

Memorandum

To: Drafting Committee Members, Advisors and Observers
From: Linda Whitton
Re: Discussion items for Fall 2004 Drafting Committee Meeting of the Committee to Revise the Uniform Durable Power of Attorney Act
Date: September 30, 2004

The following memo is organized into three sections. The first contains changes labeled Non-Controversial Technical/Style Revisions which, after consultation with the Chair, I incorporated into the accompanying draft of the Revised Act. These revisions were made in advance of the meeting to maximize the efficiency of our time together, but they are open to further discussion should anyone so desire. The next section is a list of substantive issues organized according to the chronological order of the Revised Act. Following each item, where appropriate, is a parenthetical notation indicating the source of the comment or question. The third section contains a couple of miscellaneous style/technical issues for further consideration at the meeting. A set of draft Comments will also be circulated prior to the meeting. Please note that the Comments will be in rough draft form and intended only as a beginning point for further input.

Non-Controversial Technical/Style Revisions (incorporated into the Fall Meeting 04 draft):

Article 1

- Sec. 102 The correct cross-reference should be to Sec. 105, not 104.
- Sec. 103 In the caption, insert the word “Notice” after the word “Knowledge”.
(McKay, Committee on Style)
- Sec. 103(b) Use active phrasing in the second sentence—change “and there is reasonable compliance with the routines” to “and the organization reasonably complies with the routines”.
- Sec. 104 In the first sentence insert “executed in accordance with this [act]” after the words “A power of attorney” and before “is durable. . . .” to correct the overbreadth problem (McKay, Committee on Style)
- Sec. 105 Insert at the end of the sentence: “or other person authorized to take acknowledgments”.
- Sec. 109(a) In the first sentence, change the word “refuses” to “declines”.

- Sec. 115 The correct cross-reference should be to Sec. 121, not 120.
- Sec. 117(4) Change “would” to “could” and add to the end of the phrase “upon the principal’s death”.
- Sec. 121(2) Delete the language “is incapacitated and” as duplicative of the lead-in language of the Section.

Article 2

- Sec. 202(b) Add the words “or a citation to a specific section of Sections 204 through 219” after the words “a descriptive caption in Sections 204 through 219” and before “incorporates the entire section. . . .”
- Sec. 217(5) Delete the second “the” and the words “while living”.

Article 3

Grant of
Powers: “I grant my agent power” should be changed to “I grant my agent authority”

Use all caps for the word “initialed” in the phrase,
“UNLESS I have also initialed the blank space. . .
(ACTEC)

Include all Sec. 201(b) powers (Conference House
resolution)

Effective
Date:

In the line: “• upon the following future date or event:” insert a comma after date and the following phrase after event: “, as determined by the person(s) indicated”.

In the parenthetical following the blank line for the future date or event replace the period with a comma and add: “and the full name and address of any person(s) you wish to determine that the stated event has occurred”.

Notary
Caption: Insert brackets around the word “County” (rationale—Alaska and Louisiana do not have counties).

Article 4

- Sec. 404 Insert the word “Durable” in the caption between “Existing” and “Powers”
- Sec. 405 Include repeal of Article 5, Part 5 of the UPC (JEB)

Substantive Issues for Discussion:

Article 1

General

Comment: Re-examine Sections 102(3), 105, 107, and 126 with respect to the impact of this Act vis-à-vis POAs executed in other jurisdictions or those which would be otherwise valid under the common law of agency. Query: What effect does the Act have on a POA executed in a jurisdiction that does not require notarization? Is the Act intended to apply to all durable powers? (Wellman)

Sec. 102(3) Should language be added to the definition to clarify that a durable power of attorney may include springing powers? Also, we should clarify somewhere in the Act that it does not apply to health care powers. (English)

Sec. 102(4) Consider adding definitions of “missing,” “detained,” and “unable to return to the United States.”

Sec. 103(a)(3) Is this language too broad? Consider the following alternative: (3) “in the exercise of due diligence should know it.” (Feldman, PA)

Sec. 103(a)
& (b)

Reconsider use of the term “due diligence.” The Uniform Limited Liability Company Act uses instead “reasonable diligence” in Sec. 102 Knowledge and Notice.

Sec. 105 As a compromise on the issue of notarization, take the requirement out of the statute, but require notarization on the statutory form. (ACTEC)

Sec. 108(c),

108(d), 109(b) Concern expressed over the ability of other persons to rely on the written representations of an agent as “conclusive proof” of the represented facts. Query: Should persons who have reason to know otherwise have liability for accepting false representations? (Fisher, OH)

Sec. 108(e) Should an agent who has actual knowledge of a breach of fiduciary duty by another agent have a duty to redress the breach? (JEB & ACTEC)

Sec. 111 Re-examine revocation on commencement of dissolution proceedings and revival on remarriage; revocation on decree of dissolution or annulment might be less controversial.

- Sec. 113
& 119 Clarify who is a noncompensated agent—one who is entitled to compensation but declines to take it or one who by the terms of the DPA is not entitled to compensation? (ACTEC)
- Sec. 115(a) Need to clarify when the fiduciary duty commences. Consider the situation of the agent who accepts the appointment verbally or in writing but has not yet acted under the DPA. (Kurtz, IA)
- Sec. 115(b)(5) Query—Could a resignation under Sec. 121 ever constitute a breach of fiduciary duty under this section? (Lord, NC)
- Sec. 115(c) Revisit this section to consider it’s impact on an agent’s duty of loyalty. (English)
- Sec. 115(d) What guideline for compliance applies when the agent indicates that additional time is needed?
- Sec. 116 Reconsider the language: “or providing that a person challenging the performance of an agent has the burden of proof concerning the agent’s breach of duty”. Query—Doesn’t the party challenging the agent’s actions always have the burden of proof? (English)
- Sec. 116(2) Is the language “abuse by the agent of a confidential or fiduciary relationship with the principal” intended to be broader than traditional notions of duress and undue influence? Is there a negative inference from this provision that other provisions in the DPA could not be challenged on the basis of duress or undue influence?
- Sec. 116 &
119 Reconcile the language of these sections—should “reckless indifference” be added to Sec. 119?
- Sec. 117 Should this provision be clarified concerning the role of the court of first instance to avoid confusion as to the standard of review on appeal?
- Sec. 118, 119,
123 Re-examine use of the terms “loss,” “loss or damage,” and “actual damages”. Is the intention to limit recovery to economic damages? (Dykman, WI)
- Sec. 120 Clarify the term “expenses”—does it mean court costs or broader expenses of litigation?
- Sec. 121 Should the provision require notice of resignation to be in writing?

- Sec. 123 Section should provide for both specific performance and damages. (JEB)
- Does this section apply to foreign DPAs? (Densborn, IN)
- Is there a conflict between the \$1000 damages provision in Sec. 123(a) and the UCC damages provision for failure to honor a negotiable instrument?
- Sec. 124 The language, “identifies the durable power of attorney revoked,” needs further clarification (*e.g.*, would a reference revoking all prior durable powers of attorney be sufficient?). Consider permitting express revocation of powers as well as revocation by inconsistency. (ACTEC)
- Should the provision address recording of a revocation (especially where the instrument revoked has been recorded)?
- Sec. 125 Should the absence of any agent to serve under the terms of the DPA be added as a cause of termination?
- Sec. 126 Does this provision inadvertently expand a court’s jurisdiction (*i.e.*, provide for equitable jurisdiction where none otherwise exists)? Also, look at the broader ramifications of including Sec. 126. (Dykman, WI)
- Article 2*
- Sec. 201(a) What does “general authority” mean vis-à-vis the powers specifically defined in the statute (*i.e.*, Sec. 204 through 219)? (ACTEC)
- Sec. 201(b) Clarify the relationship between Section 201(b) and the statutory powers. (English)
- With respect to Section 201(b) limitations, should a distinction be drawn between changes in dispositive provisions (such as insurance and pension beneficiary designations) and administrative changes (such as a change in fiduciary designation and succession)? (JEB)
- Should the power to disclaim be included in Sec. 201(b)? If so, remove the words “reject” and “disclaim” from Sec. 211(1). (ACTEC)
- Sec. 201(b)(7)
& Sec. 218 Should there be further clarification to indicate the distinction between ministerial delegation of certain functions in the ordinary course of an agent’s duties (*e.g.*, hiring professionals to perform services for the principal) and delegation of the role of agent to another person? (JEB)
- Should the caption be changed to read: Delegation of Agency (with a corresponding change to the optional form in Article 3)?

Sec. 208(8) Delete the borrowing power from this section and any other powers sections (with the exception of the authority to enter into a purchase money mortgage under real estate powers) and create a separate borrowing power—perhaps included in Sec. 201(b). (ACTEC)

Is there a difficulty with the separation of “banking powers” from “personal property powers?” (ACTEC)

Sec. 211(6) Could the laundry list be interpreted as exclusionary? What about the power to name a trust as a beneficiary rather than making a transfer to the trust? (ACTEC)

Sec. 214
& 215 Do these sections need to deal with federal pre-emption issues? (JEB)

Sec. 217 Should this section be revised to clarify that split gift making is permitted pursuant to IRC 2513 as well as gifts under the marital exclusion? (JEB & ACTEC)

Should Sec. 217 and/or Sec. 213 (Personal and Family Maintenance) be revised to clarify that payment of educational and medical expenses under IRC 2503(e) (including contributions to 529 plans) is included? (JEB & ACTEC)

Article 3

General
Comment: Concern expressed that the labels for areas of authority on the form are not fairly descriptive of the authority granted and a recommendation that the statutory definitions of the various powers be listed on the back of the form (JEB & ACTEC)

Should HIPAA language be added to the face of the form to facilitate acceptance by medical providers? (ACTEC)

Should an exoneration provision option be added to the form? (Ring, VA)

Designation
of Agent: Should the form provide for substitution of an initial agent when multiple initial agents are named?

Important Information Section:

Should the language include an admonition that powers granted to the initial agent may not be suitable for successors? (JEB)

Can we make the language, “The powers that you give to your agent are explained more fully in Article 2 of the Revised Uniform Durable Power of Attorney Act,” more consumer friendly? (ACTEC)

Should the Important Information Section advise that: a) the DPA should be kept in an accessible place; b) the agent should be informed of the designation and given a copy of the DPA; and c) that a copy of the DPA has the same force and effect as the original? (Godbey, TX)

Important Information for Agent:

Warning language should be stronger. (JEB)

Should Agent be required to sign form, signifying acceptance? (Kramer, VT)

Indemnification of Persons Who Rely on this Durable Power of Attorney:

Delete last sentence (“I agree to indemnify any person for claims that may arise against that person because of reliance on my durable power of attorney”) (JEB & ACTEC) and change caption to: “Reliance on this Durable Power of Attorney” (ACTEC)

Technical/Style Issues for Discussion:

General Comment

Leave in the phrase “writing or other record” where it appears throughout the Revised Act; “record” is not a commonly used term of art with practitioners or laypersons (ACTEC)

Sec. 210 Language is confusing; either divide the section into two subsections placing Sec. 201(b) restricted powers in one, or qualify the whole section by Sec. 201(b) and explain the distinctions in subsections (4) and (10). (ACTEC)