

# Power of Attorney Provisions for You and Your Trust

By Yahne Miorini, LL.M.

## A. Definition

A power of attorney is an authorization for one person to act on someone else's behalf in a legal or business matter. The person authorized to act is the "agent" or sometimes called "attorney-in-fact" and the person granting the authorization is the "principal." This is a fiduciary relationship where the agent has to act in the best interest of the principal and make decisions that are consistent with decisions that the principal made for him/herself. The agent may be held liable for a breach of any fiduciary duty to the principal<sup>1</sup>.

Under the common law, a power of attorney becomes ineffective upon the principal's incapacity. In 1954, the Commonwealth of Virginia was the first state to authorize by statute powers of attorney to be durable. However, the power needs to expressly elect its durability. Usually, the following language is used: "this power of attorney shall

not terminate on disability of the principal."

## B. Use of the Power of Attorney

The durable power of attorney is now widely used by Americans for incapacity planning as well as convenience. Without a power of attorney, all of the assets of the disabled person are frozen. The disabled person's affairs will be in complete chaos. In addition, the American population is aging; 75 million baby boomers are starting to retire. They will have diverse needs and some will require long term care. Their preference in aging places will vary and will depend on their level of income. A power of attorney is a simple document that will help these seniors in case of a temporary or permanent disability. It will also allow them to delegate a portion of the management of their personal affairs. Elderly will eventually face a situation where they will need assistance with the management of their affairs.

Now-a-days, the concept of durability has been adopted by

every state along with non-uniform provisions. Although most statutes are brief and rely heavily on the common law of agency, there is a great divergence and confusion between states. In addition, certain entities, such as banks, brokerage houses, and insurance companies have arbitrarily refused powers of attorney, requiring the principal to execute the entity's own power of attorney form.

Powers of attorney confer a great deal of authority without regular oversight or clear standards for agent conduct. Advocates for older people often call the power of attorney a "license to steal." There is no national data on the incidence of power of attorney abuse, but adult protective services and criminal justice professionals report an explosion of financial exploitation cases of this type. The most recent analysis of compiled state adult protection services data was collected in 2003 and indicated that 20.8 percent of the reports made to state adult protective services about persons age 60 or older concerned financial

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<sup>1</sup> Va. Code § 11-9.1 (C).

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exploitation. Power of attorney abuse takes many forms. An agent may spend the principal's money for self-dealing purposes. We often see the agent buying a car for him/herself instead of paying the principal's nursing home care. The agent may exceed the intended scope of authority by making gifts when the power has not been granted.

Unfortunately, the abuses are rarely detected if the principal has become incapacitated because there is no monitoring of the agent's actions by a third party unless the principal has authorized such monitoring in the power of attorney. A 2009 bill on elder abuse was left in Commerce and Labor Committee that would have required any staff from financial institution who has reason to believe that a client is or has been exploited financially to report it to the local department of social services. Financial exploitation is defined in this bill as the illegal or improper use of a person's funds, property, or assets.

Even if the power of attorney abuse is detected, there are several

reasons why it can be difficult for the civil justice system to hold the agent liable and for the criminal justice system to hold the agent accountable. The lack of statutory clarity about agent duties poses challenges to civil litigation and criminal prosecution. The agent may have dissipated the principal's assets making it impossible to pursue an often costly civil litigation against the agent. The victim of abuse by a power of attorney is aged sixty or older and may be able to get free civil legal help from a program that is funded through the Older Americans Act. Law enforcement officers may not understand that power of attorney abuse is a crime and fail to investigate allegations. On the other hand, prosecutors may not receive case referrals from adult protective services agencies, banks, or law enforcement agencies. Finally, there is a lack of resources to prosecute these cases which can be extremely challenging and labor intensive. A civil lawyer can help the principal revoke the power of attorney. The attorney can ask the civil court to order that the agent provide an accounting of how the

principal's money has been spent and may ask for rescission, to undo transactions conducted by the agent. In addition, the attorney may sue the agent for conversion, for stealing the principal's money or assets. Finally, the attorney may petition the court to declare the principal to be incapacitated and appoint a guardian and/or conservator. With a criminal prosecution, the agent can be accused of exploitation, embezzlement, forgery, fraud, larceny, money laundering, and theft.

In Mountjoy v. Smith<sup>2</sup>, the Fauquier County Circuit Court that although the power of attorney granted general powers it did not authorize the attorney-in-fact to set up an estate plan for the principal. Mr. Smith had executed a durable power of attorney, naming his spouse as attorney-in-fact. Without telling Mr. Smith, Mrs. Smith arranged for two separate revocable trust documents to be prepared, one for her and one for her husband. Real estate properties previously

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<sup>2</sup> CL08-300, February 26, 2009, J. Parker, Letter Opinion

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held as tenant by the entirety were transferred into the trusts, thus changing ownership to tenants in common. Mrs. Smith died. Mr. Smith terminated his trust and demanded entitlements through Mrs. Smith's trust. The court ruled that Mr. Smith revocable trust was void with the effect of invalidating the conveyance of the real properties to the trusts.

In Jones, et al. v. Brant<sup>3</sup>, the power of attorney contained very broad powers, including the power to make gifts, but lacked a specific grant of power to make a change of beneficiaries of the principal's certificates of deposit. The Supreme Court ruled that the principal sufficiently expressed the intent to change the beneficiary designations under the general provisions of the power of attorney.

## C. New Power of Attorney Act

The Uniform Power of Attorney Act, originally drafted by the Uniform Law Commission, was introduced at the last session of the

Virginia General Assembly. Its amended bill was enacted but contained a provision that required a reenactment by its 2010 session. If reenacted next year, the Uniform Power of Attorney Act will be located in the Virginia Code Title 26 as a new additional Chapter 7.

The Uniform Law Commission has drafted a Uniform Power of Attorney Act in 2006. The states of Colorado, Idaho, and New Mexico have already adopted it. The Act was introduced to the states of Illinois, Indiana, Maine, Maryland, Minnesota, Montana, Nevada, Oregon, and Virginia.

This Act should clarify the following topics of confusion: (1) authority of multiple agents, (2) authority of a late appointed fiduciary or guardian, (3) impact of agent's divorce, (4) activation of contingent powers, (5) authority to make gifts, and (6) standards of agent conduct and liability.

Of course, each state will modify some provisions of the Act, but it will clarify and modernize state laws. The Act preserves the effectiveness of durable powers as

a low-cost, flexible, and private form of surrogate decision-making. It provides mandatory provisions that provide safeguards for the protection of the principal, the agent, and persons who are asked to rely on the agent's authority. It modernizes the various areas of authority that can be granted to an agent and requires express language authorization by the principal where certain authority could dissipate the principal's property or alter the principal's estate plan.

It provides step by step prompts for designation of agents, successor agents, and the grant of authority through an optional statutory form. It offers clearer guidelines for the agent, who is often a trusted family member. It recognizes that an agent who acts with care, competence, and diligence for the best interest of the principal is not liable solely because he or she also benefits from the act or has conflicting interests. It permits a principal to include in the power of attorney an exoneration provision for the benefit of the agent. It provides ways for the agent to give

<sup>3</sup> 645 S.E. 2d 312 (Va. 2007)

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notice of resignation if the principal is incapacitated.

The Act encourages acceptance of a power of attorney by third parties by providing broad protections for the good faith acceptance or refusal of an acknowledged power of attorney. It recognizes portability of powers of attorney validly created in other states. It offers an additional protective measure for the principal by providing that third persons may refuse the power if they have the belief that “the principal may be subject to physical or financial abuse, neglect, exploitation or abandonment by the agent or person action for or with the agent, make a report to the appropriate adult protective service agency.”

The Act consists of 4 articles. The first two state basic substance. The third contains an optional statutory form and the last article consists of miscellaneous provisions dealing with general application of the Act and a repeal of certain prior acts.

AARP and the Virginia Bankers Association have joined

the Virginia Bar Association in recommending the enactment of the Act. If adopted in its current form, the Act provides mandatory provisions that give safeguards for the protection of the principal, the agent, and persons who are asked to rely on the agent’s authority.

The Uniform Law Commissioners have proposed the following key provisions in the Uniform Power of Attorney Act that benefit and protect people who execute powers of attorney: (1) a clear statement of the agent’s duties including the agent’s responsibility to act in good faith, within the scope of authority granted, and according to the principal’s known expectations or best interest, such as preserving estate plans and cooperating with health care proxies;(2) expressed authorization for exercising “hot powers”; (3) a provision that a third party may refuse to honor a power of attorney when the third party reports suspected abuse to an adult protective service agency or knows that someone else has made a report; and (4) liability for malfeasance of agents for damages, attorney’s fees, and cost. We will

know the result of these provisions when enough states adopt the Uniform Power of Attorney Act for several years.

The agent will be able to certify as to the validity of the power of attorney and the agent’s authority. A third party will have to either accept an acknowledged power of attorney or request a certification, translation, or an opinion of counsel within seven business days of presentment of the power of attorney. The third party will have to accept the power of attorney within five business days after receipt of the requested document. With this provision and the proposed optional statutory form, entities will have no justification to request their own power of attorney form.

In addition, the Act offers clearer guidelines for the agent. The ending paragraphs of the statutory form provide instruction on the agent’s duties and termination of authority.

The statutory form<sup>4</sup> is divided into general powers, “hot powers”

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<sup>4</sup> See attached Sample Form.

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requiring a specific authorization, and limitation on the agent's authority. The general powers will be incorporated by reference. In order to protect against power of attorney abuses, "hot powers" which include the power to make gifts, have to be specifically granted by the principal.

In order to protect against power of attorney abuses, certain important powers have to be specifically granted<sup>5</sup> such as power to: (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.

The special general powers granting the making of gifts

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<sup>5</sup> Proposed Virginia Power of Attorney Act § 26-72.01

authorizes only the agent<sup>6</sup> to the annual federal gift exclusion under Internal Revenue Code 26 U.S.C. § 2503 (b), as amended<sup>7</sup>. It also allows gifts that are consistent with the principal's objectives or gifts the agent determines to be consistent with the principal's best interest based on the following relevant factors: (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.

In addition, the principal may expressly grant the agent greater authority to make gifts. This authority should be carefully discussed with the client and

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<sup>6</sup> Proposed Virginia Power of Attorney Act § 26-72.17

<sup>7</sup> Without regard to whether the federal gift tax exclusion applies to the gift, or if the principal's spouses agrees to consent to a split gift.

drafted to meet the client's needs and desires.

One final important innovation is that under this Act, paper copies and electronically transmitted copies will have the same force and effect as the original.

## D. Relationship Between the Principal and the Agent

### 1. Principal Capacity

The principal needs to have capacity at the execution of the power of attorney. The American Bar Association has published several handbooks to help professionals assess capacity including Assessing of Older Adults with Diminished Capacity: a Handbook for Lawyers. The proposed Virginia Power of Attorney Act uses the term "incapacity" rather than "disability." Therefore a disabled person can be capable and an incarcerated person does not lose his/her capacity. The power must be signed by the principal or in the principal's conscious presence by another individual at the principal's direction.

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## 2. Selection of the Agent

The principal should select an individual who is good at finance, keeping records, trustworthy, close by, and who has time. One common mistake is to name the eldest child because he/she is the eldest. Another common mistake is to name all of the children as co-agents because the principal wants to treat them equally. It is recommended that the principal discuss his/her selection with the potential agents prior to the execution of the power of attorney.

## 3. Acceptance of the Agent

Virginia's current statutory law has eliminated the delivery requirement of the power of attorney to the agent<sup>8</sup>. The proposed Virginia Power of Attorney Act<sup>9</sup> has no provision on this matter and will repeal the current statutory law. Therefore, there will be no delivery requirements by default. The agent is presumed to have accepted the

duties by action or by a written statement. It is recommended to have a declaration of acceptance at the end of the power of attorney that the agent can sign upon acceptance of his/her duties.

## 4. Termination of Power of Attorney or Agent's Authority

Under the proposed Virginia Power of Attorney Act<sup>10</sup>, a power of attorney can be revoked by an express revocation statement in writing. A subsequently executed power of attorney will not automatically revoke the prior power. Finally, the terminating event is not effective as to an agent or other individual until they have actual knowledge of the revocation. A spouse-agent's authority is terminated if an action is filed for divorce or annulment of the marriage or legal separation from the principal. This default rule can be overridden in the power of attorney at a later date, such as a final court order of divorce or legal separation.

If the agent wants to terminate his/her fiduciary relationship, he/she must give notice to the principal or, if the principal is incapacitated, to the individual listed under the Act by order of priority.

## 5. Compensation.

The proposed Virginia Power of Attorney Act sets a default rule that an agent is entitled to reasonable compensation and to reimbursement of expenses reasonably incurred on behalf of the principal. The practitioner may want to add guidance on what is reasonable compensation.

## 6. Duties toward the Principal<sup>11</sup>

The agent shall act loyally, in good faith, with care, competence, and diligence. The agent shall act for the best interest of the principal. The agent 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 interests based on

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<sup>8</sup> Va. Code § 11-9.7.

<sup>9</sup> Proposed Virginia Power of Attorney Act §26-71.13

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<sup>10</sup> Proposed Virginia Power of Attorney Act § 26-71.10

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<sup>11</sup> Proposed Virginia Power of Attorney Act § 26-71.14

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all relevant factors. The agent shall cooperate with the health-care agent. The agent can delegate authority including investment powers but the agent's duties under the Virginia Uniform Prudent Investor Act remains. The agent shall avoid creating a conflict of interest. Finally, the agent shall keep records. If the agent has special skills or expertise, this will be taken into consideration to determine whether the agent has acted with care under the circumstances. However, the power of attorney can include an exoneration provision unless the agent's breach is committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal. As mentioned earlier, the agent can be subject to civil or criminal liability.

The proposed statutory form<sup>12</sup> of power of attorney includes a section on important information for the agent regarding the agent's duties, liability and the termination of agent's authority.

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<sup>12</sup> See attached.

## 7. Duties toward Third Party

The current statute and the proposed Virginia Power of Attorney Act allow a certain individual to request an accounting from the agent. In addition, certain individuals can petition the court to review the agent's conduct and grant appropriate relief. This group includes family members, a beneficiary under the principal's estate plan, a person that demonstrates sufficient interest in the principal's welfare, and adult protective services.

The proposed Virginia Power of Attorney Act provides broad protections for a person, who in good faith accepts an acknowledged power of attorney. This is a change in Virginia's common law. The Virginia Supreme Court has held, "one who deals with an agent does so at his own peril and has the duty of ascertaining the agent's authority. If the agent exceeds his authority, the principal is not bound by the agent's act."<sup>13</sup> Under the Act, the third party is not required to

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<sup>13</sup> *Kern v. Barksdale Furniture Corporation*, 224 Va. 683 (1983).

investigate whether the power of attorney or the agent's authority is valid. In fact, the third party must either accept an acknowledge power of attorney or request a certification, translation, or an opinion of counsel within seven business days of presentment of the power of attorney. The third party will have to accept the power of attorney within five business days after receipt of the requested document and shall not require an additional or different form of power of attorney.

However, the third party may legitimately refuse to act in certain circumstances, called "safe harbor." This includes if the third party believes in good faith that the power of attorney is not valid or that the agent does not have the authority to perform the act requested. Finally, the third party may report to the local adult protective services department or adult protective services hotline that he/she in good faith believes that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

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Another protection for financial institutions is provided under the proposed Virginia Power of Attorney Act under § 26-71.22, “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.”

## E. Limits of the Powers of Attorney and Drafting Issues

### 1. Federal Law Supersedes Power of Attorney

Certain federal government agencies do not recognize state powers of attorney and require the execution of their own form. The Internal Revenue Service has its own Form 2848<sup>14</sup> “Power of Attorney and Declaration of Representative” where not everybody can be a representative of the principal. The IRS accepts attorneys, CPAs, Enrolled Agents, Officers, and family members. The IRS will assign a CAF<sup>15</sup> number to

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<sup>14</sup> A sample form is attached.

<sup>15</sup> Centralized Authorization File Number.

the representative. Social Security Administration has a Representative Payee Program. The individual will have to make an appointment with the Social Security Administration that will investigate on the necessity of naming a representative payee. The Representative Payee will have to file annual accounting report. Treasury Direct has its own form called Durable Power of Attorney for Securities and Savings Bond Transactions<sup>16</sup>.

### 2. Protection of the Drafter

When you draft a power of attorney, you are presenting the principal. A waiver of conflict of interest could be added in the power of attorney in order for the drafter to assist the agents. In this situation, the practitioner should discuss confidentiality issues with the principal along with whether an authorization for the agent to access the principal’s estate planning should be given.

When the practitioner is the keeper of the original powers of attorney, an escrow letter should be

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<sup>16</sup> Form is attached.

executed. This letter is a durable special power of attorney appointing the attorney to act for the limited purpose of holding the durable general powers of attorney until releasing them as specifically instructed. The escrow letter can direct the lawyer to surrender the durable general power of attorney to the named agent if the lawyer receives instructions to do so from the client, the lawyer receives written opinions from two physicians that the client is mentally or physically incompetent or unable to handle ordinary business affairs, or when the lawyer obtains credible evidence that the client has disappeared. This escrow letter can be tailored to the client’s individual situation. It provides an additional layer of protection that a simple springing power of attorney may not provide. It also puts the agent in contact with the lawyer who can take the opportunity to explain what the agent’s duties and liabilities are.