

Ask the Probate Judge—New Power of Attorney Law, Part 1
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Q: I know you have addressed powers of attorney before in your column, but would you one more time explain its purpose? Thank you very much for your time.

Thank YOU for your question, which is remarkably well-timed. A new law governing financial powers of attorney took effect in New Mexico on July 1, 2007. House Bill 231, the Uniform Power of Attorney Act (UPAA), repeals the previous Uniform Statutory Form Power of Attorney Act and the Powers of Attorney provisions contained in the Uniform Probate Code.

A power of attorney is a legal document in which a principal (person creating the power of attorney) appoints an agent, who has legal authority to make health care or financial decisions on the principal's behalf. A power of attorney is useful if someone is ill, incapacitated, out of town, or immobile.

The principal must sign the power of attorney or direct someone to sign on his or her behalf. Although notarization is not absolutely required under UPAA, the power of attorney is much more likely to be honored if signed by the principal in the presence of a notary public.

UPAA is silent about whether the principal must be “of sound mind” in order to sign a power of attorney, but other parts of the law imply that the principal must have mental capacity to create the document.

The principal initials specific powers that he or she wishes to give to the agent. Optional powers, such as the power to change the beneficiaries on the principal's accounts, must be specifically granted. Under UPAA the agent is entitled to reasonable compensation and reimbursement for expenses.

An important point to remember is that even though an agent obtains authority via a power of attorney, the principal still retains the legal right to make his or her own health care and financial decisions. *Both* can make decisions for the principal.

UPAA says a power of attorney is effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency. The principal may specify in the power of attorney who has the power to determine when the principal has become incapacitated.

All powers of attorney end when the principal dies. The new law reiterates that once the principal dies, the agent's powers end. These powers can end sooner if the principal changes or revokes the designation of an agent.

Under UPAA, powers of attorney executed before July 1, 2007 are valid if their execution complied with the law of this state as it existed at the time of execution. UPAA, however, contains a ten-page form that may be used for those who wish to update their financial powers of attorney.

One major change is that a power of attorney created under UPAA is durable unless the document expressly provides that it is terminated by the incapacity of the principal. This switch from prior law means that powers of attorney remain in effect beyond the principal's incapacity unless the document states otherwise.

Another change from prior law is that the new optional power of attorney form only covers financial matters. Prior law provided a power of attorney form that included both health care decision-making and financial powers.

Also, UPAA states that the execution of a power of attorney does not revoke a previous power of attorney unless the subsequent power of attorney specifically revokes previous powers of attorney. People could, intentionally or unintentionally, have multiple versions of their powers of attorney in effect.

Problems have been reported in the past about financial institutions refusing to accept powers of attorney or recognize the authority of an agent. With limited exceptions, UPAA requires institutions to accept acknowledged powers of attorney or ask for a certification from the agent. Failure to accept a notarized power of attorney may subject the institution to liability and damages.

UPAA allows court intervention to construe a power of attorney or to review the agent's conduct.

I will identify some concerns that I have about UPAA in my next column.