

Ask the Probate Judge—New Power of Attorney Law, Part 2
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The Uniform Power of Attorney Act (UPAA), including a sample power of attorney form, now has a place in the New Mexico Statutes Annotated. UPAA is located in Sections 46B-1-101 through 46B-1-403.

My previous column summarized New Mexico's new Uniform Power of Attorney Act (UPAA). This column addresses some concerns I have about various provisions of UPAA.

Who Determines Capacity

UPAA allows the principal (person creating the power of attorney) to specify in the power of attorney who has the power to determine when the principal has become incapacitated. If a principal's power of attorney does not designate a person to determine whether the principal is incapacitated, UPAA says that a power of attorney becomes effective upon a determination that the principal is incapacitated in a writing or other record by:

- (1) a physician or licensed psychologist; or
- (2) an attorney at law, a judge or an appropriate governmental official.

It concerns me that attorneys can determine the capacity of a principal.

Revoking Prior Powers of Attorney

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. Yet the optional form included in the new law contains no language that says, "This power of attorney revokes all prior financial powers of attorney made by me."

People could, intentionally or unintentionally, have multiple versions of their powers of attorney in effect, which could create conflicts between agents. Be careful if you add your own revocation language. You do not want to inadvertently revoke health care powers of attorney that are also in effect.

Successor Agents

UPAA allows the principal to designate one or more successor agents to act if the first-named agent cannot serve. Unless the power of attorney provides otherwise, a successor agent "may not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve or have declined to serve." What happens if the predecessor agent has moved, is missing or estranged? Is court action required? UPAA does not say.

Agents Have Tremendous Power

Although UPAA imposes fiduciary duties upon agents, such as acting in good faith and in the principal's best interest, agents can obtain significantly more powers than in previous versions of laws governing powers of attorney. Under UPAA, agents may handle bank accounts, stocks, real estate, and other financial matters.

Agents may also, if the principal gives permission, change beneficiaries on the principal's accounts, create a trust (but not a will) for the principal, create or change joint tenancies with rights of survivorship, and make gifts of the principal's estate to various people. These powers could be misused by an unskilled or untrustworthy agent. UPAA states, "An agent who acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan."

Sometimes it is necessary to spend down a principal's estate for his or her care, leaving little or nothing for beneficiaries. But for each attorney who praises the flexibility that agents have under UPAA, another attorney will describe agents who exploit vulnerable principals throughout New Mexico. In the hands of a dishonest or crafty agent, a power of attorney becomes a more powerful document than ever before.

Finally, "except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator," another fiduciary, certain governmental agencies, or (if the principal dies), a personal representative. Family members of the principal do not appear entitled to oversight of an agent.

I can envision potential problems with this provision. Unless the power of attorney required periodic accountings, concerned family members would have to file a lawsuit in order to obtain information about the agent's activities on behalf of the principal.

Best Interest

The term "best interest" is used throughout UPAA, but is not defined. I foresee litigation on this topic.

UPAA Power of Attorney Form

The ten-page optional form contained in UPAA may confound some principals who wish to create a "do it yourself" power of attorney. Despite UPAA's attempts to include warnings in the form, principals who do not carefully read the form before initialing each power could be giving their agent more authority than they intend. Principals may not fully understand the impact of certain choices they make and may not remember to state when the power of attorney becomes effective. Drafting the numerous "special instructions" that can be included in the power of attorney is likely to be challenging, if not difficult.

The form itself probably contains the best advice for principals, "If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form."