Financial Powers of Attorney

Increased Oversight by States and Banks to Prevent Abuse

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This article provides an overview of the law governing powers of attorney in the United States, summarizes current legislative trends, identifies the common standards of care that agents or attorneys-in-fact owe to their principals, explains the uses of powers of attorney, discusses common pitfalls associated with powers of attorney, and evaluates the legality of refusing to accept acknowledged powers of attorney.

Recent Developments

A power of attorney is an instrument that sets forth an agent's authority to act for a principal. The common law largely governed these instruments until the 20th century, when states increasingly modified common law agency by enacting statutes. States created durable powers of attorney, which are powers that continue to be effective in the event that the principal becomes incapacitated. By creating durable powers of attorney, these states overturned the common law rule voiding the agency when the principal lost capacity to perform the authorized acts. The Uniform Probate Code (1969) and the Uniform Durable Power of Attorney Act (1979) further altered the rules concerning these instruments.

In 2006, the Uniform Power of Attorney Act (UPOAA) sought to standardize the divergent ways in which states addressed emerging problems. Twenty states have adopted the UPOAA, and states not adopting the UPOAA have adopted pieces of it. Consequently, recent trends in power of attorney law generally track the UPOAA's goals. Those trends include the following:

Default Rules to Avoid Incapacity Determinations

Determining a principal's incapacity is a central challenge under power of attorney law. At common law, the incapacity of the principal voided the agent's authority completely. "Springing" powers of attorney present the opposite problem, in that the agent lacks actual authority *until* the principal's incapacity. States have promulgated various default rules to reduce the need to adjudicate a principal's incapacity.

First, the UPOAA establishes a default rule of durability, meaning that the agent's authority does not cease on the principal's incapacity. This rule ensures that a principal's affairs continue to operate smoothly in the event of his or her incapacity and eliminates the need to determine that incapacity.

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Although some non-UPOAA states have adopted the default rule of durability, most have not. For example, Delaware adopted most of the UPOAA in 2010, but still requires express language to create a power of attorney that is durable.

Second, the UPOAA coupled the default rule of durability with the long-standing default rule of immediate effectiveness, which is virtually uniform across all jurisdictions. Although many principals prefer springing powers of attorney, so that the agent has no authority to act until the principal becomes incapacitated, the Uniform Law Commission maintains that an agent sufficiently trustworthy for a springing power of attorney is sufficiently trustworthy for an immediate power of attorney. Some states, however, such as California and Connecticut, indirectly require principals to designate *when* powers of attorney take effect by requiring powers of attorney to contain dates of effectiveness.

Some scholars have criticized the default rule of immediate effectiveness, believing that it enables fraud. Such critics maintain that springing powers of attorney better serve a principal's interests by protecting autonomy and privacy until the power of attorney becomes necessary, which may never occur. By preventing agents from gaining control over a principal's affairs until absolutely necessary, springing powers of attorney prevent abuse by preventing the authority that enables such abuse. A principal may even choose someone other than the agent to determine if the power of attorney's "triggering event" has occurred, providing additional protection to the principal and his or her assets.

Principals sometimes "hybridize" immediate and springing powers of attorney. To do so, a principal may execute an immediate power of attorney but deliberately delay the instrument's delivery to his or her agent—often through an attorney—until a specified time or event.

Abuse Prevention and Punishment

Fraud by the holder of a power of attorney is difficult to prevent. About one-third of elder financial abuse comes from family members or friends who are not subject to background checks. Pennsylvania officials have reported that state laws have failed to adequately monitor agents' conduct and encourage banks to question suspect powers of attorney.

The UPOAA combats power of attorney abuse in four ways: (1) explicitly defining the duties of agents; (2) allowing third parties to not honor suspect powers of attorney; (3) increasing oversight through co-agents; and (4) imposing legal liability on abusive agents. States generally established standards for agents' conduct before the UPOAA. For example, Georgia, a non-UPOAA state, has an elaborate scheme, which defines the standard of care for agents' conduct, forbids agents from buying or selling to themselves, forbids agents from disputing their principals' titles, prescribes remedies for the intermingling of funds, and even absolves agents of liability for bank failures.

Recently, an Alabama court confronted a flagrant case of abuse by a holder of a power of attorney. In *Cashion v. Hayden*, No. 01-cv-290.00, slip op. (Jefferson Cty., Ala., Cir. Ct. Aug. 20, 2013), Cashion, a prominent businessman, gave a durable power of attorney to his nephew, Hayden. In secret, Hayden took a number of steps to deprive Cashion of substantially all of his assets by setting up trusts, deeds, and a sham lawsuit in Nevada, and by executing other instruments to give Hayden complete authority

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and control over Cashion's assets. Ultimately, Cashion discovered these actions through his company employees. Remarkably, in subsequent litigation, Hayden took the position that the power of attorney gave him the broadest possible authority to act, including the power to assume complete control of Cashion's assets without his knowledge or consent. The trial court disagreed, noting that "[a]ctivities undertaken in secret are anathema to the most basic concept of a fiduciary." Id. at 12. The trial court imposed money damages on Hayden, declared his actions as the purported attorney-in-fact to be void and of no effect, and enjoined him from taking any actions with respect to Cashion's assets and property, among other things.

Third-Party Acceptance of Powers of Attorney

The UPOAA primarily simplifies and consolidates anti-abuse efforts, especially regarding third parties' refusal to honor powers of attorney. The UPOAA exempts third parties from liability for such refusals based on a good faith (defined as "honesty in fact") belief that the power of attorney is invalid. The UPOAA also encourages reporting suspected financial abuse by exempting third parties from liability for refusing to honor powers of attorney if they make a good faith report of suspected abuse to local authorities.

Consistent with preventing abuse is ensuring that third parties accept valid powers of attorney. Refusing to honor legitimate powers of attorney can produce a "Catch-22" in which an agent cannot act for a principal without a new power of attorney, but the principal cannot execute a new power of attorney because of incapacity.

To avoid this, the UPOAA places liability on third parties that refuse to honor acknowledged (meaning "purportedly verified before a notary public" or another authorized individual) powers of attorney. The liability covers "reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney."

The language "incurred in any action or proceeding," however, mirrors language in federal statutes such as the Individuals with Disabilities in Education Act (IDEA), which precludes awards for attorney's fees that are not "at least related to an action or proceeding brought under the IDEA." Because most, if not all, disputes in which third parties refuse powers of attorney conclude before going to court, aggrieved parties may not be able to recover attorney's fees accrued from extra-judicially enforcing the power of attorney.

Many states placed liability on recalcitrant third parties before the UPOAA, and the UPOAA merely reflected that trend. Even South Dakota's power of attorney scheme, which was generally unchanged since 1939, extended liability to third parties in 2004: "[A]ny person who refuses to accept the authority of the agent . . . is liable to the principal . . . as the person would be liable had the person refused to accept the authority of the principal to act on the principal's own behalf." The South Dakota statute permits the recovery of attorney's fees. New Jersey adopted measures similar to the UPOAA in the early 1990s.

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Aside from statutes requiring the acceptance of acknowledged powers of attorney, third parties often are exempted from liability for accepting *invalid* powers of attorney until such parties receive actual notice that the power of attorney has expired. Mississippi presents such an example. In South Carolina, however, this is true only if the power of attorney provides for such exemption.

Agents' Duties and Standard of Care

It is well-settled that agents under powers of attorney are fiduciaries to their principals. Agents owe a general duty of loyalty to their principals, while contracts and statutes provide additional duties. A leading British case distinguishes between the two sets of duties as follows: "Breach of fiduciary obligation connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty." *Bristol & West Bldg. Soc. v. Mothew*, [1998] Ch. 1, 18 (C.A.).

The UPOAA incorporates the common law duty of loyalty while also prescribing additional standards of conduct. Nonwaivable UPOAA duties include acting in good faith, "in accordance with the principal's reasonable expectations to the extent actually known by the agent," and only within the scope of the power of attorney. The principal may waive six other default duties, except (1) acting loyally for the principal's benefit, (2) avoiding conflicts of interest, (3) performing with ordinary competence, (4) following record-keeping requirements, (5) cooperating with an agent under a health-care power of attorney, and (6) attempting to preserve the principal's estate plan.

In non-UPOAA states, the standards of care owed by agents differ greatly in form, but less so in substance. For example, Florida made record-keeping requirements mandatory and provided a multifactor test for balancing the principal's best interests with maintaining the principal's estate plan. Kansas requires agents to avoid conflicts of interest, while the UPOAA permits the waiver of conflicts of interest. Louisiana established a simple "prudence and diligence" standard.

Uses

A power of attorney primarily provides third parties with evidence of the agent's authority to act. The authority that principals can confer on agents generally is unlimited in subject-matter. The statutory short form power of attorney provided by the UPOAA contains a list of subject-matters over which principals may confer general authority:

- • real property,
- • tangible personal property,
- • stocks and bonds,
- • commodities and options,
- • banks and other financial institutions,
- • operation of entity or business,
- • insurance and annuities,
- • estates, trusts, and other beneficial interests,
- • claims and litigation,
- • personal and family maintenance,

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- • benefits from governmental programs or civil or military service,
- • retirement plans, and
- • taxes.

The list covers most, if not all, of a principal's finances and property. The UPOAA extensively defines each item. States often add catchall options at the end of their forms to cover any areas that the UPOAA may have missed. For example, New York provides an "all other matters" option in addition to those offered by its statutory short form. New York also includes "gifts" (up to $500 per year) in the "Personal and Family Maintenance" subject matter and provides an option that permits agents "to delegate any or all of the foregoing powers to any person or persons whom [the] agent(s) select."

General grants are not always sufficient authorization for certain actions. For example, the power to make gifts often requires more than a general grant of authority, as North Carolina state law has recognized. Because of "increased risks associated with a grant of authority that could significantly reduce the principal's property or alter the principal's estate plan," a principal must expressly authorize general grants. The UPOAA statutory short form requires the following powers to be individually and expressly authorized:

• create, amend, revoke, or terminate an inter vivos trust;

• make a gift, subject to the limitations of the Uniform Power of Attorney Act and any special instructions in the power of attorney;

• create or change rights of survivorship;

• create or change a beneficiary designation;

• authorize another person to exercise the authority granted under the power of attorney;

• waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;

• exercise fiduciary powers that the principal has authority to delegate; and

• disclaim or refuse an interest in property, including a power of appointment.

Whether a general grant is sufficient to authorize these powers and what form that general grant must take vary by state. Tennessee, for example, requires express authorization for the power to change the beneficiaries of life insurance policies, but the phrases "to transact all insurance business" and "to take any other action in this regard" in that instrument sufficiently confer such power. States sometimes forbid conferring certain powers in any form. For example, Missouri forbids delegating the power "[t]o make, publish, declare, amend or revoke a will for the principal."

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In one recent Kentucky case, the court addressed whether a power of attorney authorized the agent to create a trust and concluded that the power did not. In *Dishman v. Dishman*, 2015 Ky. App. Unpub. LEXIS 874 (2015), a husband and a wife had signed mutual powers of attorney in favor of each other. One of the powers granted to the agent was the power to "[c]onvey any real or personal property to the Trustee of any trust agreement between me and said Trustee and entered into either before or after the date of this instrument . . . ." While the husband was incapacitated, and on the advice of counsel, the wife created a trust (as agent for the husband) and named herself and another as trustees. The husband apparently later regained capacity, filed for divorce from the wife, and revoked the power of attorney. Litigation ensued. After lengthy discovery disputes and an eight-day bench trial, the trial court found that the wife was entitled to create a trust under the power of attorney. The Kentucky appellate court disagreed, however, and found that while the instrument permitted the trustee to convey property to a trust, "there is nothing in the [power of attorney] permitting [the wife] to actually create a trust, let alone name herself as trustee." Id.

In Georgia, fact finders often determine the scope of an agent's authority. Accordingly, few powers require express authorization in Georgia. The Georgia Court of Appeals has confronted an extreme example. In *Harris v. Peterson*, 734 S.E.2d 93 (Ga. Ct. App. 2012), brothers Dennison Williams and Darius Peterson inherited real property from their mother. Williams named his sister-in-law, Anita Peterson, as his agent under a financial power of attorney, authorizing her to sell real property on his behalf. After learning that Williams had entered into contracts to sell his inherited real estate interests, Ms. Peterson allegedly presented Williams with a deed quitclaiming Williams's interests in the property to her husband, Darius Peterson. Williams refused to execute the quitclaim deed and expressed that he did not wish to transfer the property. Ms. Peterson then recorded the power of attorney, and she also executed and recorded the quitclaim deed using the power of attorney given to her by Williams—even though Williams had refused to sign the deed himself. The trial court granted summary judgment to Anita Peterson and denied Williams's motion for summary judgment. The appellate court reversed, holding that while Ms. Peterson had the legal right to make the transfer under the power of attorney, "there is at the very least a genuine issue of material fact as to whether Anita Peterson's actions in direct contravention of her principal's actions and intent were authorized." Id. at 94–95.

Pitfalls

Although powers of attorney are integral tools of estate and financial planning, potential problems exist. Already discussed above were the most common problems, specifically frequent disputes regarding a principal's incapacity, the ease with which powers of attorney can be abused, and recalcitrant third parties.

Another pitfall is the ease with which powers of attorney can be created. Principals can find commercial forms on-line and execute the powers of attorney without legal counsel. For example, a Google search of the phrase "power of attorney form Idaho" produces over 500,000 results. For forms distributed without legal counsel, California law requires the inclusion of certain warnings for durable powers of attorney. Though such a law may be beneficial, it can create future problems. For example, principals may think that they are authorizing a power through a general grant that, in fact, needs more specific authorization—or else they may think that they are *not* authorizing a certain power when, in fact, they are.

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Unwary principals may be misled by faithless agents to waive important statutory protections such as record keeping and standard of care requirements. Such waivers can undermine the principal's estate planning goals and contribute to the high potential for abuse by the agent. If the errors are not corrected before the principal's incapacitation, few options may be available to remedy the problems.

Moreover, powers of attorney are rarely tracked by the legal system. Although some states, such as Massachussets, require the recording of powers of attorney that authorize agents to make real estate transactions, powers of attorney otherwise are unrecorded. Lack of recording makes it difficult for agents and third parties to know which powers of attorney are valid.

And many cases involving powers of attorney continue to turn on whether the agent has acted in his own interests, as opposed to the principal's interest, and thus are conflicted. In a recent Arkansas opinion, one of the issues involved actions by the holder of a power of attorney in using that power of attorney for his benefit and not the principal's. In *Liberty Bank of Arkansas v. Byrd*, 482 S.W.3d 746 (Ark. Ct. App. 2016), while the wife was incapacitated, the husband used a durable power of attorney the wife had given to him to transfer jointly held real property to a revocable trust he had created individually. The husband and the wife died within a week of each other in 2013. The wife's executor sued the successor trustee of the husband's trust seeking, among other things, cancellation of the transfers and the imposition of a constructive trust over the trust's assets. After a bench trial, the court found that the husband's transfers of jointly held assets were contrary to the wife's estate plan and imposed a constructive trust over the assets. The Arkansas Court of Appeals affirmed, recognizing that a fiduciary relationship exists between the principal and the agent in a power of attorney relationship. The Court of Appeals also agreed that the husband's actions were contrary to the wife's estate plan, in that she intended to benefit her child from a previous marriage with her assets. Id. at 86.

The final pitfall, discussed below, is the difficulty in balancing third parties' competing duties to accept valid powers of attorney and to report suspected financial abuse.

Rejecting Acknowledged Powers of Attorney

Banks are in a unique position to detect and stop elder fraud, and scholars and state governments have encouraged banks to actively use that position through mandatory reporting laws, training programs, and waivers of financial privacy laws. Excessive scrutiny of powers of attorney, however, can prevent an agent from acting in his principal's interests, especially if the principal already has lost the capacity to create a new power of attorney.

Banks generally must accept acknowledged powers of attorney and are not held liable for relying on them. Under the UPOAA, banks cannot insist on using their own forms. On the other hand, banks and banking personnel often are mandatory reporters for elder financial abuse, facing criminal and civil liability if they fail to report suspected abuse. These two duties—the duty to accept acknowledged powers of attorney and the duty to report suspected abuse—do not inherently conflict, as banks often are protected if they base their actions on their good faith assessment of the situation.

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Although the law is relatively clear, why banks refuse powers of attorney when they have a good faith defense if they do accept those powers of attorney is less clear. One potential explanation is simply that the cost of not being sufficiently suspicious is far greater than the cost of being too suspicious. The criminal and civil penalties for mandated reporters are far steeper than the purely civil liability for refusing to honor valid powers of attorney. Another explanation is that fee-shifting statutes cover only fees accrued during legal actions. Thus, it costs banks nothing to request additional certainty from the purported agent and resolve any concerns before litigation. A final explanation may be that the banks are averse to litigation and have the belief that initially refusing powers of attorney invites less litigation than too eagerly accepting them. Private parties aggrieved by the rejection of valid powers of attorney have far fewer legal resources than do state governments when prosecuting mandated reporting violations, greatly skewing the risks.

Whatever the reason for the refusals, state laws generally require banks to have a good faith reason to reject a power of attorney or to fall within other statutory exceptions, such as requesting certification or opinions from counsel. Absent such exceptions, banks generally have no legal basis for refusing acknowledged powers of attorney.

Conclusion

Because of the exemption from liability for a good faith refusal to recognize a power of attorney that appears invalid, financial institutions may be willing to reject powers of attorney if there is reason to question the validity. One needs to be wary of rejecting a power of attorney too readily, however. Banks should not require that the power of attorney be on their own forms. Financial institutions that refuse to honor acknowledged (notarized or verified) powers of attorney can be held liable, including for "reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney." n

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