

Department of Legislative Services
2010 Session

FISCAL AND POLICY NOTE

House Bill 483
Judiciary

(Delegate Dumais, *et al.*)

Uniform Power of Attorney Act

This bill establishes the Uniform Power of Attorney Act and repeals existing statutory provisions relating to powers of attorney.

Fiscal Summary

State Effect: Any impact the bill will have on the workload of the Judiciary is expected to be handled with existing resources.

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary: The bill applies to all powers of attorney except a power coupled with an interest in the subject of a power, given as security, or given as consideration; a power to make health care decisions; a proxy or other delegation to exercise any and all rights with respect to an entity, or a delegation of authority to execute, become a party to, or amend a document or agreement governing an entity or entity ownership interest; a power created on a form prescribed by a governmental entity for a governmental purpose; a power created as part of, or in connection with, an agreement establishing an attorney and client relationship; and a power of attorney that states it is not subject to the bill's provisions. A power of attorney is durable (not terminated by the principal's incapacity) unless it expressly provides that it is terminated by the incapacity of the principal (the person who has granted authority to an agent in a power of attorney). The bill's various provisions address:

- signature requirements for proper execution of a power of attorney and a presumption that an acknowledged signature is genuine, validity of a power of attorney, and applicable law for determining the meaning and effect of a power of attorney;
- when a power of attorney becomes effective; when a power of attorney terminates; when an agent's authority under a power of attorney terminates; methods of resignation by an agent; the validity and enforceability of an act of an agent after the termination of a power of attorney, performed in good faith and without knowledge of the termination; the validity and enforceability of an act of an agent under a nondurable power of attorney performed in good faith and without knowledge of a principal's incapacity; and the effect of a subsequently executed power of attorney on a previous power of attorney;
- the ability of a principal to designate two or more persons to act as coagents under a power of attorney; the ability of a principal to designate, or grant authority to designate, one or more successor agents; the authority of coagents and successor agents; and the liability of an agent for a breach of fiduciary duty committed by another agent;
- acceptance of appointment as an agent under a power of attorney;
- standards applicable to an agent's actions and other requirements of an agent; liability of an agent; and disclosure by the agent of receipts, disbursements, or transactions conducted on behalf of the principal upon request by specified persons or entities or order of a court; and authority of a principal or an interested person to file a petition to enjoin an agent to comply with applicable standards/requirements;
- authority of an agent that must be expressly granted in a power of attorney; subject to the provisions of a power of attorney, the authority of an agent under an overall, general grant of authority, or a general grant of authority with respect to specific subjects; subject to the provisions of a power of attorney, limitations on a general grant of authority with respect to gifts; property with respect to which the agent may exercise authority under the power of attorney; and the effect of an act performed by an agent under a power of attorney;
- the ability of a person, in dealing with an agent, to rely on an acknowledged power of attorney without liability;

- required acceptance of an acknowledged *statutory form* power of attorney, with specified exceptions; sanctions applicable to a refusal of an acknowledged statutory form power of attorney required to be accepted under the bill's provisions; and authority of a court to, in an applicable proceeding, award to one party the reasonable and necessary expense for prosecuting or defending the proceeding on a finding of an absence of substantial justification of the other party for prosecuting or defending the proceeding;
- the nomination of a guardian in a power of attorney, in the event an appointment is necessary, and the effect of an appointment of a guardian of the principal's estate or other fiduciary charged with management of the principal's property on the agent's authority and the power of attorney;
- persons that may petition a court to construe a power of attorney or review an agent's conduct and grant appropriate relief; and the principal's ability to have such a petition dismissed, unless the court finds the principal lacks capacity to revoke the agent's authority or the power of attorney; and
- entitlement of an agent to reimbursement for reasonable expenses incurred on behalf of the principal and, if indicated in the power of attorney, reasonable compensation.

The bill also prohibits an agent that is not an ancestor, spouse, or descendant of the principal, unless the power of attorney otherwise provides, from creating in the agent, or a person to whom the agent owes a legal obligation of support, an interest in the principal's property.

The bill includes a statutory form power of attorney and an optional form for use by an agent to certify facts concerning a power of attorney.

The bill does not supersede other laws applicable to financial institutions or other entities. Those laws control if inconsistent with the bill.

Except as otherwise provided in the bill, the bill applies to a power of attorney created before, on, or after October 1, 2010, and a judicial proceeding concerning a power of attorney commenced on or after October 1, 2010. The bill also applies to a judicial proceeding concerning a power of attorney commenced before October 1, 2010, unless the court finds that application of a provision of the bill would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case the superseded law applies. An action taken before October 1, 2010, is not affected by the bill.

Current Law: With the exception of an instrument or portion of an instrument that is an advance directive appointing a health care agent under the Health-General Article of the Annotated Code (which is governed by that Article), when a principal designates another person as an attorney in fact or agent by a power of attorney in writing, it is a durable power of attorney unless otherwise provided by its terms.

An action taken by an attorney in fact or agent pursuant to the power of attorney during a period of disability, incompetence, or uncertainty as to whether the principal is dead or alive has the same effect and inures to the benefit of and binds the principal as if the principal was alive, competent, and not disabled.

If a guardian is appointed for a principal, the attorney in fact or agent accounts to the guardian rather than the principal. The guardian has the same power the principal would have if not for the principal's disability or incompetence, to revoke, suspend, or terminate all or any part of the power of attorney or agency.

The death, disability, or incompetence of a principal who has executed a power of attorney in writing does not revoke or terminate the agency as to the attorney in fact, agent, or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney or agency. In the absence of fraud, an affidavit executed by the attorney in fact or agent, stating that the attorney in fact or agent did not have actual knowledge of the revocation or termination of the power of attorney is conclusive proof of the nonrevocation or nontermination of the power at that time. Any action taken binds the principal and the principal's heirs, legatees, and personal representatives unless it is otherwise invalid or unenforceable.

Background: The bill is a modified version of the 2006 Uniform Power of Attorney Act (UPOAA) drafted, and approved and recommended for enactment in all states, by the National Conference of Commissioners on Uniform State Laws. UPOAA was drafted based on a national review of state power of attorney legislation, a national survey sent to state bar associations and other pertinent organizations, and input from various other sources. The Act serves as a codification of state legislative trends and collective best practices.

According to the prefatory note of the Act, UPOAA contains safeguards for the protection of an incapacitated principal, but primarily is "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." UPOAA has been adopted in Colorado, Idaho, Maine, Nevada, and New Mexico and introduced in 2009 in Maryland, Minnesota, Virginia, and the U.S. Virgin Islands.

State and Local Expenditures: Certain provisions of the bill, including the provisions allowing a wide group of individuals/entities to petition a court to construe a power of attorney or review an agent's conduct, could affect the workload of the courts. Any impact the bill will have, however, is expected to be handled with existing resources.

Additional Information

Prior Introductions: SB 150 of 2009 passed in the Senate as amended and received a hearing in the House Judiciary Committee, but no further action was taken. HB 852 of 2009 received a hearing in the House Judiciary Committee, but no further action was taken. In addition, similar bills were introduced in the 2007 and 2008 sessions.

Cross File: Although SB 309 (Senator Kelley, *et al.* – Judicial Proceedings) is designated as a cross file, it is not identical.

Information Source(s): Judiciary (Administrative Office of the Courts), Register of Wills, National Conference of Commissioners on Uniform State Laws, Department of Legislative Services

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