Message from the Chair

Julie A. King, Chair, Trusts and Estates Section

Earlier this year, I attended the Fall Meeting of Committee and Section Chairs & Conference Presidents at the Virginia State Bar office in Richmond. VSB President John Huddleston brought to our attention some of the great programs the VSB is currently undertaking, highlighted by the “Virginia is for Good Lawyers” project. I encourage you to visit the VSB website to see success stories about Virginia lawyers who make substantial efforts to improve our communities and make us all proud to be Virginia lawyers.

Another topic brought up at the Fall Meeting is ensuring that the members of our sections are receiving value for their section membership. Value is certainly a common term these days in light of the challenges facing our economy and we are working to make your section membership more valuable than ever. In the coming months, be sure to visit the improved Trusts and Estates section website at vsb.org/site/sections/trustsandestates. Soon you will be able to search past section newsletters by keyword and access relevant publications and resources.

I have heard from a number of section members in recent months of the value in our section’s newsletters, and on behalf of the Board of Governors, we are pleased to bring you the Winter 2010 newsletter, with special thanks to Southy Walton, our newsletter editor, and Nathan Olansen, assistant newsletter editor.

The first article, by Robert Peel, discusses the use of a directed trustee in an intentionally defective grantor trust to hold an interest in a closely held business. Robert reviews the statutory framework for directed trustees under Virginia fiduciary law and in contrast to the Uniform Trust Code’s treatment of directed trustees. Useful drafting suggestions for a specific type of directed trustee arrangement, a Special Holdings Director, are also provided.

The second article, by Tania Sebastian, covers the new exit tax rules for U.S. expatriates under the recently enacted Heroes Earning Assistance and Relief Tax Act (“HEART”). Tania also reviews the new tax regimes under HEART, the mark-to-market tax and the succession tax, with attention to gifting issues between expatriates and U.S. donors.

The third article, by Andy Hook and Lisa Johnson, provides a thorough analysis of the Virginia Uniform Power of Attorney Act (“UPOAA”) enacted in January 2009 with a reenactment clause anticipated to be passed with amendments by the Virginia General Assembly in the 2010 Session. Andy and Lisa detail the key provisions of the UPOAA and the statutory power of attorney forms. They also provide recommendations for further amendments to the UPOAA.

I hope that you find the articles in this newsletter valuable and informative. If you would like to write an article for an upcoming newsletter, or have ideas for topics for future articles, please contact Southy Walton, newsletter editor. If you should have any questions or comments about this newsletter or the Trusts and Estates Section, please contact me or any of the other members of the Board of Governors. Our contact information is listed at the end of this newsletter. ✪

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Closely held businesses have not been immune from the recent economic downturn. Perhaps the silver lining in the dark economic clouds is the opportunity to minimize the eventual transfer tax on these businesses by in effect freezing the taxable value at current levels and taking advantage of the low interest rate environment via an installment sale to an Intentionally Defective Grantor Trust (“IDGT”). This article will explore how a directed corporate fiduciary can be used to increase the effectiveness of an IDGT which holds an interest in a closely held business.

An IDGT is an irrevocable trust designed to take advantage of a lack of coordination between the income tax and estate tax laws in the Internal Revenue Code. By giving the grantor certain powers over the trust, it is possible to structure an irrevocable trust to exclude the assets from the estate of the grantor while taxing the trust income to the grantor. Since the trust is ignored for income tax purposes, it is theoretically possible for the grantor to sell assets, such as an interest in an undervalued closely held business, to the trust for a low interest promissory note without any income tax consequences, thereby allowing the assets to appreciate inside the trust and outside of the transfer tax system. In addition, the IDGT can be structured as a multi-generational dynasty trust designed to benefit the grantor’s children, grandchildren and future descendants.

The IDGT technique combined with the leveraging opportunity of an undervalued business has the potential to drastically reduce the transfer tax burden on the business owner, but certain issues remain. An IDGT presents complex administrative problems, such as the calculation and payment of the promissory note installment payments, income tax reporting requirements and the continued management of the business. These issues are exacerbated if the grantor of the IDGT wishes the trust to last for several generations or more. As a result, the grantor may wish to name a corporate fiduciary as trustee of the IDGT.

A good corporate fiduciary will have the expertise and manpower to handle the administrative concerns of an IDGT over multiple generations. A downside to a corporate fiduciary is the expense involved, which is often based on a percentage of the assets held in the trust. Another downside is that a corporate fiduciary may not be willing to act as trustee of a trust where the majority of the value of the trust is in a single asset such as the closely held business. Many corporate fiduciaries would rather sell the business and invest in a diversified portfolio of stocks and bonds to avoid the risk of the business declining in value. Further, a grantor may not wish to have a corporate fiduciary actually manage his business and would prefer to have his children or trusted advisors manage the business inside the trust. When a grantor wants a corporate fiduciary to handle the trust administration duties, but also wants the trust to retain and manage a closely held business to take advantage of multi-generational leveraging opportunities, the best option may be a directed trustee arrangement.

I. WHAT IS A DIRECTED TRUSTEE?

Simply stated, a directed trustee is a trustee who is not responsible for and does not perform all aspects of trust administration. Instead, the trustee takes direction and instruction from a third party for certain functions of a trust. Often this third party is called a trust advisor or trust protector. A trust advisor or trust protector may be given authority to direct distributions from the trust, direct how the assets in the trust are invested, remove the trustee, or amend or even terminate the trust. This article focuses on a specific type of directed trustee arrangement, referred to herein as a “Special Holdings Director.”

A Special Holdings Director is essentially a trust advisor or trust protector who is responsible for the investment and management of certain assets in the trust. The Special Holdings Director can be anyone the grantor trusts, such as the spouse, trusted business advisors or even the beneficiaries themselves. While the corporate trustee retains the power and responsibility over the rest of the trust, including the investment of the other trust assets, the Special Holdings Director will make decisions regarding “special” assets such as the closely held business.
The idea is to reap the benefits of having a corporate trustee while ensuring that the undervalued business is efficiently managed and has time to grow. The key to this arrangement is to clearly delineate the duties and responsibilities of the trustee and the Special Holdings Advisor. To do that, we must consider the statutory framework authorizing directed trustees.

II. STATUTORY FRAMEWORK FOR DIRECTED TRUSTEES

Although it is arguable that a grantor has always had a common law right to divide duties between fiduciaries, Virginia law has explicitly recognized directed trustees for investment purposes for the last thirty years. Virginia Code § 26-5.2.C provides as follows:

“Whenever the instrument under which a fiduciary or fiduciaries are acting reserves unto the trustor, testator, or creator or vests in an advisory or investment committee or any other person or persons, including a cofiduciary, to the exclusion of the fiduciary or the exclusion of one or more of several fiduciaries, authority to direct the making or retention of investments, or any investment, the excluded fiduciary or cofiduciary shall be liable, if at all, only as a ministerial agent and shall not be liable as fiduciary or cofiduciary for any loss resulting from the making or retention of any investment pursuant to such authorized direction.”

In effect, this statute limits a directed fiduciary’s liability with respect to certain trust assets to faithfully carrying out the directions of an advisor to whom investment authority is given over those assets. This statute stands for the proposition that a court “cannot hold a trustee, or anyone else, liable for decisions that it did not and could not have made.” This is formidable protection for a directed trustee; unfortunately the statute no longer applies to trustees who are subject to the requirements and provisions of the Virginia Uniform Trust Code (“UTC”).

The UTC applies to revocable or irrevocable trusts as well as testamentary trusts subject to certain exceptions. Virtually all trusts used in modern estate planning fall under the terms of the UTC. Thus, the protections afforded directed trustees in Virginia Code § 26-5.2.C are not available to most trustees. Or are they?

The UTC takes a slightly different approach to the directed trustee issue. In Virginia Code § 548.08.B, the UTC provides as follows:

“If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.”

Instead of limiting the liability of the trustee to that of a “ministerial agent” as in Virginia Code § 26-5.2.C, the UTC simply requires the trustee to act in accordance with the exercise of the power. There are however, two crucial exceptions to this provision. First, the directed trustee must ascertain if the exercise of the power is manifestly contrary to the terms of the trust. Second, the directed trustee must not act in accordance with the exercise of the power if he knows the attempted exercise would constitute a serious breach of a fiduciary duty the trust advisor owes to the beneficiaries of the trust.

These two exceptions raise concerns regarding the duties and liability of a directed trustee. At a minimum, the UTC requires more oversight than that required of the “ministerial agent” in Virginia Code § 26-5.2.C. A directed trustee must monitor the actions of the trust advisor to ensure the trust advisor comports with the terms of the trust and does not breach his fiduciary duty. For example, a direction by a trust advisor with investment authority to retain a closely held business may seem appropriate at first. However, at what point does the continued retention of that business become a breach of the trust advisor’s fiduciary duty thus triggering liability for the directed trustee if they continue to act in accordance with the original instruction to retain the business? When the value drops by a certain percentage? Or when the trust advisor appoints himself CEO and hikes up his salary? What if the trust instrument specifically directs the sale of the business once certain milestones are reached? Has a directed trustee breached his duty to the beneficiaries if the directed trustee fails to ensure the trust advisor complies with the terms of the trust?

The nature of the monitoring duties of a directed trustee is unclear under the UTC. The official comment to the Uniform Trust Code as drafted by the National Conference of Commissioners on Uniform State Law indicates that a directed trustee
has only “minimal oversight responsibility.” Notably, the Virginia General Assembly did not include this official comment in the Virginia version of the UTC. There are no cases in Virginia that interpret a directed trustee’s duties under this statute. A directed trustee operating under the UTC provision may not know the exact scope of his duties until the beneficiaries sue for breach of trust.

Fortunately, there is a way for a grantor to change the UTC’s directed trustee provision. With few exceptions, the UTC specifically states that the terms of a trust prevail over any contrary UTC provisions. In effect, a grantor can elect to have the directed trustee governed by Virginia Code § 26-5.2.C by simply stating so in the trust agreement. However, in order to avoid confusion and possible litigation, the best approach may be to draft the trust instrument so the rights, duties and responsibilities of both directed trustees and trust advisors are clearly laid out. This is especially important when describing the duties of a Special Holdings Director since a Special Holding Director may only have authority over some of the trust assets.

III. DRAFTING APPROPRIATE PROVISIONS FOR SPECIAL HOLDINGS DIRECTORS

A. Definition of Special Holdings. As noted above, a Special Holding Director only has responsibility for certain “special” assets of the trust, such as a closely held business or certain stock holdings, referred to herein as “Special Holdings.” In order to make sure the trustee has investment authority over the other assets and the Special Holdings Director has authority over the Special Holdings, the trust instrument must clearly define the term “Special Holdings.” This can be accomplished in several ways. First, the Special Holdings might be defined by listing the specific asset that is to be managed by the Special Holdings Director. Second, the Special Holdings might be defined by the class of asset such as “all closely held business entities including, but not limited to, partnerships, limited liability companies and corporations that are not publicly traded.” Finally, it is important to give the Special Holdings Director the flexibility to release the Special Holdings and convert them to holdings subject to the trustee’s normal investment authority and responsibility. At some point, the reasons for keeping the Special Holdings may no longer be applicable. There must be some mechanism for the Special Holdings Director to turn these assets over to the trustee.

B. Role and Function of Special Holdings Director. The trust agreement should specify the scope of the Special Holding Director’s duties. This should include sole discretion regarding the purchase, sale, or retention of the Special Holdings as well as the exercise of all voting rights or similar rights with respect to the Special Holdings. The trust agreement should detail how the Special Holdings Director is to direct the trustee to take these actions. This could include options such as requiring a writing signed by all the Special Holdings Directors or designating or authorizing the designation of one Special Holdings Director to communicate with the trustee.

C. Role and Function of Directed Trustee. The duties of the directed trustee should be clearly laid out. This is the opportunity to vary the terms of the UTC to avoid confusion. At a minimum, the trust agreement should specify how much oversight must be exercised by the directed trustee. For example, the UTC forbids the trustee from following the Special Holdings Director’s instruction if he knows the attempted exercise would constitute a serious breach of a fiduciary duty the trust advisor owes to the beneficiaries of the trust. How much knowledge should a directed trustee be charged with? What he actually knows? What he should know with a little digging? What he should have known had he actively monitored the Special Holdings?

Perhaps the directed trustee should be specifically forbidden to monitor the Special Holdings and only be required to consider whether the specific instruction from a Special Holdings Director would be a breach of trust. If the directed trustee has actual knowledge of other facts which would cause the instruction to be a breach of trust, the directed trustee can refuse to honor the instruction. This would clarify the issue of monitoring while preserving some oversight by the directed trustee. However a particular grantor may desire more extensive oversight by the directed trustee. There is no clear cut answer to this question. Each drafter must decide what works best in a particular situation. Often, the level of oversight must be negotiated with the directed trustee.

D. Miscellaneous Provisions. The trust instrument should include mechanisms for the removal and
resignation of the Special Holdings Directors and should provide for successor Special Holdings Directors. This is especially important for the ongoing management of the business. For example, the grantor may not know which grandchild will be interested in participating in the business. The current Special Holdings Directors, presumably the grantor’s children or trusted business advisors, might be given the authority to name their own successors. This would help ensure that the proper individuals continue to be involved in the management of the business.

The trust instrument should specify if the Special Holdings Directors will be compensated for their service and how the compensation will be calculated. This is also true for the directed trustee. The manner and method of compensating the directed trustee should be negotiated before the trust is executed. The directed trustee should be willing to accept lower fees during periods in which a Special Holdings Director is functioning. During these periods, the directed trustee will have fewer assets to administer and may not have investment authority over any of the assets in the trust. A corporate fiduciary may be willing to serve as a purely administrative trustee for a flat fee during those periods when it has no investment responsibilities. When and if the Special Holdings Director converts the Special Holdings to normal holdings, the compensation for the corporate fiduciary may flip to a percentage based fee schedule.

One additional issue that may arise is whether to use Virginia law at all. Some states, such as Delaware, have developed a body of laws that is designed to provide heightened protection for the fiduciary in a directed trust situation. For example, Delaware’s directed trustee statute requires a directed trustee to act with “wilful misconduct” before he can be held liable for a loss. As a result, some corporate fiduciaries may request the trust be administered in a state such as Delaware. Some clients may be uneasy with trust administration outside of Virginia and may object to the additional cost of having the trust agreement reviewed by an attorney licensed in Delaware. Even if the trust is to be initially administered under Virginia law, it is a good idea to draft the trust agreement so the trustee or a trust advisor has the flexibility to change the situs of the trust in the future if it becomes advisable to do so.

IV. CONCLUSION

An IDGT, with properly structured directed trustee provisions, will allow a closely held business owner to take advantage of the administrative benefits of a corporate trustee, provide for the continued management of the business and make use of the leveraging opportunities related to an undervalued business. By utilizing this technique, the down economy can be converted into an opportunity.

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2 Generally, the promissory note must bear interest equal to or greater than the applicable federal rate for the month the promissory note is executed. See Internal Revenue Code § 1274(d). For example, a nine year promissory note with annual compounding executed in September of 2009 can have a fixed interest rate as low as 2.87%. See Rev. Rul. 2009-29.

3 See Virginia Code § 55-13.3.C. Although this statute is poorly drafted and the title of the statute seems to limit its effect to nondo- native transfers, the text of the statute states that the rule against perpetuities does not apply to personal property held in trust when the trust agreement opts out of the application of the rule.

4 If the spouse or beneficiaries of the grantor are to act as Special Holdings Director, the powers of the Special Holdings Director must be drafted to ensure no part of the trust assets will be includ- ed in their gross estates for estate tax purposes.

5 See Va. Code § 26-5.2.C.

6 Rollins v. Branch Banking and Trust Company of Virginia, 56 Va. Cir. 147, 149 (Virginia Circuit Court 2002).

7 Va. Code § 26-5.2.D. Subsection D was amended in 2006 when the Virginia Uniform Trust Code was enacted.

8 Va. Code § 55-541.02. Specifically the Virginia UTC applies to “express inter vivos trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the
trust to be administered in the manner of an express trust.” It also applies to “testamentary trusts, except to the extent that specific provision is made for them in Title 26 or elsewhere in the Code of Virginia, or to the extent it is clearly inapplicable to them.” The UTC does not apply to trusts used for business, investment or commercial transactions, such as land trusts, voting trusts and deeds of trust.

9 Va. Code § 55-548.08.B.

10 Id. Notably, subsection D of § 55-548.08 raises the presumption that a trust advisor, other than a beneficiary, is a fiduciary who does owe a fiduciary duty to the beneficiaries of the trust.


12 Va. Code § 55-541.05. The terms of a trust cannot vary (1) the requirements for creating a trust; (2) the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries; (3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve; (4) the power of the court to modify or terminate a trust under §§ 55-544.10 through 55-544.16; (5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Article 5; (6) the power of the court under § 55-547.02 to require, dispense with, or modify or terminate a bond; (7) the power of the court under subsection B of § 55-547.08 to adjust a trustee’s compensation specified in the terms of the trust which is unreasonably low or high; (8) the effect of an exculpatory term under § 55-550.08; (9) the rights under §§ 55-550.10 through 55-550.13 of a person other than a trustee or beneficiary; (10) periods of limitation for commencing a judicial proceeding; and (11) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

13 When listing a specific stock, care should be taken to state that the Special Holdings also include stock for which the specified stock is changed or for which the specified stock may be exchanged. This is especially important if the specified stock goes through a merger.

14 See Va. Code § 55-548.08.B.

15 See 12 Del. C. 3313(b).

U.S. citizens and permanent residents are subject to U.S. income tax on their worldwide income, regardless of where they reside in the world. To free oneself from the U.S. income tax regime imposed on a U.S. citizen or permanent resident’s worldwide income, such persons must expatriate from the U.S. to become non-resident aliens (“NRAs”). Persons deemed NRAs generally enjoy a more tenuous relationship with the U.S. income tax system, only having to encounter it when income is generated from U.S. situs assets, a U.S. business or another U.S. source, and, additionally, when making gifts or bequests of assets considered to have a U.S. situs subject to the U.S. estate tax and gift tax rules.

While U.S. expatriates may enjoy the status of an NRA, they may also qualify as “covered expatriates” subject to the expatriation tax regime or so called exit tax rules which impose immediate as well as possible future tax liabilities on these expatriates. The recently enacted Heroes Earning Assistance and Relief Tax (“HEART”) Act not only provided tax relief to military personnel but also changed the exit tax rules for those who expatriate from the U.S. after June 16, 2008. The new exit tax changes the former rules so substantially that not only will it deter some potential U.S. expatriates, but it may also discourage those who are considering making the U.S. a permanent home. This article discusses who is subject to the new exit tax rules and what the two new tax regimes under these rules, the mark-to-market tax and the succession tax, impose on such an individual. Second, this article discusses the potential implications of the new exit tax rules and what issues may arise from their adoption. All references to code sections in this article are to the Internal Revenue Code unless otherwise indicated.

I. THE COVERED EXPATRIATE

HEART substantially changes the expatriation tax regime so that a recent or future expatriate who finds him or herself subject to the exit tax rules will not only endure a lifetime relationship with the U.S. tax authorities, instead of the more limited ten year alternative income tax regime under § 877 that
applied to those who expatriated before June 17, 2008, but also face an immediate mark-to-market tax on their worldwide assets. Prior expatriation tax rules, most recently modified by the AJCA in 2004, and prior to that by HIPAA in 1996, continue to apply to those who expatriated before June 17, 2008. Those expatriates who qualify as “covered expatriates” are subject to the exit tax rules. A covered expatriate is either a U.S. citizen or a long term resident, who relinquishes, abandons or loses either his or her U.S. citizenship or permanent resident status and, as of the day before expatriation, has:

1) a net worth of $2 million or more,
2) an average annual net income tax liability (as defined in § 38(c)(1)) over the 5 preceding taxable years of $124,000 or more (adjusted for inflation, $145,000 for 2009), or
3) failed to certify under penalty of perjury that he or she has complied with all U.S. federal tax obligations for the 5 preceding years or failed to submit evidence of such compliance.

There are two exceptions that may exclude a U.S. citizen from otherwise qualifying as a covered expatriate: if the expatriate is a person born as a citizen of both the U.S. and another country, who continues to be a citizen of, and is a tax resident of, that other country as of expatriation, and has either been (i) a U.S. resident for not more than ten out of fifteen of the taxable years immediately preceding expatriation, or (ii) a person who relinquished U.S. citizenship before reaching age eighteen and a half, provided he or she had been a U.S. resident for no more than ten taxable years before such relinquishment.

The net worth test takes into account all of the covered expatriate’s interest in property that would be taxable as a gift under Chapter 12 of the Internal Revenue Code if such property were transferred before expatriation. Property for purposes of this test includes all property interests, regardless of whether they produce income or gain. The value of each property interest should be based on a good faith appraisal and need not be made by a qualified appraiser for this purpose, although the principles of § 2512 generally apply. An expatriate’s beneficial interest in a trust is also included in this test, but the value of the beneficial interest is determined by a two step process. First, all interests in the trust must be allocated to the beneficiaries, including potential beneficiaries. This first step is determined based on all relevant facts and circumstances, such as the terms of the trust, the grantor’s written wishes, the history of trust distributions and functions performed by a trust protector or similar advisor. If such interests cannot be allocated to the beneficiaries under this analysis, then interests of the trust shall be allocated to the beneficiaries based upon the principles of intestate succession under the Uniform Probate Code based on the grantor’s intestacy. Second, once beneficial interests are allocated, any such interest allocated to the expatriate is valued under the principles of § 2512 and related regulations without regard to any prohibitions or restrictions on such interest. Note that this test includes an expatriate’s beneficial interest in any trust, regardless of whether it is foreign or domestic.

The second test is based on the expatriate’s average tax liability over the five years preceding expatriation. If the expatriate’s tax liability exceeds the threshold, adjusted for inflation, and currently at $145,000 for 2009 and 2010, then he or she is deemed a covered expatriate. Although this test does not specifically address whether the net income tax on an expatriate’s joint tax return should be included, at least one notice issued by the Internal Revenue Service (“IRS”) affirms the inclusion of the net income tax on an expatriate’s joint tax return.

The third and final test that could deem an expatriate subject to the expatriation tax rules is the most inadvertent way for an expatriate to fall into this new tax regime and is typically the easiest to avoid. This test deems an expatriate subject to the exit tax rules until he or she certifies compliance with all federal tax obligations of the five years preceding expatriation. To do this, the expatriate must complete and file Form 8854 when filing Form 1040R with the IRS for the year of expatriation.

II. THE MARK-TO-MARKET TAX – SECTION 877A

Covered expatriates who expatriate after June 16, 2008, will find themselves immediately subject to a mark-to-market tax on their world wide assets requiring the expatriate to recognize gain as if those assets were sold for their fair market value as of the day prior to expatriation. If a property was acquired before the expatriate’s U.S. citizenship or
permanent residence, the expatriate’s basis in that property, for purposes of this tax, will be the fair market value of that property at the time the expatriate became subject to U.S. federal tax laws as a permanent resident. There is some relief to the mark-to-market tax since the covered expatriate may exclude the first $600,000 of gain (which is indexed for inflation so that the excluded amount for 2009 is $626,000, and $627,000 for 2010). Actual subsequent gains and losses realized are then adjusted for gains and losses recognized under the mark-to-market tax, without including the $600,000 exclusion. The covered expatriate may also choose to make an irrevocable election on any or all property to defer the recognition of gain but will be required to post adequate security, pay interest on the deferred tax, and irrevocably waive any benefit under a U.S. tax treaty with respect to such tax assessment. In addition, to make such an election, the covered expatriate must enter a tax-deferral agreement with the IRS which includes, among other things, appointment of a U.S. agent. If such an election is made to defer the mark-to-market tax, the deferred tax must be paid once the property is actually disposed of.

There are three groups of assets that will not be subject to the mark-to-market tax but are subject to other taxes upon expatriation or upon receipt: (i) deferred compensation items, (ii) specified tax-deferred accounts, and (iii) any interest in a non-grantor trust. If a covered expatriate has one or more of these types of accounts or interests the day before expatriation, IRS Form W-8CE must be filed with each payor of any of these items within 30 days of expatriation. This form effectively notifies the payor of such account or interest that the covered expatriate is subject to these special tax rules.

Deferred compensation items are divided into two categories. If the payor of a deferred compensation item is a U.S. person or elects to be treated as a U.S. person, and the covered expatriate notifies the payor of his or her status and irrevocably waives any rights to claim under a U.S. treaty to reduce withholding on such item, then the payor of such an eligible deferred compensation item shall withhold thirty percent of any taxable payment as tax upon distribution to the covered expatriate. For all other deferred compensation items, an amount equal to the present value of the expatriate’s accrued benefit shall be treated as being received by the expatriate on the day before expatriation. Special rules apply to § 83 property.

In the case of specific tax-deferred account items, the expatriate is treated as receiving his or her entire interest in the account on the day before expatriation. However, actual (subsequent) distributions will be adjusted for tax purposes taking into account this deemed distribution.

With respect to nongrantor trusts of which the covered expatriate was a beneficiary as of the day before expatriation, the trustee must withhold thirty percent of the taxable portion of any direct or indirect distribution of property to the covered expatriate. The expatriate, however, may elect to be taxed immediately on his or her interest in the trust, effectively reducing or canceling the withholding requirement on subsequent distributions. The taxable portion is the portion that would be includible as income if the expatriate were subject to tax as a U.S. citizen. If property is distributed to the covered expatriate, the trustee must declare any gain as if the property was sold for its fair market value on the date of distribution to the covered expatriate. Note, this withholding rule applies to both domestic and foreign nongrantor trusts.

III. COVERED GIFTS AND COVERED BEQUESTS – THE SUCCESSION TAX UNDER SECTION 2801

In addition to the new mark-to-market tax under § 877A, HEART also introduced § 2801 to subtitle B of the Code which provides new succession tax rules to replace the previous special transfer tax rules for covered expatriates. Under § 2801, a transfer is subject to a succession tax if it is a “covered gift” or a “covered bequest”. A covered gift is a gift received directly or indirectly by a U.S. person from a donor who at the time the gift is made is a covered expatriate. Similarly, a covered bequest is a bequest received directly or indirectly by a U.S. donee from the estate of a covered expatriate. The covered gift or bequest is subject to the highest estate or gift tax rate available which means possibly higher transfer tax rates may be imposed than if the transfer was made by a U.S. donor. Although the U.S. donee is liable for the tax imposed under § 2801, such donee may exclude the first $13,000 of gifts or bequests received from covered expatriates in the aggregate in each year. Thus, the donee can only exclude the first $13,000 of covered gifts and bequests received in that year regardless of the num-
ber of covered expatriate donors involved.\textsuperscript{45} Both donor and donee seem to lose out on these new succession tax rules. First, the donor’s opportunity to reduce his or her estate by gifting is diminished because the donee pays the tax. In turn, the donee receives a significantly lower net value in the gift because he or she carries the burden of paying the gift or estate tax due \textit{post} transfer.

Covered gifts to trusts are treated differently depending on whether the trust is domestic or foreign. If domestic, the trust is treated as a U.S. citizen so that the trust shall pay the gift tax on the covered gift.\textsuperscript{46} If a foreign trust receives a covered gift, any distribution to a U.S. citizen or resident that is attributable to the covered gift shall trigger the tax under § 2801 which is imposed on the U.S. beneficiary.\textsuperscript{47} A foreign trust may make a revocable election to be treated as a domestic trust for purposes of paying the succession tax.\textsuperscript{48} However, the beneficiary who pays such tax may take a § 164 income tax deduction to the extent such tax is imposed on the portion of the distribution included as income to the beneficiary.\textsuperscript{49} Three significant exceptions apply to the succession tax rules. First, any transfer that would be entitled to a marital or charitable deduction is not included as a covered gift or bequest.\textsuperscript{50} Hence, a covered expatriate may gift and bequest to a U.S. spouse or gift up to the applicable amount under § 2523(i), currently at $133,000\textsuperscript{51}, to a non-U.S. spouse, without being subject to § 2801. Second, if the covered gift or bequest is a taxable gift shown on the donor’s gift tax return or estate tax return, such property is not included as a covered gift or bequest.\textsuperscript{52} Third, the succession tax is reduced by any foreign gift or estate taxes paid on the covered gift or bequest.\textsuperscript{53} The new mark-to-market tax and succession tax rules are a distinct break with prior exit tax rules, and, in turn, provide new challenges to the potential expatriate and the potential U.S. immigrant. While the prior expatriation tax rules\textsuperscript{54} subjected the covered expatriate to a ten year shadow period, which imposed for ten years on the covered expatriate an alternative income tax regime on U.S. source income and gain, as well as modified estate and gift tax rules, the new succession tax rules continue throughout the expatriate’s lifetime and life of his or her estate and so may extend significantly beyond the ten year period under the former exit tax rules. Thus, although a covered expatriate might leave the U.S. early in life, he or she may forever be subject to the succession tax rules of § 2801, possibly long after the covered expatriate’s ties with the U.S. end.

\textbf{IV. COMMENTARY}

The preferred option for a person considering expatriating is to make sure he or she does not qualify as a covered expatriate under the net worth test. A number of strategies are possible for the expatriate to reduce his or her net worth below the $2 million threshold if he or she is willing to gift assets prior to expatriation that he or she had already planned to gift later or at death. While gifting outright to younger family members may not be appropriate, trusts, if set up significantly ahead of the expatriation date, may enable the expatriate to determine how and when the assets will be available to its beneficiaries without the trust being included under the net worth test.

Depressed values under the present economy will also help some expatriates fail the net worth test. If an expatriate cannot avoid qualification as a covered expatriate, the expatriate should gift as much of his or her assets as he or she is comfortable with before expatriation to the extent the covered expatriate can fully utilize his or her lifetime gift exemption. For those expatriates who intend to transfer assets to U.S. persons, it may be worth incurring gift taxes on transfers, where there is no available gift exemption, to avoid burdening the donee with a succession tax liability and a lower net value on such gifts. Gifting before expatriation will also remove those assets that would otherwise be subject to the more immediate mark-to-market tax.

Once subject to § 877A, the most immediate concern the expatriate will face is whether he or she has sufficient liquidity to pay the mark-to-market tax on his or her worldwide property, although Congress seems to have anticipated this by allowing an irrevocable deferral of such taxes. Whereas the prior ten year shadow rule for those who expatriated before June 17, 2008, permitted the covered expatriate to avoid expatriation taxes by delaying disposition of assets until after such ten year period, the covered expatriate is faced with paying up front the gain on a deemed sale of most of his or her assets, regardless of whether those assets are disposed of tomorrow or at a much later death. If an election is made to defer the tax, providing the required adequate security as well as the ongoing accrual of interest on the tax may be deemed as significant penalties to electing such a deferral.
However, the depressed values under the present economy may enable the covered expatriate to report lower fair market values which would cause recognition of less gain, for purposes of the mark-to-market tax. Although it is likely that minority and lack of marketability discounts may be taken for closely held business interests, one should also expect the IRS to possibly challenge such valuation. Thus, more cost and effort may be required by the covered expatriate who employs such discounts.

The succession tax presents significant challenges for gifting to U.S. donees. Under the prior expatriation tax rules, particular assets, such as intangibles and stock in a controlled foreign closely-held company that held U.S. situs assets were subject to U.S. transfer taxes during the covered expatriate’s applicable 10 year shadow period. Although under the new exit tax rules, a covered expatriate may be able to gift, for example, intangibles without incurring the gift tax, with few exceptions a gift of any type of asset to a U.S. donee at anytime during the covered expatriate’s life or at death, is subject to the succession tax. Under the prior rules, a covered expatriate could avoid such taxation by holding onto those assets (and not dying) until the expiration of the 10 year shadow period. The new exit tax rules may subject the covered expatriate to a succession tax on assets whose appreciation or purchase may occur long after expatriation, and possibly long after the covered expatriate has held significant ties with the U.S. Thus, pre-expatriation planning to avoid transfers subject to the succession tax is essential for those planning to transfer assets to U.S. donees. Depending on the timing of the gift and the type of trust created, transfers to a trust may not be subject to the exit tax rules.

The new exit tax rules will both encourage and delay expatriation. Receiving a sizable bequest or inheritance with a step-up in basis may not trigger considerable gain for purposes of the mark-to-market tax if expatriation is sooner rather than later. Expecting substantial assets to enjoy significant appreciation may also likely expedite expatriation if expatriation was a consideration before. Covered expatriates who do not intend to transfer assets to U.S. persons will likely not be deterred from exiting the U.S. For these persons, expatriation today presents a great opportunity to successfully cut off ties to the U.S. tax system for all non-U.S. situs assets and non-U.S business and source income without having to wait an additional ten years as required for those who expatriated under the former exit tax rules. In addition, covered expatriates will no longer be subject to the thirty day rule which essentially punished those covered expatriates who visited the U.S. for more than thirty days in any calendar year by subjecting them to U.S. taxation as a U.S. person for that year. However, those persons whose family members are and will continue to be U.S. persons may need to plan more carefully and delay or, in some cases, abandon expatriation since post-expatriation transfers to family members, without careful pre-expatriation planning, will likely trigger the succession tax.

Further, the covered expatriate’s resident jurisdiction may subject the covered expatriate to transfer and income taxes of its own on the disposition of the same assets covered under the U.S. exit tax rules. While § 877A allows for an adjustment to the basis of those assets subject to the mark-to-market tax upon its actual (and later) disposal, the adjustment may only be helpful with respect to future U.S. tax liability. There is no guarantee that every foreign taxing jurisdiction will recognize an adjusted basis in accordance with U.S. tax rules. Double taxation for transfers to a U.S. donee, especially without an applicable U.S. treaty (with an applicable provision for such treatment under the exit tax rules), is likely.

While the exit tax rules have always placed significant exit tax burdens on covered expatriates, the mark-to-market tax under § 877A may be the most onerous expatriation tax to date. However, once such tax is paid, the covered expatriate is essentially treated like any other NRA - so long as future transfers do not include U.S. donees. Although it is likely that these new rules will deter and offer significant disincentives to expatriate from the U.S., the cost may be a similar and comparable deterrence for those with substantial wealth who are considering moving permanently to the U.S. but are not willing to risk an income tax expatriation penalty and a lifelong relationship with the U.S. tax system upon an anticipated future exit.

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1 Defined under § 7701(b) for income tax purposes.

2 For those U.S. citizens or permanent residents who find themselves residing in a treaty country, a foreign tax credit is generally available for those foreign taxes paid on the same items of income, but this relief does not lift the burden of filing U.S. income tax returns.


4 If § 877A applies to a person, such person must also file an annual information statement with the Secretary. § 6039G which essentially means in the year of expatriation unless deferral of tax under § 877A is elected.


7 A long term resident is a permanent resident as defined under § 7701(b)(6) who has retained such status for at least 8 of the 15 preceding taxable years ending with the year of his or her expatriation. § 877A(g)(5) and § 877(e).

8 The date of expatriation is the earlier of the dates a U.S. citizen (i) relinquishes his or her U.S. nationality to the Department of State (and such relinquishment is subsequently approved), (ii) renounces his or her nationality before a U.S. diplomatic or consular officer (and such renouncement is subsequently approved), (iii) is issued a Certificate of Loss of Nationality by the Department of State, or (iv) is issued a court order canceling his or her certificate of naturalization. § 877A(g)(4). The expatriation date for a long term permanent resident is the date he or she ceases to be a lawful permanent resident as defined under § 7701(b)(6) who has retained such status for at least 8 of the 15 preceding taxable years ending with the year of his or her expatriation. § 877A(g)(5) and § 877(e).

9 § 877A(g)(1)(A).

10 § 877A(g)(1)(B).

11 The net worth test is further described under Section III of Notice 97-19, 1997-1 C.B. 394, Obsoleted in part by Notice 2005-36 (“Notice 97-19”).


14 “Determination of tax liability. For purposes of the tax liability test, an individual’s net U.S. income tax is determined under § 38(c)(1). An individual who files a joint income tax return must take into account the net income tax that is reflected on the joint income tax return for purposes of the tax liability test.” Section III, Notice 97-19.

15 Form 8854 is also the form used by covered expatriates to report information on an annual basis while subject to § 877, and for some covered expatriates as described in Section 8.C. of Notice 2009-85, 2009-45 I.R.B.

16 For purposes of this test, an asset is any interest in property that would be taxable as part of the covered expatriate’s estate as if she or he died the day before expatriation without reference to § 2010 through § 2016. Notice 2009-85.

17 Valuation principles used for federal estate tax purposes should be applied to determine the fair market value under § 2031 but without regard to § 2032 and § 2032A. For rules of valuation of beneficial interests in trusts, see Section 3.A., Notice 2009-85.

18 § 877A(a)(1).

19 § 877A(h)(2). An individual may elect not to have this section apply; such election is irrevocable. For exceptions to this basis rule, see Section 3.D., Notice 2009-85.


21 Rev. Proc. 2009-50 at § 3.27.

22 § 877A(a)(3).

23 § 877A(a)(2).

24 § 877A(b). Adequate security is defined as a bond conditioned on the payment of tax (and interest thereon), and which meets the requirements of § 6325. Alternatively, adequate security may also be in another form, including letters of credit, which meets the Secretary’s requirements as the Secretary may prescribe. § 877A(b)(4)(ii). To make this election to defer, the expatriate must also irrevocably waive any right under a treaty with the U.S. that would preclude assessment or collection of any tax imposed by §
Section 3.E. of Notice 2009-85. For a sample tax-deferral agreement, see Appendix A, Notice 2009-85.

Deferred compensation items include the covered expatriate's interest in qualified § 219(g)(5) plans, interests in foreign pension, retirement or similar plans, and interests in property to be received in connection with services performed not previously taken into account in accordance with or under § 83. § 877A(d)(4).

A specified tax-deferred account item means an individual retirement plan (as defined in § 7701(a)(37)) other than a plan described under § 408(k) or (p), a “§ 529” qualified tuition plan, a “§ 223” Coverdell education savings account, a “§ 223” health savings account, and a “§ 220” Archer MSA. § 877A(e)(2).

Within 60 days of receipt of a completed Form W-8CE, the custodian of the tax deferred account must inform the covered expatriate of the value of the entire interest as of the day before expatriation. Section 6, Notice 2009-85.

Although not expressly stated in § 877A, instructions under Part B, Line 7.d of Form 8854 (2008) permit such immediate tax recognition of interest in a nongrantor trust if certain requirements are met which includes, in part, obtaining a letter ruling re the value of such interest from the I.R.S. See Section 7, Notice 2009-85.

If a nongrantor trust converts to a grantor trust subsequent to a covered expatriate’s expatriation and the covered expatriate is deemed an owner of the trust, then the conversion is deemed a taxable distribution under § 877A(f)(1) to the extent the trust is owned by the covered expatriate. Section 7, Notice 2009-85.

The expatriation tax rules were first introduced by the Foreign Investors Tax Act of 1966 (FITA), P.L. 89-809, and then substantially modified twice: first, by the HIPAA in 1996, and second, by the AJCA in 2004.

In particular, the prior rules that subjected covered expatriates to capital gains tax would no longer apply to those who expatriate after June 16, 2008, so that, under the NRA rules, investment in U.S. securities without this tax would be an option immediately after expatriation. Further, the portfolio interest exemption under § 2105(b) would no longer be denied under § 2107 to such covered expatriates.

For example, if a permanent resident (i.e., green card holder) did not expatriate but instead established a non-U.S. domicile, then he or she could transfer assets to U.S. family members under the regular NRA transfer tax rules, although he or she would still be subject to U.S. income tax rules.
I. SCOPE NOTE

The laws related to Durable Powers of Attorney ("DPAs") have largely evolved from the common law of agency and are steadily moving toward a statutory framework. The statutory law is moving from relatively short statutes amending the common law of agency to a comprehensive framework supplemented by the common law. The driving force behind this trend is the desire for increased acceptance and use of DPAs. However, DPAs are still relatively new legal tools. Case law and statutes regarding their interpretation and construction continue to develop and vary from state to state.

The Uniform Power of Attorney Act ("UPOAA") was promulgated in 2006 by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in an attempt to bring uniformity to this area of the law, which is rapidly emerging as a significant, if not vital, estate planning tool. A UPOAA bill was introduced into the Virginia General Assembly in January 2009 and passed with a provision that requires the UPOAA to be re-enacted in the 2010 Session in order to become effective. The authors recommend that the General Assembly re-enact the UPOAA in the 2010 Session with the amendments suggested in this article.

II. INTRODUCTION

People are living longer. Due to medical advances, the fastest growing segment of the U.S. population is individuals over the age of sixty-five. However, with increased age comes the increased likelihood that an individual will suffer some sort of disability or incapacity, during which they will require assistance with the management of their affairs. As such, almost everyone will eventually face a situation where they will have to assist an aging parent with the management of his or her affairs. Most attorneys advise of the importance of planning for the management of one’s own affairs in the case of disability or incapacity, often suggesting a durable power of attorney ("DPA"). A DPA is an essential disability and incapacity planning tool which allows a principal to appoint an agent to manage the principal’s property, finances, and personal affairs. DPAs are considered an inexpensive and easy-to-create alternative to guardianship or conservatorship, and they have become a standard tool in estate planning and elder law.

There is no single appropriate DPA form. Instead, DPAs are “extremely complex, powerful and flexible legal instruments that create significant legal authority, duties, and obligations.” While forms may make creating a DPA easier, a single form often does not take into account the substantial differences among individual clients. To meet specific client needs, attorneys should spend time educating themselves, as well as their clients, about the various drafting options available in order to customize the DPA.

This is especially important with ever-changing family dynamics in today’s society.

A. Early History. Under the common law, a power of attorney became ineffective upon the principal’s incapacity. It was not a useful tool to manage the affairs of an incapacitated principal because the principal’s loss of capacity terminated the agent’s actual authority. In 1954, states began to change this common law rule by statute. Virginia became the first state to provide for the continuation of the agency relationship if the instrument expressly stated that it survived the principal’s incapacity. With the promulgation of the Uniform Probate Code in 1969 and the Uniform Durable Power of Attorney Act...
(“UDPAA”) in 1979, the adoption of DPA statutes became widespread.

B. Recent Developments. There has been an explosion in the use of DPAs and resulting litigation. Many states have responded to the increase in litigation by revising their state DPA statutes to address perceived problem areas. In 2005, the American Law Institute adopted and promulgated the Restatement (Third) of Agency, which recognizes DPAs. Today, all fifty states and the District of Columbia have enacted DPA statutes. However, “most of these statutes are brief and rely heavily on the common law of Agency for the construction and interpretation of DPAs.”

In 2002, NCCUSL conducted a national study comparing state DPA statutes. The study revealed that, despite initial uniformity among state DPA statutes, there was a growing divergence. Specifically, the NCCUSL study found that a majority of states had begun to enact non-uniform provisions to deal with specific matters upon which the UDPAA was silent. These matters included execution requirements, successor agents, portability provisions, and sanctions for third-party refusal to accept DPAs. Responses to the NCCUSL survey demonstrated a high degree of consensus about many needs that should be addressed by DPAs such as: (1) improving portability; (2) including safeguards, remedies, and sanctions for abuse by an agent; (3) protecting the reliance of other persons on a power of attorney; and (4) including remedies and sanctions for third-party refusal to honor a DPA.

As a result of the survey, NCCUSL adopted and promulgated the UPOAA in 2006. The UPOAA “codifies both state legislative trends and collective best practices, and strikes a balance between the need for flexibility and acceptance of an agent’s authority [by third parties] and the need to prevent and redress financial abuse.” The UPOAA is basically “a set of default rules that preserve a principal’s freedom to choose both the extent of an agent’s authority and the principles to govern the agent’s conduct.” Where the UPOAA is silent, the common law rules of agency apply. The UPOAA is similar to the Uniform Trust Code (“UTC”) in that it is a comprehensive statute providing few mandatory rules and many default rules that can be altered by the draftsman. One significant feature of the UPOAA is the inclusion of an optional statutory form DPA, an attempt to add simplicity to the process of creating a DPA.

As of 2009, Idaho, New Mexico, Nevada, Maine, and Colorado have adopted the UPOAA. However, Illinois, Indiana, Maryland, Minnesota, Montana, and Oregon, along with Virginia, have all introduced UPOAA bills into their state legislatures in 2009. The AARP supports the enactment of the UPOAA.

C. History of the UPOAA in Virginia. Virginia currently has very limited statutes dealing with powers of attorney. Where Virginia statutes are silent, the common law of agency applies. Prior to the development of the UPOAA, Virginia legislators had never fully considered what default rules should be in place to protect principals and third parties and encourage acceptance of powers of attorney. As both the use of powers of attorney and litigation surrounding their use continue to rise, Virginia—as well as all states—should have a comprehensive set of laws in place to define the scope and limits of powers of attorney. There are several states that already have comprehensive statutes pertaining to powers of attorney. As such, the need for legislation such as the UPOAA may not be as great in those states. However, as more states continue to enact the UPOAA, every state should consider its adoption to facilitate uniformity.

Shortly after the UPOAA was developed, the Virginia Bar Association (“VBA”) Trust and Estate Section formed a sub-committee to study the UPOAA and assess the impact of its enactment on current Virginia law. The sub-committee met regularly to discuss the UPOAA and revised the Act where it felt Virginia law was superior. Additionally, the VBA sub-committee consulted with various organizations, including the Virginia Bankers Association and the AARP to solicit feedback regarding the UPOAA. The modified UPOAA was introduced into the Virginia House of Delegates as House Bill 950 in the 2008 Session—primarily to give notice of the VBA's
intention to seek its enactment the following year.\textsuperscript{37} The bill was not pursued and was left in the House Commerce and Labor Committee.\textsuperscript{38} In the fall of 2008, the sub-committee again recommended the modified version of the UPOAA to the Virginia General Assembly for enactment.\textsuperscript{39} In early 2009, the Act was re-introduced—this time in the Virginia Senate as Senate Bill 855.\textsuperscript{40} The Virginia Bankers Association and the AARP joined the VBA in recommending enactment of the UPOAA.\textsuperscript{41} The General Assembly listened, and enacted the bill with amendments made by the House of Delegates and a re-enactment provision that provides: “[T]he provisions of this Act shall not become effective unless reenacted by the 2010 Session of the General Assembly.”\textsuperscript{42}

III. OVERVIEW OF THE VIRGINIA UPOAA

A. Article 1: General Provisions.

1. UPOAA Section 101: Short Title. The title “Uniform Power of Attorney Act” does not contain the word “durable” in it.\textsuperscript{43} Thus, the Act governs both durable and nondurable powers of attorney.

2. UPOAA Section 102: Definitions. Several terms that are defined in the UPOAA are worth mentioning. For example, the term “Agent” replaces “Attorney-in-Fact.” This was done to address public confusion about the difference between an attorney-in-fact and an attorney at law.\textsuperscript{44} Virginia Code section 11-9.1 and related sections use both terms.\textsuperscript{45} Additionally, the term “Incapacity” is used in the UPOAA instead of “Disability.”\textsuperscript{46} A disability does not necessarily render an individual incapable of managing his or her property or business affairs.\textsuperscript{47} Virginia also eliminated individuals “who are detained, including incarcerated in the penal system,” from the list of those persons deemed to have an “incapacity.”\textsuperscript{48} This change complies with existing Virginia Code section 53.1-221(D), which provides that, unless a committee has been appointed, an individual who has been convicted of a felony and sentenced to confinement in a state correctional facility continues to have the same capacity, rights, powers, and authority over his property and affairs that he had prior to the conviction and sentencing.\textsuperscript{49}

Practice Tip. The UPOAA does not require that a power of attorney be in paper form. The UPOAA defines a “Power of Attorney” as a writing or other record that grants an agent authority to act for the principal.\textsuperscript{50} The term “Record” is defined as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.”\textsuperscript{51} Therefore, a power of attorney may be in electronic form.

3. UPOAA Section 103: Applicability. The UPOAA does not apply to powers coupled with an interest in the subject of the power, medical powers of attorney, proxy or voting rights for an entity, or powers created on a government form for a government purpose.\textsuperscript{52} Additionally, the UPOAA should not be applicable to a designation of a person to make arrangements for disposition of remains.\textsuperscript{53} The authors recommend that Virginia Code section 26-71.03—UPOAA section 103’s Virginia counterpart—be amended to expressly provide that the law does not apply to these designations.

4. UPOAA Section 104: Power of Attorney is Durable. Under the UPOAA, a power of attorney is durable unless it expressly states otherwise.\textsuperscript{54} This is a major change from the common law, where a power of attorney had to contain the following provision or words of similar intent: “This power of attorney (or his authority) shall not terminate on disability of the principal.”\textsuperscript{55}

Practice Tip. Even though the UPOAA automatically presumes durability unless the document states otherwise, it is recommended that a power of attorney expressly state that it survives the principal’s incapacity.

5. UPOAA Section 105: Execution of Power of Attorney. A power of attorney must be signed by the principal or in the principal’s conscious presence by another individual at the principal’s direction.\textsuperscript{56} A signature is presumed to be genuine if acknowledged before a notary public.\textsuperscript{57} Although acknowledgment of the principal’s signature is not mandatory under the UPOAA, only an acknowledged signature carries the
statutory presumption of validity.58

Practice Tip. To help insure that a durable power of attorney will be recognized in a state that has not enacted the UPOAA, the principal’s signature should be witnessed by two unrelated, disinterested witnesses. Some states require that powers of attorney be witnessed or executed in the same manner as a will or a deed.59 Witnesses can also testify to the capacity of the principal at the time the power of attorney is executed if the power of attorney is ever challenged on the basis of the principal’s lack of capacity. Additionally, any power of attorney that may have to be recorded in the office of a clerk of court (1) should be acknowledged; (2) each individual’s surname only, where it first appears, should be underscored or capitalized; (3) each page should be numbered; (4) names of all grantors and grantees should be listed; and (5) the first page should show the name of the draftsperson.60 The power of attorney should also comply with the requirements of the State Library Board for the creation, storage, and filing of public records.61

6. UPOAA Section 106: Validity of Power of Attorney. This section recognizes the validity of powers of attorney created under other law and encourages their portability. The UPOAA does not affect the validity of pre-existing powers of attorney executed under prior law, powers of attorney validly created under the law of another jurisdiction, or military powers of attorney.62 Virginia added a statement that powers of attorney created according to the laws of another state are valid in the Commonwealth if the power of attorney was executed outside of Virginia.63 Except as otherwise provided by statute other than the UPOAA,64 photocopies and electronically transmitted copies have the same force and effect as the original.65

The UPOAA is silent on the issue of whether a power of attorney must be delivered to the agent in order for it to be valid. The omission of a delivery requirement from the UPOAA means that delivery by the principal to the agent is not necessary for the validity of a power of attorney. However, where the UPOAA is silent, the common law applies.66 Cases from various common law jurisdictions vary as to whether delivery of the power of attorney to the agent is required for validity.67 Virginia common law is silent, but current Virginia statutory law addresses this concern by expressly eliminating the delivery requirement.68 If the UPOAA is adopted, current Virginia Code section 11-9.7—the statute eliminating the delivery requirement—will be repealed. To specifically address this issue and to avoid confusion, the Virginia UPOAA should be amended to retain this statute.

7. UPOAA Section 107: Meaning and Effect of Power of Attorney. The UPOAA clarifies that powers of attorney are governed by the law of the jurisdiction indicated in the power of attorney or, if not indicated, by the law of the jurisdiction where the power of attorney was created.69

8. UPOAA Section 108: Nomination of Conservator or Guardian—Relation of Agent to Court-Appointed Fiduciary. The UPOAA allows a principal to nominate a conservator or guardian for consideration by the court in the event that protective proceedings begin after the principal executes a power of attorney.70 The Virginia version of the UPOAA eliminated the optional statement, which directs the court to appoint a guardian or conservator in accordance with the principal’s most recent nomination.71 The UPOAA gives deference to the principal’s choice of agent by providing that the agent’s authority continues despite the appointment of a guardian or conservator, unless the court decides to limit or terminate the agent’s authority.72

9. UPOAA Section 109: When Power of Attorney is Effective. The UPOAA establishes a default rule that a power of attorney is immediately effective unless the principal chooses to create a “springing” power of attorney.73 This default rule is consistent with existing Virginia law.74 Under the UPOAA, if the principal creates a springing power of attorney and has not designated an individual to make the determination that the principal is incapacitated, then a physician, licensed psychologist, attorney, judge, or appropriate governmental official is authorized to make the determination.75 The Virginia ver-
sion of the UPOAA narrowed the term “physician” by stating that the capacity evaluation should be made by the “the principal’s attending physician and a second physician or licensed clinical psychologist after personal examination of the principal . . . .”76 Additionally, under the UPOAA, a person authorized to verify the incapacity of the principal is the principal’s representative for purposes of the Health Insurance Portability and Accountability Act (“HIPAA”), which includes obtaining access to the principal’s health-care information and communicating with the principal’s health-care provider.77

10. UPOAA Section 110: Termination of Power of Attorney or Agent’s Authority. The UPOAA expressly provides a list of events that will terminate the power of attorney78 or the agent’s authority.79 A power of attorney will not become ineffective due to a lapse of time since its execution.80 To effectively revoke a power of attorney, a subsequently executed power of attorney must expressly provide for the revocation of the previously created power of attorney or state that all other powers of attorney are revoked.81 A terminating event is not effective as to an agent or other individual who does not have actual knowledge that the power of attorney or the agent’s authority is terminated and who “acts in good faith under the power of attorney.”82 A spouse-agent’s authority is terminated if an action is filed for divorce or annulment of the marriage or legal separation from the principal.83 This is a default rule which may be overridden in the power of attorney.84

11. UPOAA Section 111: Co-Agents and Successor Agents. The UPOAA permits co-agents to exercise their authority independently.85 This is a default position intended to discourage the execution of multiple co-extensive powers of attorney naming different agents.86 However, the UPOAA does not encourage naming co-agents due to the potential for disagreements between agents and the possibility of agents taking inconsistent actions.87

With regard to successor agents, unless the power of attorney expressly provides otherwise, they have the same power and authority as the original agent had.88 However, there may be circumstances where the principal does not want the successor agent to have the same authority as the original agent.89 For example, a principal may wish to give a spouse the power to change beneficiary designations on insurance policies.90 However, if the principal designates one of his four children as successor agent, he may not wish to grant his successor agent-child that same authority, especially if the children do not get along.91 Under these types of circumstances, additional language may be warranted in the power of attorney to alter the default rule.92

An agent is not liable for the actions of another agent unless the former participates in or conceals the latter’s breach of fiduciary duty.93 If an agent with actual knowledge of a breach of fiduciary duty by another agent fails to notify the principal or take reasonable action to safeguard the principal’s interests, he will be liable for foreseeable damages, which might have been avoided had he acted.94

12. UPOAA Section 112: Reimbursement and Compensation of Agent. The UPOAA establishes a default rule that an agent is entitled to reasonable compensation and to “reimbursement of expenses reasonably incurred on behalf of the principal.”95

Practice Tip. While it is unlikely that the principal will alter the default rule concerning expenses, it frequently will be appropriate to limit or define the terms of the agent’s compensation.96 For example: “My agent is authorized to pay compensation for his services to himself from my funds at the rate of $____ per month,” or “My agent shall not be entitled to compensation for his services as my agent.”

13. UPOAA Section 113: Agent’s Acceptance. This section creates a default rule that a person accepts his appointment as an agent under a power of attorney when he begins exercising authority, performing duties, or evidencing any other conduct or assertion that indicates that he has accepted.97 The UPOAA does not make delivery of the power of attorney a requirement for the agent to act on the principal’s behalf. Until the re-enactment of the UPOAA, Virginia power of attorney statutes specifi-
cally state that the principal’s failure to deliver the power of attorney to the agent will not affect its validity.\textsuperscript{98} Acceptance is the “point for commencement of the agency relationship and the imposition of fiduciary duties.”\textsuperscript{99}

14. **UPOAA Section 114: Agent’s Duties.** Although it was well-settled law that an agent under a power of attorney was a fiduciary,\textsuperscript{100} the extent of the fiduciary duties imposed upon the agent by Virginia law was previously unclear.\textsuperscript{101} The UPOAA lists mandatory duties of the agent that cannot be altered by the power of attorney.\textsuperscript{102} The mandatory duties provide that all agents must act in good faith, within the scope of authority granted, and in accordance with the principal’s reasonable expectations, if known, or in the principal’s best interest if the principal’s expectations are unknown.\textsuperscript{103} The remaining duties are default rules which can be modified by the principal.\textsuperscript{104} These duties include: (1) acting loyally; (2) avoiding conflicts of interests; (3) acting with care, competence, and diligence; (4) keeping records; (5) cooperating with the health-care agent; and (6) attempting to preserve the principal’s estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal’s best interests based on all relevant factors.\textsuperscript{105}

An agent that acts in good faith is not liable to any beneficiary of the principal’s estate plan for failure to preserve the plan.\textsuperscript{106} Similarly, an agent who acts with care “for the best interest of the principal is not liable solely because the agent also benefits from the act” or has a conflicting interest.\textsuperscript{107} “If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent’s representation” of those skills or expertise, the special skills or expertise shall be considered in determining whether the agent has acted with care under the circumstances.\textsuperscript{108} Absent a breach of duty, “an agent is not liable if the value of the principal’s property declines.”\textsuperscript{109} An agent who exercises authority to delegate to someone else the authority granted by the power of attorney is not liable for any error of that person, provided the agent exercises care in the delegation.\textsuperscript{110} This section was amended to import existing Virginia Code sections 11-9.6 and 37.2-1018, which require an agent to disclose information to certain individuals.\textsuperscript{111}

**Practice Tip.** When the agent has accepted appointment, fiduciary duties are imposed by UPOAA section 114.\textsuperscript{112} But is the agent liable if he subsequently fails to act after having accepted the appointment as agent under section 113? The answer is potentially yes, since, unless the power of attorney provides otherwise, an agent must act with “diligence ordinarily exercised by agents in similar circumstances.”\textsuperscript{113} If this potential liability is a concern, consider including the following provision: “My agent shall not be liable to me or my estate for the failure to exercise any of the authority granted by this power of attorney.”

15. **UPOAA Section 115: Exoneration of Agent.** Under the UPOAA, the inclusion of an exoneration provision, relieving the agent of liability for breach of fiduciary duties, is binding on the principal and the principal’s successors in interest unless the agent’s breach is “committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal.”\textsuperscript{114} As an additional protection for the principal, an exoneration provision also will not be binding if it was inserted in the power of attorney as the result of abuse of a confidential relationship with the principal.\textsuperscript{115}

16. **UPOAA Section 116: Judicial Relief.** The purpose of this section is to protect vulnerable or incapacitated individuals against financial abuse and to protect the self-determination rights of principals.\textsuperscript{116} In addition to the remedies afforded by Virginia Code section 26-71.23—UPOAA section 123’s Virginia counterpart—the following persons are authorized to petition a court to construe a power of attorney, review the agent’s conduct, and grant appropriate relief: (i) the principal or agent; (ii) a guardian, conservator, personal representative of a deceased principal’s estate, or other fiduciary acting on the principal’s behalf; (iii) the principal’s health-care agent; (iv) the principal’s spouse, parent, or descendant; (v) an adult brother, sister, niece, or
nephew of the principal; (vi) a beneficiary under the principal’s estate plan; (vii) adult protective services; (viii) the principal’s caregiver or another person that demonstrates sufficient interest in the principal’s welfare; and (ix) a person asked to accept the power of attorney.117

Virginia added “adult protective services” to the list of individuals authorized to petition a court to construe a power of attorney or review the agent’s conduct, and then grant appropriate relief.118 This addition addresses concerns that the principal may have no family or other listed individuals to petition the court on the principal’s behalf.119

Virginia also added paragraph (B) to this section to provide judicial relief for an agent’s violation of discovery requests.120 Additionally, Virginia added paragraph (C) with a goal of preserving Virginia’s so-called “anti-Casey” statute.121 In Casey v. Commissioner of Internal Revenue, the Fourth Circuit held that gifts of a decedent’s assets made during the decedent’s lifetime by her attorney-in-fact were not authorized by a durable power of attorney held by the attorney-in-fact.122 Hence, the gifts were revocable at the time of the decedent’s death, and therefore includible in her gross estate for federal estate tax purposes.123 The Virginia General Assembly responded to this decision by enacting Virginia Code section 11-9.5, which grants an agent under a general DPA the power and authority to make gifts in any amount of any of the principal’s property to any individuals or to organizations described in §§ 170(c) and 2522(a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both, in accordance with the principal’s personal history of making or joining in the making of lifetime gifts.124

Upon motion by the principal, the court shall dismiss a petition filed under section 116 of the Virginia UPOAA unless it finds that the principal lacks capacity to revoke the agent’s authority or the power of attorney.125

17. UPOAA Section 117: Agent’s Liability. If an agent violates the UPOAA, he is liable to the principal for the restoration value of the principal’s prop-
change in Virginia’s common law. In the past, the Supreme Court of Virginia has held that “[o]ne who deals with an agent does so at his own peril and has the duty of ascertaining the agent’s authority. If the agent exceeds his authority, the principal is not bound by the agent’s act.” However, protection for third parties against liability for good faith acceptance of acknowledged powers of attorney is a new trend in the law aimed at facilitating greater acceptance of powers of attorney. Of the twelve states that currently consider it unlawful to unreasonably refuse a power of attorney, five use the term purports or purporting to clarify that good faith reliance on a power of attorney will be protected absent actual knowledge that the power of attorney was not validly executed.

This section of the UPOAA protects good faith acceptances of purportedly acknowledged powers of attorney, which could include protection for a forged power of attorney. According to the Reporter on the UPOAA Drafting Committee, this section was “arguably one of the most difficult intersections of public policy that had to be addressed in the Act.” According to the Drafting Committee’s research and considerable anecdotal evidence, the problem of power of attorney abuse appears to be slight compared to the volume of powers of attorney that are used legitimately. Where abuse occurs, the problem is typically abuse of a valid power of attorney or a power of attorney obtained through duress—not a forged durable power of attorney. The threshold question which essentially must be addressed is, “Who should bear the risk that a power of attorney is not valid?” Placing risk upon the principal may reduce due diligence by third parties and increase the number of cases involving forged powers of attorney.

While the UPOAA does not require investigation into the validity of a power of attorney or an agent’s authority, the Act allows a third party to request the agent’s certification under oath as to any factual matter, an English translation of the power of attorney, and an opinion of counsel as to any matter of law concerning the power of attorney—provided the person making the request provides the reason in writing. Virginia added language which clarifies that the third party may request a legal opinion from the principal’s, agent’s, or third party’s counsel. Under the UPOAA, an English translation or the opinion of the agent’s or principal’s counsel must be provided at the principal’s expense. In contrast, Virginia’s version of the UPOAA limits the principal’s obligation to pay for English translations and attorney opinions to those provided for the principal and agent. That is, the principal is not responsible for paying for third-party requests. Virginia also eliminated an exception to this rule that permitted requests made more than seven business days after the power of attorney is presented for acceptance. Virginia’s version of the UPOAA further adds language that requires an agent’s certification, an English translation, or an opinion of counsel to be in recordable form if the exercise of the power requires recordation of any instrument under the laws of the Commonwealth of Virginia.

UPOAA section 119 also rejects an imputed knowledge standard for those individuals who conduct activities through employees. Specifically, they are held to be without actual knowledge of a fact “if the employee conducting the transaction involving the power of attorney is without actual knowledge of the fact.” For example, if an employee who accepts a forged, invalid, or revoked power of attorney did so honestly and without actual knowledge that it was forged, invalid, or revoked, then the employer is insulated from liability.

20. UPOAA Section 120: Liability for Refusal to Accept Acknowledged Power of Attorney. The UPOAA provides enacting jurisdictions with a choice between alternative liability provisions. The VBA chose to recommend UPOAA section 120 alternative A, which applies to all acknowledged powers of attorney. The VBA rejected alternative B, which addresses only statutory form powers of attorney.
The goal of this recommendation was to facilitate the acceptance of all acknowledged powers of attorney rather than only statutory form powers of attorney.

Generally, under alternative A, a third party must either accept an acknowledged power of attorney or request a certification, translation, or an opinion of counsel within seven business days of presentation. If the third party requests a certification, translation, or opinion of counsel, the third party must accept the power of attorney within five business days of receiving the requested document. Additionally, a third party cannot require an additional or different form of power of attorney.

When it enacted the UPOAA, Virginia added language that clarifies that the term “business day,” as used in this section, excludes Saturdays, Sundays, and any day designated as a holiday in the Commonwealth of Virginia.

This section also provides third parties with significant protection against liability for rejecting a power of attorney by providing clear safe harbors for legitimate refusals. First among these safe harbors, a third party is not required to accept powers of attorney if she is permitted to refuse transacting business with the principal in the same circumstances or the principal has otherwise relieved the third party of the obligation to engage in the transaction with an agent under a power of attorney. Second, a third party can reject powers of attorney if engaging in the transaction with the agent or the principal in the same circumstances would be inconsistent with federal law. Similarly, when a third party has actual knowledge of the termination of the agent’s authority or of the power of attorney, she is free to reject the power of attorney. If a request for a certification, a translation, or an opinion of counsel has been refused, the power of attorney may also be rejected. A fourth safe harbor is reached if the third party believes in good faith that the power of attorney is not valid or that the agent does not have the authority to perform the act requested. Last, if the third party makes, or has actual knowledge that another person has made, a report to the local adult protective services department or adult protective services hotline stating that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent, she can reject a power of attorney. Only when a refusal does not meet one of these safe harbors will an individual be subject to a court order mandating acceptance of the power of attorney and liability for the costs and attorneys’ fees incurred to obtain that mandate. Notably, the imposition of attorneys’ fees is a departure from the existing Virginia common law.

While the UPOAA does not require third parties (including financial institutions) to operate as watchdogs for financial abuse, the Act permits third parties to do so when there is a good faith belief that the principal may be subject to some type of abuse by the agent or someone acting in concert with the agent. If a third party has such a belief and is willing to make a report to the local adult protective services department or adult protective services hotline, or if she knows that someone else has made such a report, then an otherwise valid power of attorney may legitimately be refused.

Practice Tip. When counseling clients about powers of attorney, practitioners should recommend that the client ask financial institutions with whom they do business whether or not her account agreements opted out of accepting powers of attorney in accordance with UPOAA section 120(b), alternative A.

21. UPOAA Section 121: Principles of Law and Equity. Although the UPOAA is a lengthy statute, the common law of agency remains relevant. As stated previously, where the UPOAA is silent, the common law of agency applies. For example, matters not covered by the UPOAA include: (i) the authority a principal cannot delegate to an agent; (ii) the agent’s liability and duties to third parties; (iii) the principal’s duty to deal fairly and in good faith with the agent; (iv) actual and apparent authority; and (v) the capacity of the agent.

22. UPOAA Section 122: Laws Applicable to Financial Institutions and Entities. Section 122 addresses the concerns of the banking and insurance industries that laws governing those entities may con-
lict with certain provisions of the UPOAA. Although no specific conflicts were identified while drafting the UPOAA, Virginia Code section 26-71.22—UPOAA section 122’s mirror—provides that in the event that laws applicable to financial institutions, insurance companies, or other entities conflict with the UPOAA, the other law will supersede the UPOAA to the extent of the inconsistency.177

23. **UPOAA Section 123: Remedies Under Other Law.** Remedies under the UPOAA are not exclusive and should not prevent aggrieved parties from seeking additional remedies under other laws.178 Virginia added a provision clarifying that the additional remedies available include a court-supervised accounting.179

**B. Article 2: Authority**

1. **UPOAA Section 201: Authority That Requires Specific Grant; Grant of General Authority.** This section requires that an express, specific grant of authority be given to an agent for certain acts due to the risk those acts pose to the principal’s property and estate plan.180 These acts requiring a specific grant of authority (frequently referred to as the “hot powers”) include: (i) creating,181 amending, revoking, or terminating182 an inter vivos trust; (ii) making a gift;183 (iii) creating or changing rights of survivorship; (iv) creating or changing a beneficiary designation; (v) delegating authority granted under the power of attorney; (vi) waiving the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or (vii) exercising fiduciary powers that the principal has authority to delegate.184

Virginia eliminated disclaiming property, including a power of appointment, from the list of those acts requiring a specific grant of authority since the Virginia Uniform Disclaimer of Property Interests Act authorizes an agent to make a disclaimer.185

*Practice Tip.* Powers of attorney were previously strictly construed in Virginia.186 Therefore, it was extremely important to clearly state in the instrument what authority an agent has. The authority granted in a power of attorney “is never considered to be greater than that warranted by its language, or indispensable to the effective operation of the authority granted.”187 The authority granted is not extended beyond the terms in which it is expressed.188 The general rule of construction with regard to powers of attorney essentially provides that expansive language should be interpreted as intending only to confer those incidental powers necessary to accomplish objectives for which express authority has been granted.189

In contrast, the UPOAA simplifies defining the agent’s authority. The Act spells out authority which requires a specific, express grant and allows authority to be incorporated into the power of attorney by reference. A grant of general authority under the UPOAA permits an agent to do all acts enumerated in Virginia Code sections 26-72.04 through 26-72.16 (UPOAA sections 204 through 216).190

*Practice Tip.* You can prepare a one sentence power of attorney. For example, “I hereby grant my agent the authority to do or perform all acts that I could do.” By including this language in a general durable power of attorney under the UPOAA, a broad grant of authority is automatically given to the agent without need to expressly list each power given. Virginia added subsection H with a goal of preserving Virginia’s so-called “anti-Casey” statute191 and laws related to gifting under pre- and post-UPOAA law.

2. **UPOAA Section 202: Incorporation of Authority.** The statutory definitions for authority over various subject areas192 may be incorporated by reference using the optional statutory form provided in Article 3 or by referring to the descriptive term or specific statutory section in which the authority is described.193

*Practice Tip.* As an example of granting general authority with respect to the principal’s real property, the power of attorney could state: “I grant my agent general authority to act for me with respect to Real Property as defined in the Virginia UPOAA,” or “I grant my agent general authority to act for me as provided in Virginia Code section 26-72.04.”

If a power of attorney grants to an agent authori-
ty to do all acts that a principal could do, the agent has authority with respect to all of the enumerated subject areas in Article 2 that do not require an express grant of authority. A principal may modify any authority incorporated by reference.194

3. UPOAA Section 203: Construction of Authority Generally. This section describes incidental authority that accompanies all authority granted to an agent under Virginia Code section 26-72.04 through section 26-72.17 (UPOAA sections 204 through 217), unless modified by the principal.196 These acts are often necessary to carry out the authority over the subjects described in section 26-72.04 through section 26-72.17.

Incidental authority includes the power to do the following: (i) recover money or another thing of value to which the principal is due and to conserve, invest, disburse, or use anything so obtained; (ii) contract on terms acceptable to the agent and perform, rescind, cancel, or modify the contract or another contract made by the principal; (iii) execute, acknowledge, deliver, file, or record any instrument; (iv) initiate, participate in, or settle a claim in favor or against the principal; (v) seek on the principal’s behalf the assistance of a court or governmental agency; (vi) engage, compensate, and discharge an attorney, accountant, investment advisor, expert witness, or other advisor; (vii) prepare, execute and file reports; (viii) communicate with any representative or employee of a government or governmental agency on behalf of the principal; (ix) access communications intended for and communicate on behalf of the principal; and (x) do any lawful act with the respect to the subject and all property related to the subject.197

4. UPOAA Sections 204 through 216. A power of attorney may grant an agent authority with respect to a particular subject by using the descriptive term for the subject or by citing to the section in the UPOAA where the authority is described. For example, if a power of attorney grants an agent authority over the principal’s real property, the agent will have the authority described in Virginia Code section 26-72.04.198

Practice Tip. If the principal creates a general power of attorney and the principal’s will makes a specific gift of property, the power of attorney or will should expressly address whether the gift is extinguished if the agent sells the property while the principal is incapacitated. The Virginia Code provides for a default nonademption rule.199 If the principal wishes to provide for ademption, consider adding the following provision to both the will and power of attorney: “I direct that any gift of specific property made in my will shall be extinguished by ademption if my agent under my general power of attorney shall sell the property. I expressly release my agent from any liability to my estate or to any beneficiary of my estate as a consequence of such sale.”

Practice Tip. The incorporation of descriptive terms into a power of attorney will permit the draftsperson to shorten the length of the document and significantly improve its readability. When this drafting option is used, the authors recommend that the draftsperson give the principal a separate document with the full description of the authority granted by each of the descriptive terms.

5. UPOAA Section 217: Gifts. A specific grant of authority to make a gift under Virginia Code section 26-72.01(a) (UPOAA section 201(a)) is subject to the default limitations of Virginia Code section 26-72.17 (UPOAA section 217) unless expressly modified by the principal in the power of attorney.200 Because a gift of the principal’s property reduces the principal’s estate, the UPOAA sets default limits on gift amounts per donee.201 However, the principal may expressly grant the agent greater authority to make gifts of his property. For example, the principal may wish to grant greater authority to the agent to make a gift of his or her assets to qualify for Medicaid Long Term Care assistance.202

Practice Tip. There is no single gift authority provision that is appropriate for every client. This authority should be carefully discussed with the client and drafted to meet the client’s needs and desires.
C. Article 3: Statutory Forms

1. UPOAA Section 301: Statutory Form Power of Attorney. Article 3 includes a concise, optional statutory form. The availability of legal forms is widespread; eighteen states in addition to Virginia have statutory power of attorney forms. The goal of these statutory forms is to promote familiarity and thereby facilitate acceptance of powers of attorney. The statutory form is designed to be understandable to lay persons and still provide attorneys with a “foundation upon which any drafting option under the [UPOAA] can be implemented.” The purpose of including a statutory form is to achieve familiarity and a common understanding of powers of attorney through the use of one form with a goal of facilitating acceptance by third parties. Critics of the UPOAA have expressed concerns that the inclusion of a statutory form would take business away from attorneys who routinely draft comprehensive powers of attorney. The authors have spoken with attorneys in North Carolina, New York, and sixteen other states with statutory forms, who report that they still frequently draft custom powers of attorney for their clients and that the statutory form has not diminished their practice in this area.

In order to create a more comprehensive, flexible, and therefore useful statutory DPA form, Virginia included the optional hot powers and made several modifications to the UPOAA form. In specific, Virginia added an option that allows for the appointment of co-agents and successor co-agents, including the ability to specify whether co-agents are to exercise their authority independently, by unanimous decision, or by majority decision. Virginia also added language to the Grant of General Authority section, stating that if authority is granted over all subjects in this section, the agent may make gifts according to the principal’s personal history of making or joining in the making of lifetime gifts. Additional limited gifting authority may be granted in the Grant of Specific Authority section of the form. This specific grant may be further modified in the optional Special Instructions section. The authority to disclaim or refuse an interest in property, including a power of appointment was eliminated from the list of authority which requires a specific grant. Virginia also added a section that clarifies whether powers of attorney previously created by the principal are revoked by the execution of the statutory form power of attorney. Lastly, a line was added in the acknowledgment block for a Notary Identification Number.

The inclusion of the hot powers in the statutory form is an option granted in the UPOAA. Fiduciaries generally do not have these powers and agents under a POA are fiduciaries with the least supervision. Members of the Virginia Elder Law bar have expressed concern that the inclusion of these optional hot powers in the statutory form would increase the likelihood of financial elder abuse using POAs. These members believe that, despite the cautionary caption, many elderly persons using the statutory form without the assistance of an attorney will simply check all of the boxes on the form without fully considering the extraordinary authority they are granting their agent. Therefore, the authors recommend that these powers be deleted from the statutory form in 2010.

Practice Tip. Will attorneys draft comprehensive powers of attorneys or statutory short form powers of attorney for their clients? The authors have learned from corresponding with attorneys in other jurisdictions that two practices have developed. The first practice is for the attorney to draft (1) a statutory short form power of attorney for routine transactions with financial institutions and (2) a comprehensive power of attorney to define the full scope of the authority granted and the terms of the relationship. The second practice is for the attorney to draft only a comprehensive power of attorney. However, even in those states that use the statutory short form, the majority of attorneys still utilize addenda (or, in the case of the UPOAA, the Special Instructions section) to tailor the form as needed for individual client circumstances. The authors will likely adopt the first practice of drafting both a short form and a comprehensive power of attorney.

Practice Tip. The statutory short form power of

attorney has an excellent, easy to understand set of instructions for agents. Attorneys should consider adopting the instructions for the powers of attorney they draft.

2. UPOAA Section 302: Agent’s Certification. This section is optional for an agent certification of facts pertaining to a power of attorney. The statements of fact in the form are those for which third persons commonly request certification, but the agent may add any other factual statements to the form as needed to satisfy a particular certification request under Virginia Code section 26.1-1.19.

D. Article 4: Miscellaneous Provisions

1. UPOAA Section 401: Uniformity of Application and Construction. UPOAA section 401 provides: “In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.” The Virginia General Assembly deleted UPOAA section 401. In the opinion of the authors, it should be restored to the Virginia Uniform Power of Attorney Act in the 2010 Session. The Virginia Uniform Trust Code, Uniform Principal and Income Act, and Uniform Simultaneous Death Act contain this same provision.

2. UPOAA Section 402: Relation to Electronic Signatures in Global and National Commerce Act. The UPOAA modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act ("ESGNCA"). However, the UPOAA does not modify, limit, or supersede section 101(c) or section 103(b) of that Act. Section 101(c) of the ESGNCA provides that if a statute, regulation, or law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, that writing may be in electronic form only if the requirements in section 101(c) are met. Furthermore, section 103(b) prohibits electronic delivery of certain notices.

This section, which is being inserted in all Uniform Acts approved in 2000 or later, preempts the ESGNCA. Section 102(a)(2)(B) of the ESGNCA provides that it can be preempted by a later statute of the state that specifically refers to the federal law. For all other purposes, the effect of this section is to leave to state law the procedures for obtaining and validating an electronic signature. The Virginia Electronic Transactions Act provides:

If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

This provision is similar to section 55-551.02 of the Virginia Uniform Trust Code.

3. UPOAA Section 403: Effect on Existing Powers of Attorney. The UPOAA applies to both a power of attorney created before, on, or after July 1, 2009, and to a judicial proceeding concerning a power of attorney commenced on or after July 1, 2009. The UPOAA applies to a judicial proceeding concerning a power of attorney commenced before July 1, 2009, unless the court finds that the application of a provision of the UPOAA would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party. The UPOAA does not affect any action taken by an agent or third party before July 1, 2009.

IV. CONCLUSION

The Virginia UPOAA was enacted this year by the General Assembly with a re-enactment clause which essentially means that it will be reintroduced into the 2010 Session of the General Assembly. The VBA has already modified the UPOAA to retain popular existing Virginia rules concerning discovery by third parties of the acts of the agent, and anti-Casey gift rules. However, the authors recommend the following as further amendments to the Virginia UPOAA: (i) Amend section 26-71.06 to
incorporate language similar to that provided in existing Virginia Code section 11-9.7, which eliminates the requirement that the power of attorney must be delivered to the agent in order for it to be valid;236 (ii) Amend section 26.72.01 to delete the hot powers;237 (iii) Amend section 26-71.03 to provide that the UPOAA will not apply to designations of persons to make arrangements for disposition of remains under section 54.1-2825;238 (iv) Amend Article 4 to include UPOAA section 401 to promote uniformity of construction;239 (v) Amend section 26-74.02 to make the effective date July 1, 2010;240 and (vi) Amend the Virginia UPOAA to provide that the risk of loss for acceptance of a forged power of attorney by a third party will rest with a third party who accepted it rather than with the purported principal.241

The Virginia UPOAA, with the amendments noted above, should be re-enacted and become effective in Virginia for several reasons. First, the UPOAA seeks to preserve powers of attorney as a low-cost, flexible, and private form of surrogate decision making. Second, the UPOAA encourages third-party acceptance of powers of attorney by providing broad protection for good faith acceptance or refusal of an acknowledged power of attorney by third parties. Third, the UPOAA provides sanctions for unreasonable refusals of an acknowledged power of attorney. Fourth, the UPOAA provides protection for principals with mandatory and default fiduciary duties for the agent, liability for agent misconduct, broad standing for judicial review, and the requirement for express language to grant certain authority that could dissipate the principal’s property or alter the principal’s estate plan. Fifth, the UPOAA recognizes that an agent who acts with care, competence, and diligence for the benefit of a principal should not be liable solely because the agent also benefits from the act or has conflicting interest. Sixth, and finally, the UPOAA assists in the drafting of powers of attorney by providing modern definitions of authority that can be granted to an agent by incorporation by reference to descriptive terms and default provisions that can be customized to suit the principal.242 Powers of attorney have become an essential disability and incapacity planning tool. As the popularity of powers of attorney has increased over the years, so has the resulting litigation surrounding their use. Virginia currently only has a few brief statutes that address powers of attorney.243 Most of the law in this area in Virginia is supplanted by the common law of agency.244 The problem is that the common law of agency was developed for supervised agencies where a principal was still competent to supervise his agent’s actions. The common law does not take into account that most powers of attorney are now durable and last beyond a principal’s incapacity. A comprehensive statute pertaining to the use of powers of attorney is warranted in Virginia to ensure that default rules are in place when a principal is incapacitated and can’t supervise his agent and to protect third parties. The authors feel that the Virginia UPOAA is that statute.

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6. Id.
7. Id. at A-2.
8. Hook & Begley, Jr., supra note 1, at 37.
9. Id.
10. Id.
11. RESTATEMENT (THIRD) OF AGENCY § 3.08(1) (2005).
15. See RESTATEMENT (THIRD) OF AGENCY § 3.08(2) & cmts. b, c (2006).
17. Id. at A-1 to A-2.
19. Id. at 1; UNIF. POWER OF ATTORNEY ACT prefatory note, 8B U.L.A. 29 (Cum. Supp. 2009). Unless otherwise noted, citations to the UPOAA are to the 2009 Cumulative Supplement of the Uniform Laws Annotated.
22. Id.
23. Id.
24. Id.
25. Id.
26. Id. § 121 cmt., 8B U.L.A. 59.
27. See id. § 301, 8B U.L.A. 79–84.
29. Id.
35. Id.
36. Id.
37. Id.
39. Posting of Andrew Hook to GeriLaw, supra note 34.
42. S.B. 855.
44. UNIF. POWER OF ATTORNEY ACT prefatory note, 8B U.L.A. 31.
47. Maine further defined “incapacity” in its UPOAA, stating that incapacity means the inability of an individual to effectively manage property or business affairs because the individual [is] impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause to the extent that the individual lacks sufficient understanding, capacity or ability to receive and evaluate information or make or communicate decisions regarding the individual’s property or business affairs.
50. Id. § 102(7); 8B U.L.A. 36.
51. See id. § 102(11); 8B U.L.A. 36.
52. Id. § 103; 8B U.L.A. 36.
56. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-71.05); UNIF. POWER OF ATTORNEY ACT § 105, 8B U.L.A. 39. Maine’s UPOAA requires the inclusion of certain notices, substantially in the form provided by the statute, for a power of attorney to be valid. See 2009 Me. Legis. Serv. ch. 292 (West) (to be codified at ME. REV. STAT. ANN. tit. 18-A, § 5-905). The Nevada UPOAA imposes the additional requirement that if the principal resides in a hospital, assisted living facility, or skilled nursing facility at the time the power of attorney is executed, then a certification of the principal’s competency from a physician, psychologist, or psychiatrist must be attached to the power of attorney. See 2009 Nev. Stat. ch. 64, § 20 (to be codified at Nev. Rev. Stat. tit. 13).
60. See Virginia Code section 17.1-227 for the rules relating to the recordation of documents and section 55-107, which provides that a power of attorney may be admitted to record in any county or city. VA. CODE ANN. § 17.1-227 (Cum. Supp. 2009); id. § 55-107 (Repl. Vol. 2007). The authors are not aware of any problems recording DPA’s; however, the authors recommend compliance with recordation rules to avoid potential problems that may arise.
61. See VA. CODE ANN. § 17.1-239 (Repl. Vol. 2003). These requirements provide that the power of attorney must be on white paper, no less than eight and one-half inches or larger than eight and one-half by fourteen inches in size, with a paper weight of at least twenty pounds. 17 VA. ADMIN. CODE § 15-70-20 (1996). The writing must be black, and signatures must be in black or dark blue ink. Id. § 15-70-30. The printing must be at least nine points in size and the margins one inch on the left, top, and bottom margins, and one-half inch on the right margin. Id. §§ 15-70-40, 15-70-50.
64. An example of another law that will require presentation of the original power of attorney is the Virginia recordation statute. Id.
65. Id. While retaining the statutory provision providing that a copy of the
power of attorney has the same effect as the original, the Nevada UPOAA also requires that, upon demand by a third party, the agent provide an affidavit stating that the copy is a true and accurate copy of the original. The requested affidavit must also assert that, to the best of the agent’s knowledge, the principal is still alive and that the agent’s relevant powers have not been altered or terminated. See 2009 Nev. Stat. ch. 64, § 21 (to be codified at Nev. Rev. Stat. tit. 13).


67. See, for example, Kountouris v. Varvaris, 476 So. 2d 599, 604 (Miss. 1985), where the Mississippi Supreme Court stated: As between the parties, the principal and the purported attorney-in-fact, all that is requisite to the enforceability of the power of attorney is execution and delivery in the same sense that, as between grantor and grantee, all that is necessary for a deed to be valid and enforceable is that the grantor execute it and deliver it.

Id. (citing Davis v. Holifield, 193 So. 2d 723, 726 (Miss. 1957); Walker v. Walker, 59 So. 2d 277, 284 (Miss. 1952)).

68. The Virginia Code provides:

An attorney-in-fact or other agent in possession of a general, special or limited power of attorney or other writing vesting any power or authority in him shall, where the instrument is otherwise valid, be deemed to possess the powers and authority granted by such instrument notwithstanding any failure of the principal to deliver the instrument to him, and persons dealing with such attorney-in-fact or agent shall have no obligation to inquire into the manner or circumstances by which such possession was acquired; provided, however, that nothing herein shall preclude the court from considering such manner or circumstances as relevant factors in any proceeding brought to terminate, suspend, or limit the authority of the attorney-in-fact.


70. Unif. Power of Attorney Act § 108, 8B U.L.A. 42. Nevada added language to its UPOAA which requires that, following the court appointment of a conservator, notice and the opportunity to be heard be afforded to the agent and the principal prior to the limitation, suspension, or termination of the power of attorney. See N.M. Stat. § 46B-1-108 (2007).


73. Id. § 109(a), 8B U.L.A. 43.


77. Unif. Power of Attorney Act § 109(d), 8B U.L.A. 43. Since the person authorized to verify the principal’s incapacity will likely need access to the principal’s health records, the UPOAA qualifies the person to act as the principal’s representative for the purposes of HIPAA. It does not authorize the agent to make health-care decisions for the principal, nor does it prevent the principal’s authorized health-care agent from also qualifying as a representative under HIPAA. See 45 C.F.R. § 164.502(g)(1)–(2) (2008).

78. Unif. Power of Attorney Act § 110(a), 8B U.L.A. 44–45. Events that terminate the power of attorney include: (1) death of principal; (2) principal’s incapacity, if the power of attorney is not durable; (3) principal revokes the power of attorney; (4) the power of attorney provides that it terminates; (5) the purpose of the power of attorney is accomplished; and (6) the principal revokes the agent’s authority, or the agent dies, resigns, or becomes incapacitated, and the power of attorney does not name a successor agent. Id.

79. Id. § 110(b), 8B U.L.A. 45. Events that terminate the agent’s authority include: (1) the principal revokes the authority; (2) the agent dies, resigns, or becomes incapacitated; (3) an action is filed for divorce or annulment of the agent’s marriage to the principal or their legal separation, unless the power of attorney provides otherwise; or (4) the power of attorney terminates. Id.

80. Id. § 110(c), 8B U.L.A. 45.

81. Id. § 110(f), 8B U.L.A. 45. But see Whitley v. Lewis, 55 Va. Cir. 485, 493 (Cir. Ct. 2000) (Fairfax County) (holding original power of attorney revoked when party later created a second power attorney, even though party did not expressly revoke original).


83. Id. § 110(b)(3), 8B U.L.A. 45.

84. Id. § 110(b)(3) cmt., 8B U.L.A. 45.

85. Id. § 111(a), 8B U.L.A. 46.

86. Id. § 111(a) & cmt., 8B U.L.A. 46–47.

87. Id. § 111 cmt., 8B U.L.A. 47.

88. Id. § 111(b)(1), 8B U.L.A. 46.

89. Whitton, supra note 58, at 20.

90. See id.

91. See id.

92. Id.


94. Id. § 111(d) & cmt., 8B U.L.A. 46–47.

95. Id. § 112, 8B U.L.A. 47. Under the Nevada UPOAA, an agent is only entitled to the reimbursement of expenses, not compensation, unless otherwise provided by the power of attorney. See 2009 Nev. Stat. ch. 64, § 27 (to be codified at Nev. Rev. Stat. tit. 13).

96. Id. § 112 cmt., 8B U.L.A. 48.

97. Id. § 113, 8B U.L.A. 48; see also id. § 118(b)(2), 8B U.L.A. 48 (creating a default method for agent resignation).


99. Id. § 113 cmt., 8B U.L.A. 48. This is similar to the provisions of Virginia’s enactment of the Uniform Trust Code, which provides that the acceptance of the trust by the trustee is the point at which fiduciary duties are imposed on the trustee. See Va. Code Ann. § 55-548.01 (Repl. Vol. 2007).

100. See Restatement (Third) of Agency § 8.01 (2006).


102. Id. § 114(a), 8B U.L.A. 48.

103. Id. The mandatory duties of an agent under the UPOAA are similar to those imposed on a trustee in Virginia’s version of the UTC, namely, “to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.” See Va. Code Ann. § 55-541.05(B)(2) (Repl. Vol. 2007 & Cum. Supp. 2009).

104. See Unif. Power of Attorney Act § 114(b), 8B U.L.A. 48–49. The UPOAA does not create a default affirmative duty of periodic accounting. See id. § 114(h), 8B U.L.A. 49. The agent is not required to disclose records unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal. Id.

105. Id. § 114(b), 8B U.L.A. 48–49. The default duties to cooperate with the principal’s health-care agent and to preserve the principal’s estate plan were included to protect the principal’s previously-expressed choices. Id. § 114 cmt., 8B U.L.A. 50. The UPOAA does not create a default affirmative duty of periodic accounting. See id. § 114(h), 8B U.L.A. 49. The agent is not required to disclose records unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal. Id.

106. Id. § 114(c), 8B U.L.A. 49.

107. Id. § 114(d), 8B U.L.A. 49.

108. Id. § 114(e), 8B U.L.A. 49.

109. Id. § 114(f), 8B U.L.A. 49.

110. Id. § 114(g), 8B U.L.A. 49. The UPOAA was amended by Virginia to provide expressly that the power to delegate does not abrogate the agent’s duties under the Virginia Uniform Prudent Investor Act. Act of Apr. 8, 2009.
A. A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:
1. Selecting an agent;
2. Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
3. Periodically reviewing the agent’s actions in order to monitor the agent’s performance and compliance with the terms of the delegation.

B. In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

C. A trustee who complies with the requirements of subsection A is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated. By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this Commonwealth, an agent submits to the jurisdiction of the courts of this Commonwealth.

The definition of “good faith” is found in section 102 of the UPOAA.

See id.
160. See Unif. Power of Attorney Act § 120(b) alternative A, 8B U.L.A. 56. Colorado amended this section in its UPOAA to include a safe harbor for individuals who refuse to accept a power of attorney based on their “good faith belief” that the agent was acting “either unlawfully or not in good faith.” However, under the Colorado UPOAA, in order to escape liability for refusing to accept a power of attorney, the person must perform a “good faith” investigation of the situation before so refusing. See Colo. Rev. Stat. Ann. § 15-14-720 (West 2006).

161. See id. § 120(b)(1) alternative A, 8B U.L.A. 56. Financial institutions and third parties can insert in their agreements with principals a provision that the financial institution or other party is not required to accept a power of attorney. This is a departure from the UPOAA.

162. Id. § 120(b)(2) alternative A, 8B U.L.A. 56.

163. Id. § 120(b)(3) alternative A, 8B U.L.A. 56.

164. Id. § 120(b)(4) alternative A, 8B U.L.A. 56.

165. Id. § 120(b)(5) alternative A, 8B U.L.A. 56.

166. Id. § 120(b)(6) alternative A, 8B U.L.A. 56.


168. See Prospect Dev. Co. v. Bershader, 258 Va. 75, 92, 515 S.E.2d 291, 300 (1999) (“The general rule in [the] Commonwealth is that in the absence of a statute or contract to the contrary, a court may not award attorney’s fees to the prevailing party.”) (citing Gilmore v. Basic Indus., Inc., 233 Va. 485, 490, 357 S.E.2d 514, 517 (1987)).


170. Id.


172. Generally, a principal can delegate to an agent any acts that the principal could do for himself unless public policy or contractual obligations require personal performance. See Restatement (Third) of Agency § 6.08 cmt. e (2006); see also First Union Nat’l Bank v. Thomas, 37 Va. Cir. 35, 40 (Cir. Ct. 1995) (Winchester City) (“In the few reported cases dealing specifically with durable powers of attorney, the courts have defined non-delegability rather narrowly.”). However, certain acts have been held by some judicial decisions to be non-delegable, including marriage; divorce; voting; executing, amending, or revoking a will; representing the principal in court; and initiating bankruptcy proceedings. Additionally, it is doubtful that an agent in Virginia may make an augmented estate election against the estate of a deceased spouse of the principal. The Virginia conservatorship statute requires a conservator to obtain court approval for the election and there is no similar authority for agents. Va. Code Ann. § 37.2-1023(A)(6)(ii) (Cum. Supp. 2009).


174. Id. § 8.15.

175. Id. §§ 2.01, 2.03.

176. Id. § 3.05.


180. Unif. Power of Attorney Act § 201 cmt., 8B U.L.A. 62. The powers requiring a specific grant of authority are often referred to as the “hot powers.” The drafter should pay particular attention to drafting provisions granting this authority.

181. The Virginia Bar Association Trust and Estates Section is recommending the revision of sections 55-544.01 and 55-544.02 of the Virginia Uniform Trust Code to expressly permit an agent under a power of attorney to create a trust where specifically authorized by the terms of the power of attorney. It is further recommending revision of Virginia Code section 55-546.02(E) to provide that the settlor’s powers of revocation, amendment, or distribution of trust property may be exercised by an agent acting under a power of attorney that expressly authorizes such action.

182. Virginia Code section 55-546.02(E) provides: “A settlor’s powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent (i) expressly authorized by the terms of the trust or (ii) authorized by the court for good cause shown.” Va. Code Ann. § 55-546.02(E) (Repl. Vol. 2007 & Cum. Supp. 2009). If the client wishes his agent to exercise his powers of revocation, amendment, or distribution under the power of attorney, include language similar to the following in the trust agreement: “My agent under a general durable power of attorney may exercise my powers to revoke, amend, or direct distributions of trust property by a writing signed by agent and delivered to me during my lifetime.”

183. But see Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at Va. Code Ann. § 26-72.01(H)) (“If a power of attorney grants to an agent authority to do all acts that a principal could do, the agent shall have the authority to make gifts in any amount of any of the principal’s property to any individuals or [charitable] organizations . . . in accordance with the principal’s personal history . . .”).


185. See Va. Code Ann. § 64.1-196.4(B) (Repl. Vol. 2007). Virginia should consider reinstating a disclaimer as a “hot power” since this code section reads in part: “Except to the extent a fiduciary’s right to disclaim is expressly restricted or limited by another statute of this state . . . a fiduciary may disclaim . . . .” Id.


187. Id.

188. Id. (citing Hotchkiss v. Middlekauff, 96 Va. 649, 653, 32 S.E. 36, 37–38 (1899)).

189. Id. However, in Jones v. Brandt, the supreme court held that an agent acting pursuant to a power of attorney had the authority to change the beneficiary designation on a certificate of deposit even though the power of attorney did not expressly grant the agent the power to do so. Id. at 138, 645 S.E.2d at 315–16.

190. See infra Part III.B.4.


193. Unif. Power of Attorney Act § 202 cmt., 8B U.L.A. 63. Colorado added a provision to its UPOAA that allows a power of attorney to incorporate by reference a writing or any other record in existence at the time the power of attorney is exercised. The language of the power of attorney must manifest the intent to incorporate the writing or record, and it must describe the writing or other record “sufficiently to permit its identification.” See Colo. Rev. Stat. Ann. §15-14-725 (West 2006).

194. See Whitton, supra note 58, at 10.


196. Id. § 203 cmt., 8B U.L.A. 64.

197. Id. § 203, 8B U.L.A. 64.

198. The UPOAA defines the authority granted by the following descriptive terms: Real Property; Tangible Personal Property; Stocks and Bonds; Commodities and Options; Banks and Other Financial Institutions; Operation of Entity or Business; Insurance and Annuities; Estates, Trusts, and Other Beneficial Interests; Claims and Litigation; Personal and Family Maintenance; Benefits From Governmental Programs of Civil or Military Service; Retirement Plans; and Taxes.
must not be listed on any account as a cosigner with the right of survivorship. The agent must solely be listed on the account as agent under the power of attorney. See id. ch. 64, § 46 (to be codified at NEV. REV. STAT. tit. 13). With regard to the descriptive term, “Personal and Family Maintenance”, Maine’s UPOAA omits the provision granting the general authority for an agent to perform the acts necessary to maintain the customary standard of living for the principal’s children. See 2009 Me. Legis. Serv. ch. 292 (West) (to be codified at ME. REV. STAT. ANN. tit. 18-A, § 5-943).

199. See VA. CODE ANN. § 64.1-62.3(B) (Repl. Vol. 2007) (“Unless a contrary intention appears in a testator’s will or durable power of attorney, a bequest or devise of specific property shall, in addition to such property as is part of the estate of the testator, be deemed to be a legacy of a pecuniary amount if such specific property shall, during the life of the testator and while he is incapacitated, be sold by an agent acting within the authority of a durable power of attorney for the testator, or if proceeds of fire or casualty insurance as to such property are paid to the agent. For purposes of this subdivision, (i) the pecuniary amount shall be the net sale price or insurance proceeds, reduced by the sums received under subdivision 2, (ii) no adjudication of testator’s incapacity before death is necessary, (iii) the acts of an agent within the authority of a durable power of attorney are rebuttably presumed to be for an incapacitated testator, and (iv) an “incapacitated” person is one who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions. This subdivision shall not apply (i) if the agent’s sale of the specific property or receipt of the insurance proceeds is thereafter ratified by the testator or (ii) to a power of attorney limited to one or more specific purposes.”).


203. Of those states that have adopted the UPOAA, Maine is the only state that chose not to include a statutory form. However, Maine did include the Agent’s Certification for the statutory form, which is used by the agent to certify facts concerning a power of attorney. See 2009 Me. Legis. Serv. ch. 292 (West) (to be codified at ME. REV. STAT. ANN. tit. 18-A, § 5-951).

204. A Google search for “power of attorney form” resulted in about 5.3 million hits with some power of attorney forms free to download and others costing as little as $9.99. The same search on Amazon resulted in 1,082 hits. LegalZoom.com sells a customized power of attorney for $35 with a “LegalZoom Peace of Mind Review” and rush, two-business-day delivery. Thus, even without the assistance of an attorney, a consumer can obtain a power of attorney form without difficulty.


206. Whitton, supra note 58, at 11.


211. See id.

212. The Virginia Uniform Disclaimer of Property Interests Act expressly includes an agent acting under a power of attorney within the definition of “Fiduciary” and permits an agent to make a disclaimer. See VA. CODE ANN. § 64.1-196.1 (Repl. Vol. 2007); see also VA. CODE ANN. § 64.1-196.4(B) (Repl. Vol. 2006) (“Except to the extent a fiduciary’s right to disclaim is expressly restricted or limited by another statute of this state or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or in part, any interest in or power over property, including a power of appointment, whether acting in a personal or representative capacity.”).


214. See id.

215. See supra note 185 and accompanying text.


217. This information is based on conversations with elder law attorneys by e-mail and at the Annual Meeting of the Virginia Chapter of the National Association of Elder Law Attorneys.

218. UNIF. POWER OF ATTORNEY ACT art. 3 gen. cmt., 8B U.L.A. 79.


220. Id. § 401, 8B U.L.A. 88.


222. See VA. CODE ANN. §§ 55-551.01, 55-277.32 (Repl. Vol. 2007); id § 64.1-104.8 (Repl. Vol. 2007).


224. Id.

225. Therefore, an agent acting for a principal under the UPOAA is subject to the requirements in section 101(c) of the ESGNC, only when each of the following elements is met: (1) the agent is selling or leasing real or personal property, products, goods, or services for the principal; (2) the recipient of the property, products, goods, or services will use them primarily for personal, family, or household purposes; (3) the transaction is in or affects interstate or foreign commerce; and (4) there is a statute, regulation, or law requiring information relating to the transaction to be in writing. See 15 U.S.C. § 7001(c)(1) (2006).

226. This provision prohibits the electronic delivery of the following notices:

   (A) the cancellation or termination of utility services (including water, heat, and power);
   (B) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual;
   (C) the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); or
   (D) recall of a product, or material failure of a product, that risks endangering health or safety . . . .


227. See id. § 7002(a)(2)(B).

228. See id. § 7002(a).


231. Act of Apr. 8, 2009, ch. 830, 2009 Va. Acts ___ (to be codified at VA. CODE ANN. § 26-74.02(1)), (2). In light of the re-enactment provision, the authors recommend that the Virginia UPOAA be amended to provide for a July 1, 2010 effective date.

232. Id. (to be codified at VA. CODE ANN. § 26-74.02(3)).

233. Id. (to be codified at VA. CODE ANN. § 26-74.02(4)).

234. Id. (to be codified at VA. CODE ANN. § 55-546.02(3)).

235. See supra Part III.A.16.

236. See supra Part III.A.6.

237. See supra Part III.B.1.

238. See supra Part III.A.3.

239. See supra Part III.D.1.

240. See supra Part III.D.3.

241. See supra Part III.A.19. The Virginia Bar Association is currently working on an amendment to accomplish this, although the precise language has not yet been agreed upon.


243. See Whitton, supra note 18, at 4–5.

244. Id.
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