

**AMENDMENTS TO
UNIFORM DURABLE POWER OF ATTORNEY ACT**

Issues for Fall Drafting Committee Meeting 2003

Substantive Issues:

Article 1

Should the Act contain a default provision establishing that a power of attorney is durable unless expressly stated otherwise? If not, should *specific* language be required to create durability?

(Note: JEB members were evenly divided on this issue. The JEB did recommend, however, that the approach adopted by NCCUSL should be consistent with ALI .)

Sections 104 (c) & (d):

Should a provision be added to establish the right of a person to rely on written verification by the agent or agents exercising authority under a DPA that less than all of the designated agents are available to act by reason of circumstances set forth in either Subsections (c) and (d)?

Section 104(e):

Should an agent who knows of a breach by another agent have a duty to act? Is the “knowingly acquiesces in” standard sufficient?

Section 105(c):

Should a successor agent have a duty to redress a known breach committed by a predecessor agent? (one rationale: no, if there is no duty to act at all; however, this is contrary to the ordinary trustee standard).

Section 106(b):

To what extent should substituted judgment inform the court’s decision?

Section 107:

Should the spouse’s authority be revived in the event of remarriage?

Section 108:

Should “shall” be changed to “may”? In other words, should the principal be *required* to designate persons who can decide if a future event or contingency has occurred, or should that merely be an option? Under the present construction, would the power be invalid if the principal failed to include a designation?

Section 201:

Should notarization be required?

(Note: There was general support from the JEB for the notarization requirement; one suggestion was to include it as a bracketed option for adopting jurisdictions.)

Should additional witnesses be required?

Should a provision regarding electronic signatures and acknowledgments be included?

Should agent acceptance be required to activate a durable power of attorney?

(Note: This was a controversial item in the Annual Conference meeting discussion.)

Section 301:

Should the ability to hold securities in TOD form and to create Totten trusts or other POD bank accounts be included in the list of Section 301 powers that require express authority? If so, should language similar to the bracketed language in Sections 304, 305, 310, and 311 be added to Sections 306 and 308?

Section 302(a)(2):

Should incorporation by reference be permitted by reference to the respective section numbers without further reference to the caption or contents of the incorporated section?

Sections 306 and 308:

(See discussion items under Section 301.)

Section 316:

In light of Section 301, should the authority to designate beneficiaries under retirement plans and change existing designations be removed from those powers incorporated by reference in Section 316 Retirement Plans?

(Note: This language is presently included in Section 316 of the current draft only because it appears in the Uniform Statutory Form Power of Attorney Act; consistency in the draft Act argues for omitting this language from Section 316 and including language in the section similar to the bracketed language in Sections 304, 305, 310, and 311.)

Section 401:

Should there be an agent duty to act?

(Note: JEB members were divided on this issue. Factors identified by the JEB which are relevant to the discussion are whether the power is general or limited, and whether the principal is incapacitated.)

Should there be an exemption from fiduciary standards for instruments used in commercial transactions that are not intended to create a fiduciary relationship?

(*cf.* 20 Pa. C.S.A. § 5601 (e.1); *e.g.*, power given to a creditor in connection with a loan or other credit transaction; power given exclusively for the purpose of transferring stocks, bonds, and other assets; a power contained in the governing document of a legal entity by which a director, partner, or member authorizes the agent to act upon behalf of the entity.)

Section 402:

Is the exoneration standard too cryptic (*cf.* UTC § 1008(a))?

(*e.g.*, clarify that the exoneration provision is unenforceable to the extent that it relieves the agent of liability for breach of fiduciary duties committed in bad faith or with reckless indifference to the purposes of the durable power of attorney or was inserted as a result of an abuse by the agent of a fiduciary or confidential relationship.)

Section 403:

Should standing to petition the court for those other than the principal be effective only when the principal is incapacitated?

Should the list of those entitled to standing include beneficiaries of insurance policies, annuities, and TOD and POD arrangements?

Should the option of adding “domestic partner” be included for those jurisdictions that recognize such partnerships?

Section 404:

Should the standard of “negligently, fraudulently or otherwise dishonestly” be replaced by a liability standard based simply on the agent’s violation of a fiduciary obligation or standard? What if the agent’s untoward conduct was approved by a competent principal?

Section 405:

Should an agent be required to give notice to *all* successor agents or should notice to the next designated agent be sufficient?

Section 501:

Should there be more explicit exculpatory language for other parties relying on an agent's authority (*e.g.*, no duty to investigate validity of POA, no liability for transfer or application of principal's property, etc.)?

Section 502(a):

Should there be a statutory minimum damage amount for refusal to accept the agent's authority (*e.g.*, \$1000.00)?

Section 502(b):

Should we add language protecting a person who refuses to accept a power because the springing event has not yet occurred?

Should there be a "catch-all" provision covering other valid reasons for refusal? (*e.g.*, agent lacks capacity, less than all of the multiple agents have signed, etc.)

Section 601(a):

Is Section 601(a) too narrow? (*e.g.*, what about actions taken before the principal's death—like endorsement of a check by the agent on behalf of the principal? Should these be given force and effect even though there is knowledge of the principal's subsequent death?)

Section 601(b):

Should this section regarding non-durable powers be deleted?

(Note: Frank Daykin indicated in his comments regarding style that inclusion of Section 601(b) may violate the single-subject rule constitutionally governing many legislatures.)

Style Issues:**General:**

Should the draft be designated as a Revised Act of current date rather than as Amendments to the existing Act?

Should Articles 1 & 2 be combined in one article; and, likewise, Articles 4, 5, and 6? (rationale: style committee aversion to short articles)

Section 102(2):

Should the phrase, “the agent’s authority under a durable power of attorney may become effective immediately or upon a future date or event,” be moved to a separate section as a substantive, rather than a definitional, provision?

Section 106(b):

Should the language “fiduciary once appointed” be replaced by the language “or if a conservator, guardian, or other fiduciary has already been appointed, upon petition of that conservator, guardian, or other fiduciary”?

Section 301(a)(2):

Should the language be revised to read:

(2) fund with the principal’s property a trust unless created by the principal or created on behalf of the principal by a person authorized to do so?

(same question re/ Section 311(b))

Section 302(d):

Does this section obviate the need for the phrase “unless expressly authorized” in Sections 312 and 316? (*cf.* approach in Sections 312 and 316 with the bracketed language approach in Sections 304, 305, 310, and 311.)

Section 318:

Should this section be moved to the general provisions/creation article?

Section 404:

Is the phrase “and for punitive damages as allowed by law” surplusage?