

September 28, 2004

TO: Members of the Uniform Durable Power of Attorney Drafting Committee,
Advisors and Observers

FROM: Jack Burton, Chair

RE: OVERARCHING CONCEPTUAL PROPOSALS

Here are a few “big picture” or “thinking outside the box” proposals. They have been raised privately by concerned commissioners with me or the leadership of the conference. I am presenting them to see if the committee wishes to discuss them at the meeting that is scheduled for October 22-24. If we do not address these issues ourselves, I am concerned that there may be floor amendments to our act at the next annual meeting, which is scheduled to be the end of the drafting process. That is not to say that we should accede to these proposals if we do not think they are well founded. It is merely to point out that the commissioners who have raised them feel strongly about them, so we should consider them carefully.

The Chicago office will be distributing a separate memo about the draft of the act from Linda Whitton in a few days. I am the reason that her memo is getting to you so late, so I apologize in advance.

1. Revisit the issue of whether to make this act applicable only to durable powers or to all powers of attorney.

The proponents of this proposal base it upon principle and what they believe is intellectual honesty.

I believe that Linda said that her state’s act is applicable to all powers of attorney, not just to durable ones. Presumably, that statute works, so the question is whether the concept is a good idea or not.

The proponents point out that our act makes significant improvements in the law for principals, agents and third parties who have to deal with agents. It has been suggested that those improvements ought to be available to everyone under all powers of attorney, whether durable or not.

It has also been suggested that there is no principled reason not to do this.

Further it is suggested that this is the net effect of our act anyway. Here’s why, they say: The act says that a power of attorney is durable unless it states otherwise. So right there the act applies to all powers of attorney, unless the power of attorney states otherwise. The problem is that the act gets there through the back door. It is suggested that we go ahead and state it up front.

Of course, people could still opt out of the act if they want to, whether the power of attorney is durable or not.

2. Bracket the statutory form of power of attorney and all the statutory provisions that deal only with the statutory form. In other words the proposal is to bracket all of Article 3 (the statutory form) and most of Article 2 (that is Sections 201 (a) and 202 – 219. (Another suggestion is that Section 218 [Delegation] be revised instead of deleted. That suggestion will be dealt with in another memo that I hope to send out to you early next week.)

The proponents of this proposal say that it is made to enhance the enactability of our act in the vast majority of the states.

They say that Article 1 of our act is a relatively non-controversial update and expansion of the existing durable power of attorney law that has been enacted in most states, so that that part of the act could be enacted in almost every state.

On the other hand, they point out that most of Article 2 and all of Article 3 of the act are an update of the Uniform Statutory Form Power of Attorney Act that has been enacted in only a handful of states.

They also point out that many lawyers, consumer advocates and legislators will view these provisions as too avant garde and rife with the possibility of abuse to be enacted in their states. They base this view upon long experience in obtaining the enactment of uniform laws in the states and on the reactions of some commissioners at the annual meeting. Based on the same experience they firmly believe that these provisions cannot be enacted in the foreseeable future in many states that do not already have a statute providing for a statutory form power of attorney.

If these provisions are not bracketed, it is said, the controversial parts of our act will prevent the enactment of the non-controversial parts in many states. If it does not prevent the enactment of the non-controversial parts entirely in some states, they say that it will slow down the enactments by years and will lead to non-uniform amendments.

I look forward to seeing you in Chicago in about 3 weeks. It should be an interesting meeting.

Best regards.