

OUTSTANDING DRAFTING ISSUES

April 1, 2005

The Interim Draft of the UPOAA dated January 19, 2005 was reviewed by the Joint Editorial Board for Uniform Trust and Estate Acts as well as by the Uniform Laws Subcommittee and State Laws Committee of ACTEC. Comments from the JEB and ACTEC are noted after each discussion item with additional comments on other issues summarized at the conclusion of each article. Following each issue is also a Reporter's comment or recommendation. If a substantive change was made in the April 1, 2005 draft with respect to an issue, the change is described in this memo.

Article 1

General Provisions and Definitions

Issue #1:

Sec. 107/ new 107 & 108. Power of Attorney Executed in Another State or Country; Pre-existing Powers of Attorney; Interpretation.

Section 107 in the Jan. 19, 2005 draft is modeled loosely on UTC 403. Assess whether a simpler approach would be better in the context of powers of attorney. Unlike trusts which generally include important governing principles in the express terms of the trust document, POAs often rely on the default rules of the jurisdiction where drafted. The current 107 may make it difficult to ascertain the default rules for powers executed outside of the state where presented. The typical portability provisions for foreign durable powers recognize as valid POAs executed in another state or jurisdiction in compliance with the law of that state or jurisdiction. They also recognize as valid powers that were validly executed in the adopting state before adoption of a new act.

JEB Comments: There was consensus that a simpler approach should be adopted and that the scope of authority in a POA should be controlled by the principal's intent as ascertained from the face of the document and any default provisions upon which the POA relies. However, authority granted in another jurisdiction should be honored only to the extent that it does not offend public policy in the state where the POA is presented.

ACTEC Comments: There was general agreement with the JEB views on this issue with the additional suggestion that "validity" and "interpretation" be covered in separate provisions. With respect to validity, it was suggested that a POA be treated as valid if it complied with the law of the jurisdiction where executed or the law of the jurisdiction in which the principal intended that it be used.

Reporter's Comment: Former Section 107 is redrafted in the April 1, 2005 draft as Sections 107 and 108 for committee review.

Issue #2:

Sec. 108/ new 201. Authority of Agent.

Should subsection (a) dealing with general grants of authority be moved back to Article 2? What does “general authority” mean vis-à-vis the powers specifically defined in Article 2, Sections 203 - 217?

***JEB Comments:** After considerable discussion, the board expressed consensus that all of Sec. 108 should be moved back to Article 2, and that a legislative note in the prefatory comments to the Act could set forth the modifications that ought to be made if a jurisdiction elects to enact only Article 1 of the new act. It was also recommended that the language in Sec. 108(a) of the Jan. 19, 2005 draft be clarified to indicate that a general grant of authority includes all of the defined powers in Article 2 with the exception of those which require a specific grant of authority pursuant to Sec. 108(b). It was also recommended that the last sentence of Sec. 108(a) be deleted from the section and covered instead in the comments. Regarding Sec. 108(b), it was recommended that subsection (1) be modified as follows: “create, modify, or revoke an inter vivos trust.*

***ACTEC Comments:** There was general agreement with the JEB views on this issue with the additional suggestion that Section 108(b)(2)(the authority to fund a trust not created by the principal) be deleted because 108(b)(3)(authority to make a gift) really covers this situation. (Consider—to fund a trust not created by the principal or the agent one would need the authority to make a gift)*

***Reporter’s Comment:** Former Section 108 is now moved back to Article 2 in the April 1, 2005 draft. The language of former Section 108(b)(1) is revised as recommended and former Section 108(b)(2) is deleted. These changes are subject to committee review.*

Other Comments from JEB Members on Article 1:

Issue #3:

Sec. 106. Creation.

A question was raised as to whether Sec. 106 would be sufficient to protect a bank that relies on an apparently notarized signature which was in fact forged. (cf. In re Estate of Davis, 632 N.E.2d 64 (Ill. App. Ct. 1994)(held that “in order to claim good faith reliance on an agency, an agency, as defined by the Act, must first exist.” Note, the Illinois statute has since been revised to protect reliance on a “copy of a document purporting to establish an agency.”)

***Reporter’s Comment:** Section 119(a) already addresses this concern.*

Issue #4:

Section 112. Co-Agents and Successor Agents.

Should clarification be made in the statute or comments that the requirement of “majority consent” when there are only two agents results in a requirement of unanimous consent?

Reporter’s Comment: The style committee also suggested that we address this. Section 112(a)(1) in the April 1, 2005 draft is revised accordingly for committee review.

Issue #5:

Sec. 114(f) & (g)/ new 114 (g)

Strong consensus was expressed that the standard of liability for the agent should be the same whether the agent employs another person on behalf of the principal or delegates the agent’s discretionary authority to another person pursuant to former Sec. 108(7). The standard recommended is that stated in former Section 114(f), with the suggestion that the drafting committee consult Sec. 9 of the Uniform Prudent Investor Act. It was also suggested that the phrase “delegating authority” in former subsection (g) be re-worded.

Reporter’s Comment: Former sections 114(f) and (g) are revised and combined as Section 114(g) in the April 1, 2005 draft for committee review.

Other Comments from ACTEC on Article 1:

Issue #6:

Sec. 112. Co-agents and Successor Agents.

Section 112 should state that persons may rely on an agent’s certification as to the unavailability of a predecessor or co-agent.

Reporter’s Comment: Section 119(b) already addresses this concern.

**Article 2
Powers**

Issue #7:

Sec. 211/ new 212. Claims and Litigation.

Should the language be revised to clarify that this list is not exclusive?

JEB: Clarify in comment.

ACTEC: The provision should be revised to clarify that the list is not exclusive.

Reporter's Comment: Former Section 211(now 212) is revised in the April 1, 2005 draft, subject to committee review, to include "including but not limited to" language in subsection (1). The accompanying comments will also clarify that the list of actions in the provision is not exclusive.

Issue #8:

Sec. 212/ new 213. Personal and Family Maintenance.

Should this section be revised to clarify that payment of educational and medical expenses under IRC 2503(e) (including contributions to 529 plans) is included?

JEB: While the board did not believe it is necessary to specifically mention IRC 2503(e) in the statute, it was suggested that the proposed language be reviewed, and revised if necessary, to make certain that any individuals customarily supported by the principal would be included within the scope of the power (e.g., parents and adult children). The comment should indicate that payments under this section are not subject to any limitations contained in the authority to make gifts, but that such payments may be subject to gift tax consequences. See also UPC Sections 2-109 and 2-609 regarding acknowledgment of an advancement or ademption by satisfaction.

Reporter's Comment: Former Section 212(1) (now 213(1)) is revised in the April 1, 2005 draft for committee review. Clarifying remarks will also appear in the commentary.

Issue #9:

Sec. 216/ new 217. Gifts.

Should this section be revised to clarify that split gift making pursuant to IRC 2513 and gifts under the marital exclusion are permitted? What about contributions to 529 plans?

JEB: Yes to gift splitting and 529 plans. Language should also be revised to clarify that the reference to the annual exclusion is for the purpose of clarifying the default limit on gift amounts to both individuals and organizations. Comments should clarify that Section 216 does not limit authority under 212 (Personal and Family Maintenance). The comments should also indicate that gifts to individuals may include gifts to custodian accounts.

ACTEC: Clarify that Section 216 does not constrain 529 plans under Section 212.

Reporter's Comment: The committee should consider this issue further to determine what revisions are in order.

Other Article 2 Comments:

Issue #10:

Consider whether the language in any of the powers sections needs to be revised to address authority to deal with specific governmental agencies such as the bureau of motor vehicles, US Postal Service, and Veteran's Administration.

Reporter's Comment & Recommendation: No significant comments were received. Former Section 202(8) (now 203(8)) currently provides that an agent has authority to "prepare, execute, and file a report, or other document the agent considers desirable to safeguard or promote the principal's interest under a statute or governmental regulation." Section 203(9) was added to the April 1, 2005 draft to clarify that an agent also has authority to: "communicate with any representative or employee of a government, governmental subdivision, agency or instrumentality on behalf of the principal". This revision is subject to committee review.

Other Comments from JEB members on Article 2:

Issue #11:

Sec. 202(3)/ new 203(3):

Jim Wade offered revisions to the last phrase in Section 202(3) as follows:
...including creating, at any time, a schedule listing some or all of the principal's property and attaching it to the power of attorney;

Reporter's Comment: Section 202(3) in the April 1, 2005 draft is revised accordingly for committee review.

Issue #12:

Sec. 207/new 208:

Fred Miller suggested that the drafting committee revisit the language of Section 207 to determine whether it adequately covers electronic transactions.

Reporter's Comment: While the language of former Section 207/ new 208 is probably sufficiently broad, the words "electronic funds transfer" were added to Section 208(5) and "electronic transaction authorization" to Section 208(11) for the committee's review.

Article 3
Statutory Form Power of Attorney

Issue #13:

Important Information Section:

Should this section include any of the following:

1) advice that the POA should be kept in an accessible place, 2) that the agent should be informed of the designation and given a copy of the POA, 3) that a copy of the POA has the same force and effect as the original, and 4) an admonition that powers granted to the initial agent may not be suitable for successor agents?

***JEB & ACTEC:** No specific comments were made with respect to the foregoing questions. At the ACTEC meeting it was suggested that the phrase “If your agent can no longer act for you” be clarified to read “If your agent is unable or unwilling to act for you. . .”*

***Reporter’s Comment and Recommendation:** The ACTEC clarification is adopted in the April 1, 2005 draft for committee review. The committee should consider whether the benefit of including any of the other suggestions outweighs the detriment of added length to the form.*

Issue #14:

Body of Form:

Should the form include options for creating a springing power of attorney or a non-durable power of attorney?

***JEB:** NO as to springing powers; regarding non-durable powers, perhaps the second sentence in the Important Information Section should include at the end “unless otherwise provided” or words to similar effect.*

***ACTEC:** Include in a comment sample instructions for creating a springing power of attorney.*

***Reporter’s Recommendation:** Include instructions for creating a springing power of attorney in the comment; the committee should consider whether the form should include the “unless otherwise provided” language suggested by JEB for non-durable powers.*

Other Comments from ACTEC Regarding the Body of the Form:

Issue #15:

Consider adding a Guardian nomination provision to the body of the form.

Reporter's Comment: *A draft provision is included in the April 1, 2005 draft for committee review.*

Issue #16:

Important Information for Agent:

Should this section include an admonition to stop acting on behalf of the principal once the agent learns of any event of revocation or termination of the power of attorney or the agent's authority?

JEB: *YES*

ACTEC: *No Comment*

Reporter's Comment: *A draft provision is included in the Important Information for Agent section of the April 1, 2005 draft for committee review.*

Other Comments:

JEB: *There was considerable discussion about the two different formats used for Grant of General Authority versus Grant of Specific Authority. Some believed that using different methods would be confusing for the layperson. Another suggestion was to require both crossing out and initialing of deleted powers in the Grant of General Authority Section. Larry Waggoner suggested simplifying the first sentence under Grant of Specific Authority by replacing the phrase "Neither my agent nor a successor agent may do" with the phrase "My agent MAY NOT do". A question was also raised concerning the Addendum and whether it would be confusing to the layperson.*

ACTEC: *It was suggested that the Addendum was potentially confusing and that it should be deleted. It was also suggested that the word "fiduciary" be deleted from the Important Information for Agent section because the term is not layperson friendly and we do not use the term in Section 114 Agent's Duties.*

Reporter's Recommendation: *The committee should consider, hopefully for the last time, the prudence of the methods for granting general and specific authority in the form. The suggestions to simplify the first sentence in the grant of specific authority section, to delete the Addendum, and to delete the word "fiduciary" have been adopted in the April 1, 2005 draft for committee review.*

Article 4

Item # 17:

Miscellaneous Provisions

Section 404. Effect on Existing Powers of Attorney.

This section is modeled after UTC 1106. Analyze whether this approach is applicable in all respects to powers of attorney.

No comments were received on this issue. The committee should review this at the spring drafting committee meeting.