

**NATIONAL DURABLE POWER OF ATTORNEY
SURVEY RESULTS AND ANALYSIS**

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Durable Power of Attorney Survey Results and Analysis

Introduction

In February 2002, the Advisory Committee to the Joint Editorial Board for Uniform Trusts and Estates Acts presented its report on a comparative review of state durable power of attorney legislation. This study was conducted to ascertain: a) how many jurisdictions have adopted the Uniform Durable Power of Attorney Act (Uniform Act) in whole or in part; b) whether the legislative enactments of adopting states include significant departures from the Uniform Act; c) whether states that are not official adopters have integrated, in language or spirit, components of the Uniform Act; and d) the emergence of state legislative trends that are not embodied in the Uniform Act.

The study found that while twenty-nine (29) jurisdictions (27 states, the District of Columbia, and the Virgin Islands) are official adopters of the Uniform Act, seventeen (17) of the twenty-three (23) states who are not official adopters have incorporated into their statutes provisions substantially similar to those of the Uniform Act. However, despite this “core” uniformity, the study further revealed significant areas of developing divergence. Conflicts and potential conflicts between states appear in two contexts—subject areas in which a growing number of states have enacted statutory provisions, but the provisions diverge in approach, and subject areas where the Uniform Act is silent and states are “filling in the blanks.”

Areas of divergent state legislative provisions include:

- Authority of a later-appointed fiduciary or guardian vis-à-vis the attorney-in-fact

Twenty-three (23) jurisdictions follow the Uniform Act approach which provides that once there is a court-appointed guardian or fiduciary, the attorney-in-fact is then accountable to both the fiduciary and the principal; seventeen (17) provide that after court appointment of a fiduciary the attorney-in-fact is accountable only to that fiduciary; five (5) terminate the attorney-in-fact’s authority upon court appointment of a fiduciary; and four (4) specify that the attorney-in-fact’s authority actually supersedes that of a later-appointed fiduciary. Regarding a fiduciary’s authority to revoke a DPA, thirty-four (34) jurisdictions follow the Uniform Act approach that the fiduciary has the same power the principal would have had to revoke the agent’s authority

and six (6) require that a Court find sufficient basis for revoking the attorney-in-fact's authority.

- Springing powers

Thirty-eight (38) jurisdictions follow the Uniform Act approach that a durable power of attorney can be designated to become effective upon the "disability or incapacity" of the principal. Nine (9) jurisdictions provide for other variations on springing powers, and four (4) are silent on the topic. Seven (7) require a confirming affidavit by the agent that the power has sprung.

- Authority to make gifts

Twenty (20) jurisdictions specifically address agent authority to make gifts, and all but two (2) of these jurisdictions provide for statutory default limitations on the authority. Statutory limitations vary considerably, but in general, states are divided into two divergent groups—one that requires the DPA to include specific authorization of gift making authority, and the other that implies gift making authority if the agent is given broad authority without specific limitations.

- Authority of multiple agents

Sixteen (16) jurisdictions address the issue of multiple agents. Two (2) prohibit co-agents; one (1) requires that multiple agents act jointly; nine (9) provide that the instrument can specify joint or several authority for multiple agents, but that in the absence of specification the multiple agents must act jointly; three (3) provide that multiple agents may act independently in the absence of specification to the contrary; and one (1) does not provide a default rule but states that the instrument can specify joint or several authority.

- Impact of divorce on authority of spouse-agent

Twelve (12) states provide for revocation of a spouse-agent's authority upon divorce, and four (4) actually provide for revocation upon the filing of the petition. Five (5) also revoke authority upon legal separation.

- Fiduciary standards of care

Nineteen (19) statutes address fiduciary standards of care for agents, but the substance of the statutes varies considerably—from minimal treatment which merely identifies the attorney-in-fact as a fiduciary to those requiring the same level of care as a trustee and specifying a list of duties. With respect to remedies for breach of the agent's duties, the statutory provisions range from silence to rather extreme civil and criminal penalties.

Common areas that are not covered by the Uniform Act, but which are addressed in an increasing number of state statutes include:

- Execution requirements (27 jurisdictions)
- Successor agents (16 jurisdictions)
- Portability provisions (12 jurisdictions)
- Sanctions for third party refusal to accept DPA (8 jurisdictions)

Although some variation exists in the foregoing provisions, the spirit of the provisions is similar.

To further assess developing trends and issues in durable power of attorney legislative reform, the Advisory Committee prepared a survey which was distributed to all probate and elder law sections of state bar associations, to the leadership of the American College of Trust and Estate Counsel, the National Academy of Elder Law Attorneys, and the ABA Section of Real Property, Probate and Trust Law, as well as to special interest listserves of the ABA Commission on Law and Aging. The following report summarizes and analyzes the results of this survey.

Survey Respondents

It was not possible to formulate a statistical response rate due to the variety of methods by which the survey was distributed; however, forty-four (44) jurisdictions were represented in the 371 surveys that were returned. In an effort to gauge whether the type of state statute influenced the nature of the responses, results were analyzed by state groupings as well as in the aggregate. States were grouped according to their degree of similarity to or divergence from the Uniform Act. States in the “General” category are those whose statutes are basically the same as the Uniform Act. The thirteen (13) states which comprise this group (AL, DE, HI, ID, IA, KS, MA, MI, MS, NV, OR, RI, WV) represent 26% of total jurisdictions. Thirty-five percent (35%) of the survey respondents were from the General category. The “Modified General” category is comprised of states which basically follow the Uniform Act but which have added a few additional specific provisions. This group includes eighteen (18) states (AZ, DC, KY, LA, MD, MT, NE, NH, ND, NM, OH, OK, SC, SD, UT, VA, WI, WY), which represent 35% of total jurisdictions, and 23% of the respondents to this survey. The last category, labeled the “Specific” group, includes the largest number of states—twenty (20)—and represents those states which have enacted very specific, detailed provisions either in addition to or instead of the provisions of the Uniform Act. This group represents 39% of all jurisdictions and 42% of the survey respondents. The following chart summarizes participation by state and state groupings:

Durable Power of Attorney Survey – Participation by State

General States			Modified General			Specific		
AL	13		AZ	4		AK	*	
DE	13		DC	11		AR	3	
HI	18		KY	1		CA	17	
ID	32		LA	3		CO	6	
IA	3		MD	8		CT	7	
KS	4		MT	*		FL	5	
MA	2		NE	11		GA	6	
MI	19		NH	4		IL	19	
MS	6		ND	*		IN	16	
NV	2		NM	5		ME	6	
OR	10		OH	20		MN	2	
RI	8		OK	*		MO	5	
WV	1		SC	*		NJ	4	
			SD	*		NY	13	
			UT	1		NC	*	
			VA	13		PA	12	
			WI	4		TN	11	
			WY	1		TX	8	
						VT	4	
						WA	10	
13 states	131	35% of total responses	18 states	86	23% of total responses	20 states	154	42% of total responses

GRAND TOTAL – 371

* Responses were received from all but seven jurisdictions (AK, MT, NC, ND, OK, SC, SD)

Overview of Survey Responses

What is most striking about the survey responses is that the percentage of respondents who selected each option was nearly identical without regard to state grouping affiliation. In other words, the type of statute in effect in a particular jurisdiction appeared to have little or no relationship to the preferences and opinions expressed by survey respondents. Furthermore, there was significant consensus demonstrated with respect to a number of areas identified in the Committee's first report as areas of growing statutory divergence or enactment (e.g., authority of later-appointed fiduciaries, springing powers, authority to make gifts, impact of divorce on authority of spouse-agent, fiduciary standards of care, portability provisions, and sanctions for third party refusal to accept a DPA).

The following summarizes survey results by topic, reporting only the aggregate results of the entire response pool unless there was significant variation in the response percentages by state grouping. Where questions asked respondents to indicate multiple answers if they desired, percentages are based on the number of respondents answering that specific question.

General Questions about Durable Power of Attorney Practice

Number of POA documents prepared annually?

Fewer than 25	25%
25 - 50	23%
51 - 100	29%
Greater than 100	23%

Majority of POA documents are?

General durable powers	93%
Special limited powers	2%
Approx. equal numbers	5%

Client preference for when POA effective?

Immediately	61%
Springing	23%
No trend	16%

Are you in favor of statutory short forms?

Yes 59%
No 41%

Springing Powers

Should DPA statute authorize springing powers?

Yes 89%
No 11%

Should statute require a confirming affidavit to activate springing powers?

Yes 74%
No 26%

Should statute permit an affidavit to provide assurance to 3rd parties?

Yes 81%
No 19%

*Who should be the affiant?**

Health Care Professional	63%
Person designated in POA	58%
Agent	27%

*Although not directed to, a number of respondents circled multiple answers.

Authority to Make Gifts

Which should be the default rule for making gifts?

No authority unless specifically authorized	73%
Implied authority unless expressly limited	27%

Should statute specify default limitations on gift making authority?

Yes 67%
No 33%

Should statute limit permissible recipients of gifts?

Yes 50%
No 50%

Should the statute limit the types of organizations that are permissible recipients?

Yes, organizations to which principal has made gifts or pledges	45%
No	33%*
Yes, only to IRS charitable organizations	19%*
Yes, to organizations charitable or otherwise	3%

*More of the respondents in the Modified General grouping selected the response, "Yes, only to IRS charitable organizations" than the "No" response to limitations.

Should the statute limit the classes of persons who are permissible recipients?

No	47%
Yes, limit to principal's spouse, committed partner, descendants, spouses of descendants, descendants of partner, and parents	21%*
Yes, limit to principal's spouse, descendants, spouses of descendants, and parents	15%*
Yes, limit to principal's spouse and descendants	9%*
Yes, limit to principal's spouse, descendants and parents	8%*

*There was a slight preference in the Modified General grouping for the response which included spouses of descendants, but omitted references to committed partners, and a slight preference in the General grouping for the option which included parents over the option limited to only the principal's spouse and descendants.

Should the statute specify a maximum amount for gifts?

No maximum	47%
Limit to \$10,000 or current annual gift tax exclusion	29%*
Limit gifts to agent to \$10,000 or current annual gift tax exclusion	24%*

*Respondents in the General grouping had a slight preference for capping only gifts to agents at the annual gift tax exclusion amount as opposed to a default limitation on all gifts at the annual exclusion amount.

Should the statute provide other guidance for making gifts?

Agent can make gifts on principal's behalf as determined to be in principal's best interest, estate's best interest, or that will reduce the estate tax payable on the principal's death and also be in accordance with the principal's history of making or joining in the making of lifetime gifts	51%
Nothing more is needed	36%
Agent can make gifts on principal's behalf as the agent shall determine to be in accord with the principal's personal history	13%

Authority to Create, Revoke, or Modify Revocable Trusts

If the POA gives the agent broad authority, which should be the default rule for revocable trusts?

Agent can exercise principal's powers only to the extent expressly authorized by the terms of the trust document or the POA	51%
Agent can exercise principal's powers unless limited in the POA, but only to make revisions as the circumstances and facts reveal the principal would have made	32%
Agent can exercise principal's powers unless authority is limited in the POA	17%

The Agent as Fiduciary

Should the statute set forth a default standard of care for the agent?

Yes	89%
No	11%

Which of the following should be the default standard of care?

Same fiduciary standard as Trustees	63%
Good faith	19%*
Due care/ordinary negligence	18%*

*There was a slight preference for the due care/ordinary negligence standard over the good faith standard in the General grouping.

Should the statute permit the principal to alter the default standard of care to provide exoneration?

Yes	73%
No	27%

Choose all of the following that you would favor for inclusion in statutory exoneration:

Agent not liable solely because the agent also benefits from the act	84%
Agent not liable for loss due to another person's error of judgment or action	81%
At the principal's election, agent will only be liable for action undertaken in bad faith	73%

Agent not liable solely because the agent has conflicting interests	71%
Agent not liable solely because the agent acts in a different manner with respect to the principal's and the agent's individual interests	50%
None of the above	16%

Should the statute require notice by agent when no longer willing or able to act?

Yes	75%
No	25%

If yes, indicate inclusions favored for a notice provision:

Notice to principal, and if principal is incapacitated, then to guardian, legal representative, or caretaker	91%
Notice to all 3 rd parties with whom agent has transacted on behalf of the principal	41%
Notice to principal only	20%

Third Party Liability and Sanctions for Refusal to Accept Agent's Authority

Ever experience difficulty obtaining third party acceptance of an agent's authority?

Yes, occasionally	63%
No	20%*
Yes, frequently	17%*

*Respondents in the Specific grouping rated "Yes, frequently" slightly higher than "No."

Would you favor inclusion of a remedies or sanctions provision in all durable power of attorney statutes?

Yes	74%
No	26%

If yes, indicate all recommended provisions for inclusion in a remedies or sanctions provision:

Attorney's fees and court costs	87%
Civil penalty not to exceed \$1000, plus damages, costs and fees	53%
Prejudgment interest on actual damages	45%
Treble damages	18%

Would you favor protecting third party reliance with a statutory presumption of validity?

Yes	92%
No	8%

Authority of Later-Appointed Fiduciary or Guardian

If court appoints a guardian, conservator, or other fiduciary for the principal, to whom should an agent under a previously-executed power of attorney be accountable?

The fiduciary and the principal	58%
The fiduciary only	30%
The principal only	12%

Should a court-appointed fiduciary have authority to revoke or amend the POA?

Only if court specifically grants authority	61%
Yes	31%
No	8%

Should court appointment of a fiduciary automatically revoke a previously executed POA?

No	64%
Yes	36%

Should the agent's authority under a POA supersede that of a later-appointed fiduciary?

No	68%
Yes	32%

Impact of Divorce or Legal Separation on Authority of Spouse-Agent

Indicate all of the following that should cause revocation of the spouse's agency:

Divorce or annulment	84%
Filing a petition for divorce	73%
Legal separation	69%
None of the above	7%

If the principal appointed a spouse's relative as agent, who is not related to the principal except by marriage, should divorce revoke the agency?

No	62%
Yes	38%

Portability

In your own practice, have you ever experienced difficulty obtaining POA acceptance in another jurisdiction?

No	65%
Yes	35%

Would you favor a portability provision in all POA statutes?

Yes	97%
No	3%

If yes, which of the following would you prefer?

POA is valid in this State if validly executed under the laws of another state, but shall not authorize actions that are in contravention of laws of this State	62%
POA is valid in this State if validly executed under the laws of another state	38%

Abuse

Have you, in your own practice, encountered POA abuse by an agent?

Yes	64%
No	36%

If yes, which best describes the total number of instances?

Fewer than 5	53%
Greater than 10	24%*
5 to 10	23%*

*Both the General and Modified General groupings rated the category "5 to 10" slightly higher than "Greater than 10."

Are you aware of instances of power of attorney abuse by an agent outside the experience of your own practice or work?

Yes	78%
No	22%

If yes, which best describes the total number of instances?

Fewer than 5	45%
5 to 10	28%
Greater than 10	27%

Should POA statute provide remedies and sanctions for agent abuse in addition to those available under common or criminal law?

Yes	75%
No	25%

If yes, indicate all you would include in a remedies or sanctions provision:

Agent to pay attorney's fees and costs	91%
Prejudgment interest	70%
Civil penalty not to exceed \$1000, plus damages and costs	61%
Treble damages	40%
Disinheritance from principal's estate	37%

Should the POA statute include safeguards against abuse by agent?

Yes	81%
No	19%

If yes, indicate all of the following that you would include:

Certain classes of interested parties have standing to seek court review of the agent's actions when the principal is incapacitated	89%
POA must be recorded when the principal becomes incapacitated	41%
Agent must account to a 3 rd party when the principal becomes incapacitated	33%

Conclusion

Despite the initial success of the Uniform Durable Power of Attorney Act (forty-five (45) out of fifty-one (51) jurisdictions adopted in large part the core provisions of the Act, whether officially or unofficially), currently only thirteen (13) states have durable power of attorney statutes that are completely faithful to the original Act. Eighteen (18) states retain many of the Act's provisions, but with varying degrees of additions and modifications, and twenty (20) states have enacted very subject specific durable power of attorney provisions. Despite the divergence in state law that presently exists, results of a national durable power of attorney survey indicate a high degree of consensus in areas where statutes conflict or are silent. For example, there is over 70% consensus on the following subjects which are not addressed by the Uniform Act:

- Statute should require a confirming affidavit to activate springing powers
- Gift making authority should be expressly stated rather than implied
- Statute should set forth a default standard for agent's fiduciary duties
- Principal should be permitted to alter the default fiduciary standard
- Statute should require notice by agent when no longer willing or able to act
- Statute should include a remedies or sanctions provision for third party's refusal to honor a DPA
- Third party reliance should be protected by a statutory presumption that DPA is valid
- Divorce, annulment, or the filing of a petition for divorce should revoke spouse-agent's authority
- Statute should include a portability provision
- Statute should include a remedies and sanctions provision for abuse by agent
- Statute should include safeguards against abuse by the agent

Given the legislative movement in twenty (20) states toward durable power of attorney statutes that are more specific and detailed, this may be an opportune time to revisit the Uniform Durable Power of Attorney Act. Based on the Committee's research, the environment appears conducive for revising the Act to address specific concerns that are common across jurisdictions and to incorporate general principles about which there appears to be consensus. Absent revision of the Act, it is likely that there will be further disintegration of uniformity if the remaining thirty-one (31) jurisdictions independently engage in statutory reform.