immediately and not contingent, id. § 109(a), 8B U.L.A. 79; (3) termination of the agency when there is a divorce or legal separation between the principal and agent, id. § 110(b)(3), 8B U.L.A. 81; (4) the power does not terminate due to lapse of time, id. § 110(c), 8B U.L.A. 81; (5) successor agent has the same authority as the original agent, id. § 111(b)(1), 8B U.L.A. 82; (6) a successor agent does not have any authority until the original agent is no longer serving, id. § 111(b)(1)-(2), 8B U.L.A. 82; (7) the agent is reimbursed for expenses, id. § 112, 8B U.L.A. 84; (8) entitled to compensation, id.; (9) implied acceptance by the agent, id. § 113, 8B U.L.A. 85–86. (10) there are minimum duties such as: the duty of loyalty, the duty not to create a conflict of interest that impairs the agent’s ability to act impartially in the principal’s best interests, duty of care, duty of competence and diligence, duty of record keeping; and a duty to cooperate with other agents, in an attempt to preserve the principal’s estate plan, id. § 114, 8B U.L.A. 85–86.
52. See UNIF. POWER OF ATT’Y ACT § 201(a)-(b), 8B U.L.A. 104 (requiring a specific grant for the agent to have authority with respect to the property subject-matters). The matters that impose significant risk of loss for the principal because of the potential of abuse by an agent are only permitted by specific grant of authority, and are not part of the general grant authority. Id. § 111(d), 8B U.L.A. 83 (mandating that an agent with actual knowledge of a breach by a coagent has a duty to notify the principal); id. § 217(b)(1), 8B U.L.A. 123 (limiting gift-giving to the annual exclusion amount); see infra note 66.
53. UNIF. POWER OF ATT’Y ACT § 115, 8B U.L.A. 89.
54. Id. § 120(c)(1)-(2) cmt., 8B U.L.A. 96–97 (providing sanctions for unreasonable refusals and significant protections for third parties against liability for legitimate
Article 1 includes a definitional section applicable to most, but not all powers of attorneys, durability, execution requirements, validity of photocopies and those electronically submitted, portability, guardianship, effectiveness, termination, successor agents, compensation, implied acceptance by agent, agent duties, and the resignation requirements imposed on the agent.

55. See infra Part II.C.
56. Unif. Power of Att’y Act § 102, 102 cmt., 8B U.L.A. 68–70 (adopting the term agent, as opposed to attorney-in-fact, to avoid confusion among lay persons, and replacing disability with the term incapacity as such definition is identical to the terms used in the Unif. Guardianship & Protective Proceedings Act § 401 cmt., 8A U.L.A. 377–78 (1997)).
57. Unif. Power of Att’y Act § 103, 8B U.L.A. 71 (excluding the health-care agent as well as certain powers given to creditors and powers connected with business entities).
58. Id. § 104, 8B U.L.A. 73 (providing that a durable power is not impacted by the principal’s incapacity, thus, on the disability of the principal, the power of attorney remains effective).
59. Id. § 105, 8B U.L.A. 73. The only statutory formality requirement is that the document be signed by the principal). See infra Part IV.B.
60. Unif. Power of Att’y Act § 106(d), 8B U.L.A. 75 (giving photocopies and electronically submitted powers the same effect as the original document).
61. Id. § 106(c), 8B U.L.A. 75. Consistent with the goal of uniformity, the UPOA Act authorizes the documents to be effective in more than one jurisdiction. See infra Part IV.C.
62. Unif. Power of Att’y Act § 108, 8B U.L.A. 77. In the event of a later-appointed guardian, the agent continues to account to the principals as well as the guardian. See infra Part III.B.
63. Unif. Power of Att’y Act § 109, 8B U.L.A. 79. A power of attorney is generally effective immediately, but the principal may postpone its effectiveness and create a springing power of attorney. See infra Part IV.C.
64. Unif. Power of Att’y Act § 110, 8B U.L.A. 80–81. Termination of the power occurs on death, revocation, or resignation, as well as upon divorce of the principal and agent. See infra Part III.C.
65. Unif. Power of Att’y Act § 111(b), 8B U.L.A. 82. A successor agent generally has the same authority as the principal gave the original agent. See infra Part IV.A.
66. Unif. Power of Att’y Act § 112, 8B U.L.A. 84. There is no problem in compensating or reimbursing the agent. To the extent the agent is compensated, that income would be taxable. I.R.C. § 101 (2013). If the agent is likely to inherit from the principal, said inheritance is not taxable. Therefore, it will be prudent for certain agents to take the taxability of compensation into consideration.
67. Unif. Power of Att’y Act § 113, 8B U.L.A. 84. Unlike the trustee, an agent under a power is not required to expressly accept the fiduciary role. Instead the agent’s actions will be deemed acceptance. Restatement (Second) of Trusts §§ 169–182
Article 1 also includes the UPOA Act’s provisions dealing with the agent’s liability for breaching any fiduciary or authorized duty. As to the agent’s liability, Article 1 holds the agent liable for breach, unless exonerated by the principal.

B. Article 2 Authority

Article 2 addresses areas of authority for agents by specifically defining the scope of the power given to the agent. This Article retained much of what is contained in the Uniform Statutory Form Power of Attorney Act of 1988. Article 2 identifies agent powers that require a specific grant of authority. The authority warranting specific grant includes powers that impact the principal’s property. These property-sensitive matters involve the grant of authority where there is the greatest risk of abuse by the agent.

68. UNIF. POWER OF ATT’Y ACT § 114, 8B U.L.A. 85–86. An agent has both mandatory minimum duties and duties created as a result of the principal’s general and specific grant of authority. See infra Part III.F.

69. UNIF. POWER OF ATT’Y ACT § 118, 8B U.L.A. 92 (requiring an agent to give notice of resignation to the principal, guardian, care-giver, or other person or governmental agency having an interest in the principal’s welfare).

70. Id. § 114, 8B U.L.A. 85–86. The agent has minimum mandatory duties such as to act in good faith, with loyalty, within the scope of authority, and to act in accordance with the principal’s known reasonable expectations or in the principal’s best interests. See infra Part III.F.

71. UNIF. POWER OF ATT’Y ACT § 117, 8B U.L.A. 92. See infra Part III.F.

72. UNIF. POWER OF ATT’Y ACT § 115, 8B U.L.A. 89. The principal may choose to relieve the agent from certain breaches other than those made in bad faith.

73. See id. The foundation of an agency relationship is that an agent must act within the scope of the agent’s authority. See RESTATEMENT (THIRD) OF AGENCY §§ 2.01–2.03 (2006).


75. UNIF. POWER OF ATT’Y ACT § 201(a), 8B U.L.A. 104. The statutory form power of attorney requires the principal to indicate in a separate section of the form “Grant of Specific Authority” authorization for actions that could affect the principal’s assets. See infra Part II.C.

76. UNIF. POWER OF ATT’Y ACT § 201(a), 8B U.L.A. 104.

77. See id. The property-sensitive matters for which the agent must be authorized by optional specific grant include the agent’s authority to:

(1) create, amend, revoke, or terminate an inter vivos trust; (2) make a gift; (3) create or change rights of survivorship; (4) create
Additionally, because these powers by specific grant address authority that could sharply reduce the principal's property or change the principal's estate plan, the UPOA Act imposes further limitations on any agent who is not an ancestor, spouse, or descendant of the principal (close relative). Non-relative agents are prohibited from exercising the property-sensitive powers in favor of themselves or someone to whom they have a legal obligation of support.99

Article 2 also provides for the general grant of authority with respect to the incidental subject matters of the power attorney.80 Sections 204 through 216 of the UPOA Act describe in detail the general authority granted therein.81 The general authority granted may be incorporated by reference.82

C. Article 3 Statutory Forms

Article 3 includes two optional forms: the Statutory Form and the agent's certification.83 The Statutory Form begins with a warning to the principal labeled "Important Information."84 This section identifies the risks associated with executing a power of attorney.85 One of those risks is the agent's ability to make property decisions for the principal immediately, regardless of whether the principal can act for himself or herself.86

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 account; [or] (7) exercise fiduciary powers that the principal has authority to delegate; or (8) disclaim property, including a power of appointment].

Id.
78. See id.
79. Id. § 201(b), 8B U.L.A. 104.
80. Id. § 203(1)–(10), 8B U.L.A. 108. Article 3 incidental subject matters, id. §§ 204–216, 8B U.L.A. 109–22, are discussed further in this article. See infra Part II.C.
82. Id. § 202(a)–(b), 8B U.L.A. 107.
83. Id. §§ 301–302, 8B U.L.A. 125–34.
84. Id. § 301, 8B U.L.A. 125–29.
85. See id. § 301, 8B U.L.A. 125; id. § 201 cmt., 8B U.L.A. 105 (noting the principal's risks associated with assets and depletion thereof). See generally AARP, supra note 3, at 4–6 (explaining the risks associated with executing a power of attorney, specifically the risk of power of attorney abuse).
86. UNIF. POWER OF ATT'Y ACT § 301, 8B U.L.A. 125.
The Statutory Form has a fill-in-the-blank format for the principal to first designate an agent and a successor agent.\footnote{Id. § 301, 8B U.L.A. 126.} Next is a section dealing with the general grant of authority, allowing the principal to identify subject matters to be included in the agent's general authority\footnote{Id.} and providing the principal with an option to select an all-inclusive general grant of authority instead. These subject matters are encompassed in the principal's general grant of authority and cover a range of property types.\footnote{Id.} Each property type is listed; however, the Statutory Form does not describe the kinds of actions the agent can take with respect to that property.\footnote{Id.}

The third section identifies property-sensitive topics,\footnote{UNIF. POWER OF ATT'Y ACT § 301, 8B U.L.A. 127.} which require an express grant of authority. The Statutory Form allows the principal to grant the agent express authority and the power to engage in estate-planning endeavors on behalf of the principal.\footnote{Id. With express authorization the agent may create, amend, revoke, or terminate an inter vivos trust; make a limited gift; create or change rights of survivorship; create or change a beneficiary designation; delegate the agent's authority under the document; waive or disclaim on behalf of the principal; and exercise any fiduciary powers that the principal may have. Id. § 201(a), 8B U.L.A. 104.} These property-sensitive topics impose significant risks of loss; therefore, stricter rules apply to agents who are not the ancestor, spouse, or descendant of the principal. The principal is both warned and required to expressly authorize the agent to "take actions that could significantly reduce [the principal's] property or change how [the principal's] property is distributed at [the principal's] death."\footnote{Id. § 201(a), 8B U.L.A. 104; id. § 301, 8B U.L.A. 127 (alteration in the original).}
Next is a section further limiting the agent, who is not a close relative\textsuperscript{94} of the principal, from using property for the agent’s benefit. The Statutory Form has a section for special instructions,\textsuperscript{95} is effective immediately,\textsuperscript{96} provides an opportunity for the principal to identify a guardian using a fill-in-the-blank format,\textsuperscript{97} and provides a statement authorizing reliance by a third party, followed by a signature with an optional acknowledgement.\textsuperscript{98} Also included in the Statutory Form is a section entitled, “Important Information for Agent,” which describes the agent’s duties,\textsuperscript{99} termination of authority,\textsuperscript{100} and potential for liability.\textsuperscript{101}

\section*{D. Article 4 Miscellaneous Provisions}

Article 4 contains miscellaneous provisions authorizing retroactive application to pre-existing powers of attorney.\textsuperscript{102} Section 401 emphasizes the need to “promote uniformity of the law” with respect to the power of attorney.\textsuperscript{103}

\section*{III. SPECIFIC MATTERS ADDRESSED BY THE UPOA ACT}

In addition to the codified provision promoting uniformity amongst the states,\textsuperscript{104} the Prefatory Note to the UPOA Act specifically identifies the need to create uniformity amongst adopting jurisdictions on a variety of specific matters (specific matters) including:

\begin{itemize}
\item\textsuperscript{94} \textit{Id.} § 201(b), 8B U.L.A. 104. An agent, who is not the ancestor, spouse, or descendant of the principal, may not use the principal’s property for themselves or for any person to whom the agent has a legal obligation of support. \textit{Id.}
\item\textsuperscript{95} \textit{Id} § 301, 8B U.L.A. 127. Other than the application to the appointment of a co-agent, the UPOA Act does not provide any direction with respect to limitations as to special instructions.
\item\textsuperscript{96} \textit{Id.} § 109, 8B U.L.A. 79. The UPOA Act provides for the power of attorney to be effective immediately, unless otherwise indicated to the contrary. This is another default provision of the UPOA Act. \textit{See} discussion \textit{infra} Part III.D.
\item\textsuperscript{97} UNIF. POWER OF ATT’Y ACT § 301, 8B U.L.A. 127–28; \textit{Id.} § 108, 8B U.L.A. 77.
\item\textsuperscript{98} \textit{See id.} § art. 3 cmt., 8B U.L.A. 125. Acknowledgment is not an execution requirement but is strongly encouraged.
\item\textsuperscript{99} \textit{Id.} § 114, 8B U.L.A. 85–86.
\item\textsuperscript{100} \textit{Id.} § 110, 8B U.L.A. 80–81.
\item\textsuperscript{101} \textit{Id.} § 117, 8B U.L.A. 92.
\item\textsuperscript{102} \textit{Id.} § 403, 8B U.L.A. 135.
\item\textsuperscript{103} \textit{Id.} § 401, 8B U.L.A. 135.
\item\textsuperscript{104} \textit{Id.}
\end{itemize}
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.\(^{105}\)

This section will identify how these specific matters are addressed in the UPOA Act and among the adopting jurisdictions. Additionally, this section will identify whether there are recommendations for the Commission.

**A. The authority of multiple agents**

The UPOA Act authorizes multiple agents,\(^{106}\) which addresses the situation when two or more agents are appointed by the principal, or an original agent and a successor. Under the UPOA Act, the appointment of a coagent must be made in the Specific Instructions section of the Statutory Form.\(^{107}\) If the principal appoints a coagent, the coagent will not be liable for the breach of his or her coagent as long as he or she did not participate in or conceal the breach.\(^{108}\) Furthermore, the coagent has a duty to notify the principal or take reasonably appropriate actions to safeguard the principal’s best interest.\(^{109}\) The UPOA Act provides a default for coagents to act independently without the other.\(^{110}\)

In the situation of a successor agent, one that is appointed to replace the agent originally designated, the successor agent may not act until the original agent is not available to serve.\(^{111}\) Like the coagent, a successor agent will not be liable for the breach of a predecessor and has a duty to notify the principal or take appropriate acts to safeguard the principal’s best interest.\(^{112}\)

Among the adopting jurisdictions, there is a consensus that coagency should be authorized.\(^{113}\) Although the UPOA Act authorizes multiple

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\(^{105}\) *Id.* prefatory note, 8B U.L.A. 62.

\(^{106}\) *Id.* § 111, 8B U.L.A. 82.

\(^{107}\) *Id.* § 301, 8B U.L.A. 126–27.

\(^{108}\) *Id.* § 111(c), 8B U.L.A. 83.

\(^{109}\) *Id.* § 111(d), 8B U.L.A. 83.

\(^{110}\) *Id.* § 111(a), 8B U.L.A. 82.

\(^{111}\) *Id.* § 111(b)(2), 8B U.L.A. 82.

\(^{112}\) *Id.* § 111(c)–(d), 8B U.L.A. 83; *see also infra* Part IV.A.

\(^{113}\) See, e.g., MONT. CODE ANN. § 72-31-316 (2011); N.M. STAT. ANN. § 45-5B-111 (LexisNexis 2012).
agents, the principal must make the coagency identification in the
special instructions section of the Statutory Form. The UPOA Act’s
default provision allowing each coagent to act independently is not
followed unanimously. Maryland’s statutory default is that coagents
must act unanimously unless otherwise stated.

Additionally, the adopting jurisdictions agree that a successor agent
should have authority equal to that of the primary agent and that no
successor agent shall act prior to the primary agent’s inability to
serve. The justification for the coagents’ ability to act independently was that “such a requirement impedes use of the power
of attorney, especially among agents who do not share close physical
or philosophical proximity.” However, the ability of coagents to
act independently could increase the risk of inconsistencies, and
liability. Additionally, most coagency appointments require
unanimity between fiduciaries.

The Commission should re-examine the ability of the coagent to act
independently. The appointment of co-fiduciaries serves as a
policing function when all fiduciaries must act together. This
advantage is lost by allowing the coagents to act independently. A
better default rule would be to require unanimity. Therefore, the
Commission should re-examine its position on this topic.

B. The Authority of a Later-Appointed Fiduciary or Guardian

The second specific matter identified as an area of concern deals
with the interactions of the agent and a later-court-appointed guardian

117. Unif. Power of Att’y Act § 111(b), 8B U.L.A. 82 (stating that the original agent’s inability to serve could be caused by resignation, termination, death, disqualification, or unwillingness).
118. Id. § 111 cmt., 8B U.L.A. 83.
119. Id.
120. See Restatement (Second) of Trusts § 194 cmt., (1959) (“If there are two or more trustees, the powers conferred upon them can properly be exercised only by all the trustees, unless it is otherwise provided by the terms of the trust.”).
Typically, the power of attorney is incorporated as part of one's estate plan to avoid a guardianship of one's property, which can be a costly and time consuming process. The appointment of a guardian requires an action by the court. When there is an existing agent, this court-appointment generally occurs because the power of attorney failed to address a relevant aspect of the principal's affairs. When there is a court-appointed guardian, the UPOA Act does not terminate the agent’s authority, “[e]xcept for good cause shown or disqualification.” The agency remains intact, and the agent becomes accountable to the guardian as well as the principal, unless the court directs otherwise. This position is based on the theory that the guardianship will “supplement, not truncate, the agent’s authority.”

All adopting jurisdictions agree that the principal’s nomination in a power of attorney should be honored in most situations. However, a number of adopting jurisdictions have deviated from the UPOA Act as to the agent’s role once there is a later-appointed guardian. For example, Nevada and West Virginia provide that the appointment of the guardian automatically terminates the agent’s role under the power of attorney. Alabama provides that the guardian has the power to terminate the agency. Maryland requires the agent to account only to the later-appointed guardian.

Placing the guardian and agent on equal footings in a position of joint fiduciaries unless limited, suspended, or terminated by the court could create conflicts between the parties. It would be best if the agent’s role is automatically terminated, giving the guardian a statutory priority as to authority, to avoid potential negative consequences. Although the UPOA Act provides that the agent must

122. Section 108 allows for the nomination of a conservator or guardian. Id. § 108, 8B U.L.A. 77.
123. See VALLARIO, supra note 116, at 331 (comparing the durable power of attorney to a guardianship, finding guardianships as costly, subject to court proceedings, and requiring annual reports).
125. VALLARIO, supra note 116, at 332.
127. Id. § 108(b), 8B U.L.A. 77.
128. Id. § 108 cmt., 8B U.L.A. 77.
129. Id. § 108 Action in Adopting Jurisdictions, 8B U.L.A. 78–79.
account to the guardian\textsuperscript{134} in addition to the principal, this implied authority may not be sufficient. The guardian is not required to account to the agent,\textsuperscript{135} so it is not clear whether the guardian has a statutory seniority in the event of a disagreement. However, the agent should only account to the guardian, establishing a statutory pecking order, if needed.\textsuperscript{136} This approach allows the agent to remain in the role while ensuring that the agent accounts to the guardian in the event of dispute between the fiduciaries.

The role of the agent after the subsequent appointment of a guardian should be re-examined by the Commission. Since the power of attorney is typically put in place to avoid the guardianship, if a court-appointed guardian is required, then the agent’s role should be diminished and the agent’s default should not be for the agent to continue to account to the principal. It is possible that the agent has done nothing warranting termination or limitation, but the potential inconsistencies among different fiduciaries who may not be familiar with each other’s property-management abilities is problematic. On this specific matter the Commission should re-examine the default and consider having express priorities established between the later-appointed guardian and the agent to avoid any unforeseen negative consequences for these fiduciaries, and ultimately, the principal.

\textbf{C. The Impact of Dissolution or Annulment of the Principal’s Marriage to the Agent}

The power of attorney terminates on the principal or agent’s death, revocation, or by its terms.\textsuperscript{137} Even a subsequent appointment inconsistent with other powers of attorney does not terminate an existing power of attorney.\textsuperscript{138} If the agent and principal are married, the UPOA Act provides for automatic termination of the agent’s authority when the parties legally separate or file for divorce.\textsuperscript{139} This automatic termination provision is somewhat similar to, but broader

\begin{itemize}
\item \textsuperscript{134} \textit{Unif. Power of Att’y Act} § 108(b), 8B U.L.A. 77.
\item \textsuperscript{135} See id.
\item \textsuperscript{136} See Md. Code Ann., Est. & Trusts § 17-105(e)(1).
\item \textsuperscript{137} \textit{Unif. Power of Att’y Act} § 110, 8B U.L.A. 80–81 (requiring non-durable powers to terminate on the principal’s incapacity, and a limited power of attorney limited in time or act would terminate when the period of time or action have been accomplished). \textit{But see id.} § 110(f), 8B U.L.A. 81 (indicating that a lapse of time alone is insufficient to terminate unless otherwise provided).
\item \textsuperscript{138} Id. § 110(f), 8B U.L.A. 81.
\item \textsuperscript{139} Id. § 110(b)(3), 8B U.L.A. 81 (terminating an agent’s authority when an action is filed for the dissolution or annulment of the agent’s marriage to the principal or their legal separation).
\end{itemize}
than, the automatic revocation of a bequest to a spouse in a will.\textsuperscript{140} This default provision can be drafted around if the principal determines that the agency should remain intact, regardless of the marital status between principal and agent.

All adopting jurisdictions have retained the automatic termination provision, and Maine, Wisconsin, and Ohio further provide for automatic termination of the agency if the domestic partnership between the agent and principal terminates.\textsuperscript{141} The UPOA Act and all adopting jurisdictions agree that the termination of the marriage between principal and agent should automatically terminate the agency relationship.\textsuperscript{142} Neither the UPOA Act nor the adopting jurisdictions address whether or not any agent related to the principal through that potential ex-spouse should also be terminated. For example, if the principal designated a spouse’s sibling as agent and the principal and his spouse subsequently legally separate or divorce, the agency should terminate. By terminating the power of attorney upon the filing of divorce, the Commission has suggested codification to an area that most principals desire. This is a positive addition to power of attorney law for the adopting jurisdictions.

However, the Commission should expand the automatic termination provision to include the relatives of the ex-spouse or ex-domestic partner to bring the termination provision in line with the will revocation provision.\textsuperscript{143}

\begin{itemize}
\item \textsuperscript{140} UNIF. PROBATE CODE § 2-804(b) (amended 2010), 8 U.L.A. 237–38 (Supp. 2013); see MD. CODE ANN., EST. & TRUSTS § 4-105(4); Friedman v. Hannan, 412 Md. 328, 348, 987 A.2d 60, 72 (2010) (holding that the automatic revocation of provision benefiting the spouse could be implicitly extended to the ex-spouse’s family members). The automatic termination of the agency under the power of attorney occurs when the action is filed, whereas in a testamentary setting the automatic revocation takes place upon divorce.
\item \textsuperscript{141} ME. REV. STAT. ANN. tit. 18-A, § 5-910 (2012); OHIO REV. CODE ANN. § 1337.30 (West 2013); WI. STAT. ANN. § 244.10 (West Supp. 2012). Of the jurisdictions that have enacted the UPOA Act, domestic partnerships are recognized in Maine (ME. REV. STAT. ANN. tit. 22, § 2710 (Supp. 2012)); Maryland (MD. CODE ANN., HEALTH-GEN. § 6-101 (LexisNexis Supp. 2012)); Nevada (NEV. REV. STAT. ANN. § 122A.110 (LexisNexis 2010)); Wisconsin (WI. STAT. ANN. § 770.18 (West Supp. 2012)); and Colorado (Salzman v. Bachrach, 996 P.2d 1263, 1268–69 (Colo. 2000) (recognizing the legal effect of a domestic partnership agreement by the Colorado Supreme Court)).
\item \textsuperscript{142} UNIF. POWER OF ATT'Y ACT § 110(b)(3), 8B U.L.A. 81.
\item \textsuperscript{143} See supra note 140.
\end{itemize}
D. Activation of Contingent Powers

The UPOA Act’s provision on contingent powers creates a default that the power of attorney will be effective immediately, but allows for the principal to express that the authority be contingent upon some future event or contingency. Thus, the activation of contingent power is addressed by Section 109. A contingent power of attorney is a “springing” power because some act or event springs the legal document’s effectiveness. The power of attorney does not become effective until the event or circumstance that triggers the powers occurs. The UPOA Act documents the requirements of a power of attorney that becomes effective upon the principal’s incapacity. The requirements of incapacity must be appropriately verified.

The adopting jurisdictions agree, with some minor definitional distinctions, that the power of attorney may be effective immediately and authorize springing powers. Since the primary reason to put a power of attorney in place is to handle the principal’s incapacity, the springing power (with the principal’s incapacity as its trigger) may impose a delay on the ability of the agent to have the incapacity requirements verified.

The concept of an immediately effective or springing power of attorney simply codifies the contingent powers. There is no recommendation for the Commission as to the activation of contingent powers.

144. UNIF. POWER OF ATT’Y ACT § 109(a), 8B U.L.A. 79.
145. Id.
146. BLACK’S LAW DICTIONARY 1290 (9th ed. 2009).
147. UNIF. POWER OF ATT’Y ACT § 109(a), 8B U.L.A. 79 (stating when the power of attorney becomes effective).
148. Id. § 109(c)–(d), 8B U.L.A. 79.
149. Id. § 109 cmt., 8B U.L.A. 80.
150. See infra Part V.C (discussing different definitions with respect to incapacity).
151. UNIF. POWER OF ATT’Y ACT § 109, 8B U.L.A. 79. A power of attorney that is contingent upon the principal’s incapacity requires a physician or licensed psychologist, attorney, judge, or appropriate governmental official, or person designated by the document itself to verify incapacity. Id. § 109 cmt., 8B U.L.A. 80. Incapacity based on the principal’s impairment may be verified by the physician; incapacity based on principal’s unavailability is verified by a judge, attorney, or appropriate governmental official. Id.
E. The Authority to Make Gifts

The UPOA Act has a separate provision dealing with gifts because of the potential risk of harm and the need to incorporate more safeguards for the principal. The gift-giving authority is by specific grant. By specific grant, the agent may make limited gifts. The agent is limited to making annual exclusion gifts that are consistent with the principal’s “known objectives.” If the principal’s objectives are not known, then the agent may exercise the gift-giving authority consistent with the principal’s “best interest” based on a number of identified relevant factors. However, the agent may not exercise this authority in favor of themselves or for someone to whom the agent has a legal obligation of support, unless the agent is closely related to the principal.

The adopting jurisdictions have taken several different approaches to gifts. In Maine, the agent’s gift-giving provision has been broadened by removing the annual exclusion limitation and allowing for the agent to make gifts of the principal’s property consistent with the principal’s known or implied objectives. However, Nevada expressly removed the gift-giving ability without an express authorization for a non-related party. Colorado did not grandfather the specific grant of general authority into pre-existing powers of

152. Id. § 217, 8B U.L.A. 122–23.
153. Id. §§ 201(a)(2), 301, 8B U.L.A. 104, 127.
154. Id. § 201(a)(2), 8B U.L.A. 104. The gift-giving power is limited to the annual gift exclusion amount authorized under the Internal Revenue Code section 2503(b). Id. § 217(b)(1), 8B U.L.A. 104, 127; see VALLARIO, supra note 116, at 216 (illustrating the annual exclusion amounts). The 2013 annual exclusion amount is $14,000. I.R.S. News Release IR-2012-78 (Oct. 18, 2012). The annual amount is doubled for the principal and the principal’s spouse if there is consent by the spouse to gift-split. UNIF. POWER OF ATT’Y ACT § 217(b)(2), 8B U.L.A. 123.
155. UNIF. POWER OF ATT’Y ACT § 217(c), 8B U.L.A. 123.
156. Id. § 217(c), 8B U.L.A. 123 (identifying “(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 principals’ personal history of making or joining in making gifts.”).
157. Id. § 201(b), 8B U.L.A. 104; see NEV. REV. STAT. ANN. § 162A.450 (LexisNexis Supp. 2011) (limiting to spouse); OHIO REV. CODE ANN. § 1377.42 (West 2013) (limiting to ancestor, spouse, or descendant); WIS. STAT. ANN. § 244.41 (West Supp. 2012) (limiting to spouse or domestic partner).
158. ME. REV. STAT. tit. 18-A, § 5-947 (2012) (obtaining the implied objectives from the list of identified factors).
159. NEV. REV. STAT. ANN. § 162A.450.
attorney.\textsuperscript{160} Alabama clarifies that gifting in excess of the allowable amount must be expressly stated and will not be inferred to the agent.\textsuperscript{161} Some of the adopting jurisdictions have further narrowed the close-relationship requirement\textsuperscript{162} to the principal’s spouse for the more-specific grant.\textsuperscript{163} Otherwise, the adopting jurisdictions agree that, in order for the agent to exercise property-sensitive powers for the benefit of themselves or someone for whom the agent has a legal obligation of support, these default limitations make sense to avoid the type of harm and abuse that triggered this reform in the first place.\textsuperscript{164}

The requirement of an express grant for a gift-giving power that is limited to annual exclusion gifts or those gifts consistent with the principal’s known objectives, or in the principal’s best interest implied from a number of relevant factors, is a statutory safeguard.\textsuperscript{165} A limited gift-giving power in a power of attorney is prudent and wise because annual exclusion gifts do not exhaust any of the principal’s transfer tax exemption amounts.\textsuperscript{166} Additionally, requiring the close relationship between the principal and agent before gifts can be made is also wise. The principal has the ability to deviate from the gift default rules, but in doing so may have to execute a supplemental power of attorney because it is unclear how elaborate the special instructions on the Statutory Form can be.\textsuperscript{167}

The gifting provisions and safeguards built into the UPOA Act are excellent. My only recommendation to the Commission would be to provide further guidance as to the limitations imposed by the special instruction section of the Statutory Form. It would be ideal if the Commission would expressly authorize the expansion of the gift-giving powers within the special instructions section of the Statutory Form.

\begin{flushright}
162. \textit{See supra} note 78–79 and accompanying text.
164. \textit{See supra} notes 3–5 and accompanying text.
167. \textit{See infra} Part V.A.
\end{flushright}
F. Standards for Agent Conduct and Liability

1. Conduct

The standards for agent conduct and liability need to be discussed first in terms of the agent’s duties. The agent has a duty to act in good faith and within the scope of the power of attorney.\(^{168}\) The agent must work with the principal’s health-care agent and preserve the principal’s known estate plan, provided it is in the principal’s best interest.\(^{169}\) The UPOA Act establishes many default agency powers\(^{170}\) as part of the general authority granted in Article 2, Sections 204 through 216.\(^{171}\) In addition to the default provisions, Section 201 requires a specific, express grant of authority for a laundry-list of subjects that could affect the principal’s assets.\(^{172}\) The agent’s authority with respect to these property-sensitive subjects requires an optional grant of specific authority, identified separately in the Statutory Form, whereby the principal is warned of the potential ramifications.\(^{173}\) In addition to requiring an express grant, Section 201(b) requires a more-specific grant for the designated agent who is not closely related to the principal\(^{174}\) to exercise any of the property-sensitive subjects in favor of the agent, or anyone for whom the agent has a legal obligation of support.

2. Liability

The agent’s liability is both limited and imposed under the UPOA Act. An agent who complies with the fiduciary duties is not liable for: valuation declines in the principal’s property,\(^{175}\) apparent conflicts,\(^{176}\) disappointed beneficiaries,\(^{177}\) or actions of persons to whom the agent delegated authority.\(^{178}\) Additionally, the principal may exonerate the agent from liability due to a breach of a fiduciary

\(^{168}\) \textit{Unif. Power of Att’y Act} § 114(a), 8B U.L.A. 85.

\(^{169}\) \textit{Id.} § 114(b), 8B U.L.A. 85.


\(^{171}\) \textit{Id.}

\(^{172}\) \textit{Id.} § 201, 8B U.L.A. 104.

\(^{173}\) \textit{See id.} § 201(b), 8B U.L.A. 104.

\(^{174}\) \textit{Id.} (providing that an ancestor, spouse, or descendant need not obtain a more-specific grant).

\(^{175}\) \textit{Id.} § 114(f), 8B U.L.A. 86.

\(^{176}\) \textit{Id.} § 114(d), 8B U.L.A. 85.

\(^{177}\) \textit{Id.} § 114(c), 8B U.L.A. 85.

\(^{178}\) \textit{Id.} § 114(g), 8B U.L.A. 86.
duty. The UPOA Act establishes a list of parties who have standing to question the agent’s conduct. Section 117 articulates the potential remedies for actions taken in violation of the power of attorney. In the event of liability, the agent is required to make the principal whole and reimburse the principal for attorney’s fees.

The UPOA Act’s prescribed standards for agent conduct and liability are adhered to by most adopting jurisdictions. However, it is notable that Maine lowers the UPOA Act’s “best interest” standard, requiring instead that the agent simply act in the principal’s “interest,” thus shielding the agent from liability to a greater extent than the UPOA Act. At the other end of the spectrum, West Virginia imposes additional liability on an agent by making the agent responsible for “such other amounts, damages, costs or expenses as the court may award.” Additionally, Nevada imposes criminal liability in certain situations.

The UPOA Act’s codification of an agent’s minimum duties and liability are essential to the enforceability of powers of attorneys. Before promulgating the UPOA Act, the Commission had not thoroughly addressed agent conduct and liability—two issues that are central to the effective functioning of a power of attorney. It is the imposition of liability that curtails potential abuse by agents. The clear statutory guidance as to who is entitled to question the agent’s conduct provided by the UPOA Act is a step in the right direction.

In summary of what this Article has covered so far, it is evident that the UPOA Act has made solid progress in addressing the six specific matters it set out to address, but, as discussed above, there are still significant improvements that can be made. The Commission must ask why, after seven years, so few states have adopted the UPOA Act and, out of those who have, why the vast majority of these states have made notable deviations from the UPOA Act’s proposal. In addition to incorporating the suggestions made by this Article, the Commission should consider new ways to market the

179. Id. § 115, 8B U.L.A. 89.
180. Id. § 116(a), 8B U.L.A. 89-90.
181. Id. § 117, 8B U.L.A. 92.
182. Id. An agent must make the principal whole by restoring the value of the principal’s property to “what it would have been had the violation not occurred.” Id.
183. Id.
184. ME REV. STAT. ANN. tit. 18-A, § 5-911 (2012); see also id. §§ 5-914 to -915.
187. UNIF. POWER OF ATT’Y ACT § 114, 8B U.L.A. 85-86.
comprehensive legislation in an effort to gain more support across the nation. With regards to this Article’s recommendations, the Commission should focus primarily on the role of the agent after the appointment of a court-appointed guardian and the ability of coagents to act independently.

IV. OTHER MATTERS ADDRESSED BY THE UPOA ACT

In addition to the specific matters, the Prefatory Note identifies five other topics that needed to be addressed by the UPOA Act. This section will identify those topics in the UPOA Act and adopting jurisdictions to determine if uniformity is being achieved. The other matters (other matters) include:

1) Successor agents;
2) Execution requirements;
3) Portability;
4) Sanctions for dishonor of a power of attorney; and
5) Restrictions on authority that has potential to dissipate a principals’ property or alter a principal’s estate plan.

A. Successor Agents

The UPOA Act provides that a successor agent has the same authority as the original agent and may not act until the original agent becomes unable to do so. The successor agent is not liable for the predecessor’s breach as long as the successor agent did not conceal or participate in the breach. The successor agent has a duty to notify the principal of any breach made by a prior agent.

All adopting jurisdictions have adhered to this rule with respect to successor agents. The UPOA Act is sensible and realistic, yet

188. Id. prefatory note, 8B U.L.A. 62.
189. Id. § 111(b), 8B U.L.A. 82 (providing that an agent is unable to act if he resigns, dies, becomes incapacitated, no longer qualifies, or is unwilling to serve).
190. Id. § 111(c), 8B U.L.A. 83.
191. Id. § 111(d), 8B U.L.A. 83.
imposes specific duties on the successor agent to avoid concealment of, or participation in, a breach. Therefore, there are no suggested modifications to the UPOA Act's provision on successor agents.

B. Execution Requirement

The UPOA Act only requires the power of attorney be signed by the principal or proxy. Although not a statutory requirement, acknowledgement is encouraged. Acknowledgement before a notary creates a rebuttable presumption that the principal's signature is genuine. Furthermore, the statutory sanctions are only available with respect to an acknowledged document.

By simply requiring the principal's signature (or signature by proxy), the UPOA Act takes a bare-bones approach to the execution requirement. Deviating from the UPOA Act, some adopting jurisdictions have made their execution requirements more stringent in light of the historical abuse. For example, Maine and West Virginia require acknowledgement. Maryland requires the power of attorney be witnessed and notarized. Finally, Virginia mandates the requirements for recordation be satisfied.

As it stands, the UPOA Act imposes minimal execution requirements. However, in light of the potential for abuse of the power of attorney document, the execution requirements should be expanded to include witness and acknowledgment requirements. Alternatively, the UPOA Act could require that the execution requirements for a power of attorney be the same as the formality

194. Id. § 105, 8B U.L.A. 73. A proxy is another individual directed by the principal to sign for the principal in the principal's conscious presence. Id.
195. Id. § 105 cmt., 8B U.L.A. 73; see also WIS. STAT. ANN. § 706.07 (defining acknowledgement).
196. See UNIF. POWER OF ATT'Y ACT § 105 cmt., 8B U.L.A. 73.
197. Id. § 120, 120 cmt., 8B U.L.A. 96–97.
198. See id. § 105 cmt., 8B U.L.A. 73 (“While notarization of the principal’s signature is not required to create a valid power of attorney, this section strongly encourages the practice. . . .”).
199. See supra note 3–5 and accompanying text.
200. ME. REV. STAT. ANN. tit. 18-A, § 5-905 (2012) (deviating from the UPOA Act by requiring power of attorney to be acknowledged to be valid).
203. VA. CODE ANN. § 64.2-1603 (2012).
requirements for executing a will in the enacting jurisdiction. 205 Added execution requirements are not burdensome and will likely serve a protective function.

C. Portability

The UPOA Act grandfathers existing powers of attorney as well as recognizing powers of attorney executed in other states. If the goal is to promote uniformity, portability is important and essential. 206 The UPOA Act offers the ability of a document executed in one jurisdiction to be effective in a jurisdiction in which it was not executed. The principal may elect a jurisdiction of effectiveness and a default provision allows for the jurisdiction of execution to be effective if the principal does not make a choice of law. 207 The UPOA Act honors photocopies and electronically submitted documents as well. 208

All of the adopting jurisdictions concur that the power of attorney documents should be useful in different states, as well as recognizing the validity of these documents executed in other non-adopting jurisdictions. 209

With the mobility of people, powers need to be mobile as well. The portability offered to the power of attorney in the UPOA Act is similar to the portability offered by will savings statute. 210 Principals often own property in multiple jurisdictions at the same time, thus a power of attorney document that is effective in multiple jurisdictions (i.e. portable) is efficient. Additionally, the use of a single portable

205. See Md. Code Ann., Est. & Trusts § 17-110. Maryland requirements for a power of attorney are greater than those required to properly execute a will. A will requires a writing, signed by the testator, and attested by two or more credible witnesses. Id. § 4-102.


208. Id. § 106(d), 8B U.L.A. 75.


power of attorney document reduces the risk of inconsistent nominations and powers. A single portable power of attorney document allows the agent to act for the principal across state lines.

D. Sanctions for Dishonor of Power of Attorney

The unreasonable refusal of a power of attorney was one factor that initiated the UPOA Act. The UPOA Act therefore created a statutory procedure for presentment, that if followed, allows for the agent and/or principal to force third parties like banks to honor legitimate powers of attorney. The third party must accept or request additional documentation within seven days after presentment. The provisions that impose sanctions for the unwarranted refusal to accept the Statutory Form provide the needed enforcement mechanism against the financial institution.

Most adopting jurisdictions impose sanctions for undocumented refusals of the power of attorney. In Wisconsin, a third party cannot refuse to accept a power of attorney based exclusively on the execution date of the power of attorney. Wisconsin expressly articulates what is not a refusal, such as request for a different form. Other jurisdictions like Ohio have no sanctions for an unwarranted refusal. In Alabama, if a third party conducts a transaction in reliance upon power of attorney, the third party is fully exonerated from any liability for that transaction. In addition to sanction provisions, an exoneration provision, such as this, promotes acceptance by third parties.

The UPOA Act’s imposition of sanctions was warranted and necessary. These are the sanctions that require financial institutions to honor the legal document. This enforcement mechanism is the most important reason for the use of the acknowledged Statutory Form.

212. Id. § 120, 8B U.L.A. 96–100.
213. Id.
215. See, e.g., NEV. REV. STAT. ANN. § 162A.370 (LexisNexis Supp. 2011) (changing the seven day requirement to a ten day requirement); WIS. STAT. ANN. § 244.20 (West Supp. 2012) (adopting a ten day requirement).
216. WIS. STAT. ANN. § 244.20
217. Id.
218. OHIO REV. CODE ANN. § 1337.21–64 (West 2013).
220. See UNIF. POWER OF ATT’Y ACT § 120, Alt. B, 8B U.L.A. 100 (imposing sanctions only if there is an “acknowledged statutory form power of attorney”).
E. Restrictions on Authority that has Potential to Dissipate a Principal's Property or Alter a Principal's Estate Plan.

One significant risk associated with the power of attorney is that the agent will help themselves to the principal's assets and that this breach of duty will be discovered too late. The UPOA Act legislation attempts to strike a balance between protecting the principal from abuse and allowing the principal to exercise freedom of choice with respect to the agent's authority. Additionally, an agent who is not closely related to the principal may not exercise those powers in favor of themselves or someone for whom the agent has a legal obligation of support.

The UPOA Act's requirement of special grant for property-sensitive matters coupled with limited gift-giving powers and a further standard for non-relatives to exercise the property-sensitive matters in favor of themselves are all positive steps of the power of attorney reform.

In sum, the other matters were adequately addressed by the UPOA Act and adopting jurisdictions. There is little additional reform necessary on these other matters. There are, however, further deviations between the UPOA Act and the adopting jurisdictions that are worth noting as to the Statutory Form. These deviations are discussed next.

V. FURTHER MODIFICATIONS BY THE ADOPTING JURISDICTIONS

A. Statutory Form

The Statutory Form is optional but is strongly encouraged because it is with the Statutory Form that enforcement mechanisms apply. The statute provides that the Statutory Form shall be sufficient and that no third party may require an additional or different form. This means that financial institutions cannot require customers to use the bank’s form. Additionally, by using one of the Statutory Forms,

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221. See Gatesman, supra note 3.
222. The UPOA Act provides only by specific grant that the principal may authorize the powers subject to risk of loss of the principal’s property. UNIF. POWER OF ATT’Y ACT § 201(b), 8B U.L.A. 104.
223. Id. § 201(a)(1)–(8), 8B U.L.A. 104; see supra note 78–79 and accompanying text (describing the requisite relations test for the UPOA Act).
224. See supra Part IV.D.
or one that is "substantially in the same form" as the statutory document, the third party could be liable for attorney’s fees for refusal of the document, if a court orders acceptance.

All of the adopting jurisdictions have the Statutory Form. Only Maryland has made significant deviations from the Statutory Form. Maryland created two statutory forms: a general power of attorney and limited power of attorney. The general power of attorney expands subject matters with a detailed description of the inclusions within each incidental subject matter in arriving at its Statutory Forms. In the general power of attorney, there is no need for the principal to initial each incidental property item, as it is an all-inclusive power. As an alternative to the all-inclusive general power of attorney, Maryland’s separate limited power of attorney includes a list of the subject matters (without a detailed description) and allows the principal to initial the agent’s scope of authority by selecting some, but not necessarily all, of the subjects.

Although the adopting jurisdictions have adhered to the Statutory Form, there is no consensus as to what extent the Statutory Form can be modified when it is tailored to the principal’s needs. It is clear that a coagent appointment is authorized. However, what is not clear is how much the default provisions can be drafted around in the special instructions section of the Statutory Form, and whether or not significant deviations from the Statutory Form require a supplemental power of attorney. Typically, to avoid creating an ineffective power of attorney due to extensive alterations of the Statutory Form,

226. Id. § 17-101(g)(1).
232. Id. § 17-203.
practitioners create supplemental powers of attorney in addition to the Statutory Form.\textsuperscript{234} This is inconsistent with the UPOA Act's uniformity goal and the supplemental powers of attorney are not privy to the enforcement mechanism of the legislation.\textsuperscript{235}

Although the Statutory Form is readily recognized by financial institutions and is easily portable among adopting jurisdictions, there is a serious risk associated with having a powerful form like the power of attorney available in a Statutory Form. The Statutory Form is available to the public at large and on the internet.\textsuperscript{236} This makes a power of attorney document prepared with competent legal advice indistinguishable from a power of attorney document hastily printed from the internet and unknowingly signed by the principal. Although the Statutory Form is convenient and promotes uniformity, there are significant risks of having a power attorney form readily available and subject to abuse.

B. Additional Limitations on Appointment of Agents

In Nevada, if a principal resides in a hospital, assisted living facility, or nursing home at the time of execution of the power of attorney, a certification of the principal’s competency must be attached.\textsuperscript{237} Additionally, the principal may not name as an agent: a hospital assisted living facility or nursing home, the owner or operator of the facility, or an employee of the facility.\textsuperscript{238} There is an exception to this rule if any of the aforementioned “prohibited” agents are the spouse, guardian, or next of kin of the principal, or are named as agents only to establish Medicaid eligibility.\textsuperscript{239} If a prohibited agent is named as an agent solely to assist with Medicaid eligibility, no valid financial power of attorney may exist, the prohibited agent must make a documented, good faith effort to contact the family members of principal, the prohibited agent has limited access to the principal’s financials, with no access to other assets, and the power of attorney is valid only until Medicaid eligibility is determined, or six months from execution, whichever is sooner.\textsuperscript{240} A violation of a power of attorney provision is a felony.\textsuperscript{241}

\begin{footnotes}
\item[234] Id. § 301, 8B U.L.A. 127.
\item[235] See supra Part IV.D.
\item[238] Id.
\item[239] Id.
\item[240] Id.
\end{footnotes}
C. Miscellaneous

There are other insignificant differences between the UPOA Act and the adopting jurisdictions such as: deviations in the definition of incapacity, deviations in the permissible actions of the incidental powers, and deviations as to title and whether the legislation authorizes incorporation by reference. These nominal deviations have no real impact on this article's recommendations to the Commission, or on how the Commission can make improvements to the UPOA Act, market it more effectively, and thus inspire more adoptions of it.

VI. COMPLETE UNIFORMITY

It is absolutely essential to note that there are some aspects of the UPOA Act that have been unanimously adopted by the enacting jurisdictions. For example, the presumption of durability, which overrides the prior law, was universally adopted. In light of the main reason why people put powers of attorney in place—to plan for disability and to avoid the costs and delays associated with guardianship—a default provision that makes the power of attorney durable, "unless it expressly provides that it is terminated by the incapacity of the principal," is the more sensible default. All adopting jurisdictions agree and have a durable default provision.

Additionally, the termination provisions, other than the termination in the event of divorce, are consistently followed by the adopting jurisdictions. All jurisdictions have excluded certain

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241. Id.
243. The Uniform Durable Power of Attorney Act’s default provision was that the power of attorney was not durable unless otherwise stated. UNIF. DURABLE POWER OF ATT’Y ACT § 1 (amended 1984), 8A U.L.A. 246 (2013), replaced by UNIF. POWER OF ATT’Y ACT, 8B U.L.A. 191 (Supp. 2013).
245. UNIF. POWER OF ATT’Y ACT § 104, 8B U.L.A. 73.
246. Id. § 110(a), 8B U.L.A. 80.
247. Id. § 110(b)(3), 8B U.L.A. 81.
powers of attorney from the UPOA Act because these powers are not the powers for which the UPOA Act was intended. All agents should be entitled to reimbursement and compensation. No affirmative action is required of the agent. The agent’s resignation provision and the provision stating that remedies are not exclusive under the UPOA Act have both been unanimously adopted by the enacting jurisdictions. Finally, the provision that states that the UPOA Act supplements common law and applies to financial institutions has also been unanimously adopted by the enacting jurisdictions.

The areas where complete uniformity exists demonstrate non-controversial areas where the UPOA Act is consistent with the legislative trend.

VII. NON-UNIFORM JURISDICTIONS

Although UPOA Act reform over the last seven years has fifteen adopting jurisdictions, this law is far from achieving its desired uniformity among the U.S. jurisdictions. There remain thirty-eight jurisdictions that have not enacted some version of the UPOA Act. Some jurisdictions

248. Applicability specifically excludes powers of attorney coupled with an interest in health-care powers, powers used to exercise voting or management rights associated with an entity, and powers created on a governmental form. Id. § 103, 8B U.L.A. 71.
249. Id. § 112, 8B U.L.A. 84.
250. Id. § 113, 8B U.L.A. 84.
251. Id. § 118, 8B U.L.A. 92.
252. Id. § 123, 8B U.L.A. 102.
253. Id. § 121, 8B U.L.A. 101.
255. See supra notes 14–15 and accompanying text.
256. The U.S. jurisdictions that have not enacted the UPOA Act in any form are: Alaska; Arizona; California; Connecticut; Delaware; District of Columbia; Florida; Georgia; Hawaii; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Massachusetts; Michigan; Minnesota; Mississippi; Missouri; New Hampshire; New Jersey; New York; North Carolina; North Dakota; Oklahoma; Oregon; Pennsylvania; Puerto Rico; Rhode Island; South Carolina; South Dakota; Tennessee; Texas; Utah; Vermont; Washington; Wyoming (38 jurisdictions in total). See Legislative Fact Sheet - Power of Attorney, supra note 12 (listing the 15 adopting jurisdictions).
have proposed legislation without enacting it,\textsuperscript{257} while some jurisdictions have enacted non-uniform law.\textsuperscript{258} Other jurisdictions have retained existing power of attorney law and have made no effort to change.\textsuperscript{259} A discussion and comparison of these non-uniform jurisdictions is beyond the scope of this article but will be addressed in a future article.

VIII. CONCLUSION

After seven years of being tried and tested, the UPOA Act has not been enacted by the majority of jurisdictions.\textsuperscript{260} Most of the adopting jurisdictions have done so with notable amendments. To date, only three jurisdictions have enacted the UPOA Act without modification.\textsuperscript{261} It is time for the Uniform Law Commission to re-examine the UPOA Act, make reasonable adjustments to it, and reduce its complexity in an effort to achieve the Act's goal of uniformity amongst the U.S. jurisdictions. One of the reasons for the Act's unpopularity is that it is comprehensive and thus difficult to get through state legislatures without significant time and energy on the part of the constituents.\textsuperscript{262} The sheer breadth of the UPOA Act affects a wide variety of stakeholders at the state level, and thus it is difficult to achieve a consensus as to the wording and presentation of the state version of the UPOA Act.

Even though comprehensive legislation like the UPOA Act is not a one-size fits-all solution, the Act has made significant progress in the advancement of power of attorney law that was non-existent prior to the UPOA Act. However, the Uniform Law Commission cannot ignore that, after seven years since its promulgation, there are still too few jurisdictions adopting the legislation to achieve the Act's intended goal of uniformity. Therefore, it is time for the Commission to reconvene on this Act in order to make some simple, but much needed upgrades, as suggested by this article, which will make the Act more adoptable by those jurisdictions reluctant to do so up to this point. In 2013, no jurisdictions enacted the UPOA Act,\textsuperscript{263} which suggests that the wave of adopting jurisdictions may be stalled and in need of a jump start. Therefore, the Commission's updating of the

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., H.F. 1228, 86th Leg., 1st Sess. (Minn. 2009).
\item See, e.g., D.C. Code § 21-2101 to -2118 (2012).
\item See supra notes 14–15 and accompanying text.
\item See supra note 14 and accompanying text.
\item See supra note 31 and accompanying text.
\item See Legislative Fact Sheet - Power of Attorney, supra note 12.
\end{enumerate}
\end{footnotesize}
UPOA Act, along with subsequent lobbying of state legislators, could encourage others to join the power of attorney reform. It is only with expanded support that the Commission's goal of uniformity can be achieved.\textsuperscript{264}

\textsuperscript{264} Additionally, the portability feature of the UPOA Act remains largely ineffective without a larger number of jurisdictions adopting the Act. \textit{See supra} Part IV.C.