

# MAINE STATE LEGISLATURE

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# 124th MAINE LEGISLATURE

## FIRST REGULAR SESSION-2009

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Legislative Document

No. 1404

S.P. 507

In Senate, April 2, 2009

### An Act To Enact the Maine Uniform Power of Attorney Act

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Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script that reads "Joy J. O'Brien".

JOY J. O'BRIEN  
Secretary of the Senate

Presented by Senator HOBBS of York.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 18-A MRSA Art. 5, Pt. 5, as amended, is repealed.**

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6

**UNIFORM POWER OF ATTORNEY ACT  
("UPOAA")  
Prefatory Note**

7 The catalyst for the Uniform Power of Attorney Act (the "Act") was a national review  
8 of state power of attorney legislation. The review revealed growing divergence among  
9 states' statutory treatment of powers of attorney. The original Uniform Durable Power of  
10 Attorney Act ("Original Act"), last amended in 1987, was at one time followed by all but  
11 a few jurisdictions. Despite initial uniformity, the review found that a majority of states  
12 had enacted non-uniform provisions to deal with specific matters upon which the Original  
13 Act is silent. The topics about which there was increasing divergence included: 1) the  
14 authority of multiple agents; 2) the authority of a later-appointed fiduciary or guardian; 3)  
15 the impact of dissolution or annulment of the principal's marriage to the agent; 4)  
16 activation of contingent powers; 5) the authority to make gifts; and 6) standards for agent  
17 conduct and liability. Other topics about which states had legislated, although not  
18 necessarily in a divergent manner, included: successor agents, execution requirements,  
19 portability, sanctions for dishonor of a power of attorney, and restrictions on authority  
20 that has the potential to dissipate a principal's property or alter a principal's estate plan.

21 A national survey was then conducted by the Joint Editorial Board for Uniform Trust  
22 and Estate Acts (JEB) to ascertain whether there was actual divergence of opinion about  
23 default rules for powers of attorney or only the lack of a detailed uniform model. The  
24 survey was distributed to probate and elder law sections of all state bar associations, to  
25 the fellows of the American College of Trust and Estate Counsel, the leadership of the  
26 ABA Section of Real Property, Probate and Trust Law and the National Academy of  
27 Elder Law Attorneys, as well as to special interest list serves of the ABA Commission on  
28 Law and Aging. Forty-four jurisdictions were represented in the 371 surveys returned.

29 The survey responses demonstrated a consensus of opinion in excess of seventy  
30 percent that a power of attorney statute should:

- 31 (1) provide for confirmation that contingent powers are activated;  
32 (2) revoke a spouse-agent's authority upon the dissolution or annulment of the  
33 marriage to the principal;  
34 (3) include a portability provision;  
35 (4) require gift making authority to be expressly stated in the grant of authority;  
36 (5) provide a default standard for fiduciary duties;  
37 (6) permit the principal to alter the default fiduciary standard;  
38 (7) require notice by an agent when the agent is no longer willing or able to act;  
39 (8) include safeguards against abuse by the agent;  
40 (9) include remedies and sanctions for abuse by the agent;  
41 (10) protect the reliance of other persons on a power of attorney; and

1 (11) include remedies and sanctions for refusal of other persons to honor a power  
2 of attorney.  
3

4 Informed by the review and the survey results, the Conference's drafting process also  
5 incorporated input from the American College of Trust and Estate Counsel, the ABA  
6 Section of Real Property, Probate and Trust Law, the ABA Commission on Law and  
7 Aging, the Joint Editorial Board for Uniform Trust and Estate Acts, the National  
8 Conference of Lawyers and Corporate Fiduciaries, the American Bankers Association,  
9 AARP, other professional groups, as well as numerous individual lawyers and corporate  
10 counsel. As a result of this process, the Act codifies both state legislative trends and  
11 collective best practices, and strikes a balance between the need for flexibility and  
12 acceptance of an agent's authority and the need to prevent and redress financial abuse.

13 While the Act contains safeguards for the protection of an incapacitated principal, the  
14 Act is primarily a set of default rules that preserve a principal's freedom to choose both  
15 the extent of an agent's authority and the principles to govern the agent's conduct.  
16 Among the Act's features that enhance drafting flexibility are the statutory definitions of  
17 powers in Article 2, which can be incorporated by reference in an individually drafted  
18 power of attorney or selected for inclusion on the optional statutory form provided in  
19 Article 3. The statutory definitions of enumerated powers are an updated version of those  
20 in the Uniform Statutory Form Power of Attorney Act (1988), which the Act supersedes.  
21 The national review found that eighteen jurisdictions had adopted some type of statutory  
22 form power of attorney. The decision to include a statutory form power of attorney in the  
23 Act was based on this trend and the proliferation of power of attorney forms currently  
24 available to the public.

25 Sections 119 and 120 of the Act address the problem of persons refusing to accept an  
26 agent's authority. Section 119 provides protection from liability for persons that in good  
27 faith accept an acknowledged power of attorney. Section 120 sanctions refusal to accept  
28 an acknowledged power of attorney unless the refusal meets limited statutory exceptions.  
29 An alternate Section 120 is provided for states that may wish to limit sanctions to refusal  
30 of an acknowledged statutory form power of attorney.

31 In exchange for mandated acceptance of an agent's authority, the Act does not require  
32 persons that deal with an agent to investigate the agent or the agent's actions. Instead,  
33 safeguards against abuse are provided through heightened requirements for granting  
34 authority that could dissipate the principal's property or alter the principal's estate plan  
35 (Section 201(a)), provisions that set out the agent's duties and liabilities (Sections 114 and  
36 117) and by specification of the categories of persons that have standing to request  
37 judicial review of the agent's conduct (Section 116). The following provides a brief  
38 overview of the entire Act.

#### 39 **Overview of the Uniform Power of Attorney Act**

40 The Act consists of 4 articles. The basic substance of the Act is located in Articles 1  
41 and 2. Article 3 contains the optional statutory form and Article 4 consists of  
42 miscellaneous provisions dealing with general application of the Act and repeal of certain  
43 prior acts.

1           **Subpart 1 (UPOAA Article 1) – General Provisions and Definitions – Section 102**  
2 lists definitions which are useful in interpretation of the Act. Of particular note is the  
3 definition of "incapacity" which replaces the term "disability" used in the Original Act.  
4 The definition of "incapacity" is consistent with the standard for appointment of a  
5 conservator under Section 401 of the Uniform Guardianship and Protective Proceedings  
6 Act as amended in 1997. Another significant change in terminology from the Original  
7 Act is the use of "agent" in place of the term "attorney in fact." The term "agent" was  
8 also used in the Uniform Statutory Form Power of Attorney Act and is intended to clarify  
9 confusion in the lay public about the meaning of "attorney in fact." Section 103 provides  
10 that the Act is to apply broadly to all powers of attorney, but excepts from the Act powers  
11 of attorney for health care and certain specialized powers such as those coupled with an  
12 interest or dealing with proxy voting.

13           Another innovation is the default rule in Section 104 that a power of attorney is  
14 durable unless it contains express language indicating otherwise. This change from the  
15 Original Act reflects the view that most principals prefer their powers of attorney to be  
16 durable as a hedge against the need for guardianship. While the Original Act was silent  
17 on execution requirements for a power of attorney, Section 105 requires the principal's  
18 signature and provides that an acknowledged signature is presumed genuine. Section 106  
19 recognizes military powers of attorney and powers of attorney properly executed in other  
20 states or countries, or which were properly executed in the state of enactment prior to the  
21 Act's effective date. Section 107 states a choice of law rule for determining the law that  
22 governs the meaning and effect of a power of attorney.

23           Section 108 addresses the relationship of the agent to a later court-appointed  
24 fiduciary. The Original Act conferred upon a conservator or other later-appointed  
25 fiduciary the same power to revoke or amend the power of attorney as the principal  
26 would have had prior to incapacity. In contrast, the Act reserves this power to the court  
27 and states that the agent's authority continues until limited, suspended, or terminated by  
28 the court. This approach reflects greater deference for the previously expressed  
29 preferences of the principal and is consistent with the state legislative trend that has  
30 departed from the Original Act.

31           The default rule for when a power of attorney becomes effective is stated in Section  
32 109. Unless the principal specifies that it is to become effective upon a future date, event,  
33 or contingency, the authority of an agent under a power of attorney becomes effective  
34 when the power is executed. Section 109 permits the principal to designate who may  
35 determine when contingent powers are triggered. If the trigger for contingent powers is  
36 the principal's incapacity, Section 109 provides that the person designated to make that  
37 determination has the authority to act as the principal's personal representative under the  
38 Health Insurance Portability and Accountability Act (HIPAA) for purposes of accessing  
39 the principal's health-care information and communicating with the principal's health-care  
40 provider. This provision does not, however, confer on the designated person the authority  
41 to make health-care decisions for the principal. If the trigger for contingent powers is  
42 incapacity but the principal has not designated anyone to make the determination, or the  
43 person authorized is unable or unwilling to make the determination, the determination  
44 may be made by a physician or licensed psychologist, who must find that the principal's  
45 ability to manage property or business affairs is impaired, or by an attorney at law, judge,

1 or appropriate governmental official, who must find that the principal is missing,  
2 detained, or unable to return to the United States.

3 The bases for termination of a power of attorney are covered in Section 110. In  
4 response to concerns expressed in the JEB survey, the Act provides as the default rule  
5 that authority granted to a principal's spouse is revoked upon the commencement of  
6 proceedings for legal separation, marital dissolution or annulment.

7 Sections 111 through 118 address matters related to the agent, including default rules  
8 for coagents and successor agents (Section 111), reimbursement and compensation  
9 (Section 112), an agent's acceptance of appointment (Section 113), and the agent's duties  
10 (Section 114). Section 115 provides that a principal may lower the standard of liability  
11 for agent conduct subject to a minimum level of accountability for actions taken  
12 dishonestly, with an improper motive, or with reckless indifference to the purposes of the  
13 power of attorney or the best interest of the principal. Section 116 sets out a  
14 comprehensive list of persons that may petition the court to review the agent's conduct  
15 and Section 117 addresses agent liability. An agent may resign by following the notice  
16 procedures described in Section 118.

17 Sections 119 and 120 are included in the Act to address the frequently reported  
18 problem of persons refusing to accept a power of attorney. Section 119 protects persons  
19 that in good faith accept an acknowledged power of attorney without actual knowledge  
20 that the power of attorney is revoked, terminated, or invalid or that the agent is exceeding  
21 or improperly exercising the agent's powers. Subject to statutory exceptions, alternative  
22 Sections 120 impose liability for refusal to accept a power of attorney. Alternative A  
23 sanctions refusal of an acknowledged power of attorney and Alternative B sanctions only  
24 refusal of an acknowledged statutory form power of attorney.

25 Sections 121 through 123 address the relationship of the Act to other law. Section  
26 121 clarifies that the Act is supplemented by the principles of common law and equity to  
27 the extent those principles are not displaced by a specific provision of the Act, and  
28 Section 122 further clarifies that the Act is not intended to supersede any law applicable  
29 to financial institutions or other entities. With respect to remedies, Section 123 provides  
30 that the remedies under the Act are not exclusive and do not abrogate any other cause of  
31 action or remedy that may be available under the law of the enacting jurisdiction.

32 **Subpart 2 (UPOAA Article 2) – Authority** – The Act offers the drafting attorney  
33 enhanced flexibility whether drafting an individually tailored power of attorney or using  
34 the statutory form. Like the Uniform Statutory Form Power of Attorney Act, Sections  
35 204 through 217 of the Act set forth detailed descriptions of authority relating to subjects  
36 such as "real property," "retirement plans," and "taxes," which a principal, pursuant to  
37 Section 202, may incorporate in full into the power of attorney either by a reference to  
38 the short descriptive term for the subject used in the Act or to the section number.  
39 Section 202 further states that a principal may modify in a power of attorney any  
40 authority incorporated by reference. The definitions in Article 2 also provide meaning for  
41 authority with respect to subjects enumerated on the optional statutory form in Article 3.  
42 Section 203 applies to all incorporated authority and grants of general authority,  
43 providing further detail on how the authority is to be construed.

1 Article 2 also addresses concerns about authority that might be used to dissipate the  
2 principal's property or alter the principal's estate plan. Section 201(a) lists specific  
3 categories of authority that cannot be implied from a grant of general authority, but which  
4 may be granted only through express language in the power of attorney. Section 201(b)  
5 contains a default rule prohibiting an agent that is not an ancestor, spouse, or descendant  
6 of the principal from creating in the agent or in a person to whom the agent owes a legal  
7 obligation of support an interest in the principal's property, whether by gift, right of  
8 survivorship, beneficiary designation, disclaimer, or otherwise.

9 **Subpart 3 (UPOAA Article 3) – Statutory Forms** – The optional form in Article 3  
10 is designed for use by lawyers as well as lay persons. It contains, in plain language,  
11 instructions to the principal and agent. Step-by-step prompts are given for designation of  
12 the agent and successor agents, and grant of general and specific authority. In the section  
13 of the form addressing general authority, the principal must initial the subjects over which  
14 the principal wishes to delegate general authority to the agent. In the section of the form  
15 addressing specific authority, the Section 201(a) categories of specific authority are  
16 listed, preceded by a warning to the principal about the potential consequences of  
17 granting such authority to an agent. The principal is instructed to initial only the specific  
18 categories of actions that the principal intends to authorize. Article 3 also contains a  
19 sample agent certification form.

20 **Subpart 4 (UPOAA Article 4) – Miscellaneous Provisions** – The miscellaneous  
21 provisions in Article 4 clarify the relationship of the Act to other law and pre-existing  
22 powers of attorney. Enacting jurisdictions should repeal their existing power of attorney  
23 statutes, including, if applicable, the Uniform Durable Power of Attorney Act, The  
24 Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform  
25 Probate Code.

26 **SUBPART 1 (UPOAA ARTICLE 1)**  
27 **GENERAL PROVISIONS**  
28 **General Uniform Comment**

29 The Uniform Power of Attorney Act replaces the Uniform Durable Power of  
30 Attorney Act, the Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of  
31 the Uniform Probate Code. The primary purpose of the Uniform Durable Power of  
32 Attorney Act was to provide individuals with an inexpensive, non-judicial method of  
33 surrogate property management in the event of later incapacity. Two key concepts were  
34 introduced by the Uniform Durable Power of Attorney Act: 1) creation of a durable  
35 agency—one that survives, or is triggered by, the principal's incapacity, and 2) validation  
36 of post-mortem exercise of powers by an agent who acts in good faith and without actual  
37 knowledge of the principal's death. The success of the Uniform Durable Power of  
38 Attorney Act is evidenced by the widespread use of durable powers in every jurisdiction,  
39 not only for incapacity planning, but also for convenience while the principal retains  
40 capacity. However, the limitations of the Uniform Durable Power of Attorney Act are  
41 evidenced by the number of states that have supplemented and revised their statutes to  
42 address myriad issues upon which the Uniform Durable Power of Attorney Act is silent.  
43 These issues include parameters for the creation and use of powers of attorney as well as  
44 guidelines for the principal, the agent, and the person who is asked to accept the agent's

1 authority. The general provisions and definitions of Article 1 in the Uniform Power of  
2 Attorney Act address those issues.

3 In addition to providing greater detail than the Uniform Durable Power of Attorney  
4 Act, this Act changes two presumptions in the earlier act: 1) that a power of attorney is  
5 not durable unless it contains language to make it durable; and 2) that a later court-  
6 appointed fiduciary for the principal has the power to revoke or amend a previously  
7 executed power of attorney. Section 104 of this Article reverses the non-durability  
8 presumption by stating that a power of attorney is durable unless it expressly provides  
9 that it is terminated by the incapacity of the principal. Section 108 gives deference to the  
10 principal's choice of agent by providing that if a court appoints a fiduciary to manage  
11 some or all of the principal's property, the agent's authority continues unless limited,  
12 suspended, or terminated by the court.

13 Although the Act is primarily a default statute, Article 1 also contains rules that  
14 govern all powers of attorney subject to the Act. Examples of these rules include  
15 imposition of certain minimum fiduciary duties on an agent who has accepted  
16 appointment (Section 114(a)), recognition of persons who have standing to request  
17 judicial construction of the power of attorney or review of the agent's conduct (Section  
18 116), and protections for persons who accept an acknowledged power of attorney without  
19 actual knowledge that the power of attorney or the agent's authority is void, invalid, or  
20 terminated, or that the agent is exceeding or improperly exercising the power (Section  
21 119). In contrast with the rules of general application in Article 1, the default provisions  
22 are clearly indicated by signals such as "unless the power of attorney otherwise  
23 provides," or "except as otherwise provided in the power of attorney." These signals alert  
24 the draftsman to options for enlarging or limiting the Act's default terms. For example,  
25 default provisions in Article 1 state that, unless the power of attorney otherwise provides,  
26 the power of attorney is effective immediately (Section 109), coagents may exercise their  
27 authority independently (Section 111), and an agent is entitled to reimbursement of  
28 expenses reasonably incurred and to reasonable compensation (Section 112).

29 **Sec. 2. 18-A MRSA Art. 5, Pt. 9** is enacted to read:

30 **PART 9**

31 **MAINE UNIFORM POWER OF ATTORNEY ACT**

32 **SUBPART 1**

33 **GENERAL PROVISIONS AND DEFINITIONS**

34 **§5-901. Short title**

35 This Part may be known and cited as "the Maine Uniform Power of Attorney Act."

36 **Uniform Comment**

37 (This is Section 101 of the UPOAA)

38 This Act, which replaces the Uniform Durable Power of Attorney Act, does not  
39 contain the word "durable" in the title. Pursuant to Section 104, a power of attorney



1 created under the Act is durable unless the power of attorney provides that it is terminated  
2 by the incapacity of the principal.

3 **§5-902. Definitions**

4 As used in this Part, unless the context otherwise indicates, the following terms have  
5 the following meanings.

6 (a). "Agent" means a person granted authority to act for a principal under a power of  
7 attorney, whether denominated an agent, attorney-in-fact or otherwise. The term includes  
8 an original agent, coagent, successor agent and a person to which an agent's authority is  
9 delegated.

10 (b). "Durable," with respect to a power of attorney, means not terminated by the  
11 principal's incapacity.

12 (c). "Electronic" means relating to technology having electrical, digital, magnetic,  
13 wireless, optical, electromagnetic or similar capabilities.

14 (d). "Good faith" means honesty in fact.

15 (e). "Incapacity" means inability of an individual to manage property or business  
16 affairs because the individual:

17 (1). Is impaired by reason of mental illness, mental deficiency, physical illness or  
18 disability, chronic use of drugs, chronic intoxication or other cause to the extent that  
19 the individual lacks sufficient understanding, capacity or ability to receive and  
20 evaluate information or make or communicate decisions; or

21 (2). Is:

22 (i) Missing;

23 (ii) Detained, including incarcerated in a penal system; or

24 (iii) Outside the United States and unable to return.

25 (f). "Person" means an individual, corporation, business trust, estate, trust,  
26 partnership, limited liability company, association, joint venture, public corporation,  
27 government or governmental subdivision, agency or instrumentality or any other legal or  
28 commercial entity.

29 (g). "Power of attorney" means a writing or other record that grants authority to an  
30 agent to act in the place of the principal, whether or not the term "power of attorney" is  
31 used.

32 (h). "Presently exercisable general power of appointment," with respect to property  
33 or a property interest subject to a power of appointment, means power exercisable at the  
34 time in question to vest absolute ownership in the principal individually, the principal's  
35 estate, the principal's creditors or the creditors of the principal's estate. The term  
36 includes a power of appointment not exercisable until the occurrence of a specified event,  
37 the satisfaction of an ascertainable standard or the passage of a specified period only after

1 the occurrence of the specified event, the satisfaction of the ascertainable standard or the  
2 passage of the specified period. The term does not include a power exercisable in a  
3 fiduciary capacity or only by will.

4 (i). "Principal" means an individual who grants authority to an agent in a power of  
5 attorney.

6 (j). "Property" means anything that may be the subject of ownership, whether real or  
7 personal, or legal or equitable, or any interest or right therein.

8 (k). "Record" means information that is inscribed on a tangible medium or that is  
9 stored in an electronic or other medium and is retrievable in perceivable form.

10 (l). "Registered domestic partner" means an individual registered as a domestic  
11 partner under Title 22, section 2710, subsection 3.

12 (m). "Sign" means, with present intent to authenticate or adopt a record:

13 (1). To execute or adopt a tangible symbol; or

14 (2). To attach to or logically associate with the record an electronic sound, symbol or  
15 process.

16 (n). "State" means a state of the United States, the District of Columbia, Puerto Rico,  
17 the United States Virgin Islands or any territory or insular possession subject to the  
18 jurisdiction of the United States.

19 (o). "Stocks and bonds" means stocks, bonds, mutual funds and all other types of  
20 securities and financial instruments, whether held directly, indirectly or in any other  
21 manner. The term does not include commodity futures contracts and call or put options  
22 on stocks or stock indexes.

#### 23 **Uniform Comment**

24 (This is Section 102 of the UPOAA)

25 Although most of the definitions in Section 102 are self-explanatory, a few of the  
26 terms warrant further comment.

27 "Agent" replaces the term "attorney in fact" used in the Uniform Durable Power of  
28 Attorney Act to avoid confusion in the lay public about the meaning of the term and the  
29 difference between an attorney in fact and an attorney at law. Agent was also used in the  
30 Uniform Statutory Form Power of Attorney Act which this Act supersedes.

31 "Incapacity" replaces the term "disability" used in the Uniform Durable Power of  
32 Attorney Act in recognition that disability does not necessarily render an individual  
33 incapable of property and business management. The definition of incapacity stresses the  
34 operative consequences of the individual's impairment—inability to manage property and  
35 business affairs—rather than the impairment itself. The definition of incapacity in the Act  
36 is also consistent with the standard for appointment of a conservator under Section 401 of  
37 the Uniform Guardianship and Protective Proceedings Act as amended in 1997.

1 The definition of "power of attorney" clarifies that the term applies to any grant of  
2 authority in a writing or other record from a principal to an agent which appears from the  
3 grant to be a power of attorney, without regard to whether the words "power of attorney"  
4 are actually used in the grant.

5 "Presently exercisable general power of appointment" is defined to clarify that where  
6 the phrase appears in the Act it does not include a power exercisable by the principal in a  
7 fiduciary capacity or exercisable only by will. Cf. Restatement (Third) of Property (Wills  
8 and Don. Trans.) § 19.8 cmt. d (Tentative Draft No. 5, approved 2006) (noting that unless  
9 the donor of a presently exercisable power of attorney has manifested a contrary intent, it  
10 is assumed that the donor intends that the donee's agent be permitted to exercise the  
11 power for the benefit of the donee). Including in a power of attorney the authority to  
12 exercise a presently exercisable general power of appointment held by the principal is  
13 consistent with the objective of giving an agent comprehensive management authority  
14 over the principal's property and financial affairs. The term appears in Section 211  
15 (Estates, Trusts, and Other Beneficial Interests) in the context of authority to exercise for  
16 the benefit of the principal a presently exercisable general power of appointment held by  
17 the principal (*see* Section 211(b)(3)), and in Section 217 (Gifts) in the context of  
18 authority to exercise for the benefit of someone else a presently exercisable general  
19 power of appointment held by the principal (*see* Section 217(b)(1)). The term is also  
20 incorporated by reference when using the statutory form in Section 301 to grant authority  
21 with respect to "Estates, Trusts, and Other Beneficial Interests" or authority with respect  
22 to "Gifts." If a principal wishes to delegate authority to exercise a power that the  
23 principal holds in a fiduciary capacity, Section 201(a)(7) requires that the power of  
24 attorney contain an express grant of such authority. Furthermore, delegation of a power  
25 held in a fiduciary capacity is possible only if the principal has authority to delegate the  
26 power, and the agent's authority is necessarily limited by whatever terms govern the  
27 principal's ability to exercise the power.

#### 28 **Maine Comment**

29 Subsection (e), the definition of incapacity, deviates from the Uniform Act by  
30 applying the definition of incapacity from 18-A M.R.S.A. §§ 5-101(1) and 5-401(2). A  
31 new subsection (l) adds the definition of registered domestic partner under Maine law,  
32 which is used throughout the act.

#### 33 **§5-903. Applicability**

34 This Part applies to all powers of attorney except:

35 (a). A power to the extent it is coupled with an interest in the subject of the power,  
36 including a power given to or for the benefit of a creditor in connection with a credit  
37 transaction;

38 (b). A power to make health care decisions;

39 (c). A proxy or other delegation to exercise voting rights or management rights with  
40 respect to an entity; and

1 (d). A power created on a form prescribed by a government or governmental  
2 subdivision, agency or instrumentality for a governmental purpose.

3 **Uniform Comment**

4 (This is Section 103 of the UPOAA)

5 The Uniform Power of Attorney Act is intended to be comprehensive with respect to  
6 delegation of surrogate decision making authority over an individual's property and  
7 property interests, whether for the purpose of incapacity planning or mere convenience.  
8 Given that an agent will likely exercise authority at times when the principal cannot  
9 monitor the agent's conduct, the Act specifies minimum agent duties and protections for  
10 the principal's benefit. These provisions, however, may not be appropriate for all  
11 delegations of authority that might otherwise be included within the definition of a power  
12 of attorney. Section 103 lists delegations of authority that are excluded from the Act  
13 because the subject matter of the delegation, the objective of the delegation, the agent's  
14 role with respect to the delegation, or a combination of the foregoing, would make  
15 application of the Act's provisions inappropriate.

16 Paragraph (1) excludes a power to the extent that it is coupled with an interest in the  
17 subject of the power. This exclusion addresses situations where, due to the agent's  
18 interest in the subject matter of the power, the agent is not intended to act as the  
19 principal's fiduciary. See Restatement (Third) of Agency § 3.12 (2006) and M.T.  
20 Brunner, Annotation, *What Constitutes Power Coupled with Interest within Rule as to*  
21 *Termination of Agency*, 28 A.L.R.2d 1243 (1953). Common examples of powers coupled  
22 with an interest include powers granted to a creditor to perfect or protect title in, or to  
23 sell, pledged collateral. While the example of "a power given to or for the benefit of a  
24 creditor in connection with a credit transaction" is highlighted in paragraph (1), it is not  
25 meant to exclude application of paragraph (1) to other contexts in which a power may be  
26 coupled with an interest, such as a power held by an insurer to settle or confess judgment  
27 on behalf of an insured. See, e.g., *Hayes v. Gessner*, 52 N.E.2d 968 (Mass. 1944).

28 Paragraph (2) excludes from the Act delegations of authority to make health-care  
29 decisions for the principal. Such delegations are covered under other law of the  
30 jurisdiction. The Act recognizes, however, that matters of financial management and  
31 health-care decision making are often interdependent. The Act consequently provides in  
32 Section 114(b)(5) a default rule that an agent under the Act must cooperate with the  
33 principal's health-care decision maker.

34 Likewise, paragraph (3) excludes from the Act a proxy or other delegation to exercise  
35 voting rights or management rights with respect to an entity. The rules with respect to  
36 those rights are typically controlled by entity-specific statutes within a jurisdiction. See,  
37 e.g., Model Bus. Corp. Act § 7.22 (2002); Unif. Ltd. Partnership Act § 118 (2001); and  
38 Unif. Ltd. Liability Co. Act § 404(e) (1996). Notwithstanding the exclusion of such  
39 delegations from the operation of this Act, Section 209 contemplates that a power granted  
40 to an agent with respect to operation of an entity or business includes the authority to  
41 "exercise in person or by proxy . . . a right, power, privilege, or option the principal has or  
42 claims to have as the holder of stocks and bonds . . ." (see paragraph (5) of Section 209).  
43 Thus, while a person that holds only a proxy pursuant to an entity voting statute will not  
44 be subject to the provisions of this Act, an agent that is granted Section 209 authority is

1 subject to the Act because the principal has given the agent authority that is greater than  
2 that of a mere voting proxy. In fact, typical entity statutes contemplate that a principal's  
3 agent or "attorney in fact" may appoint a proxy on behalf of the principal. See, e.g.,  
4 Model Bus. Corp. Act § 7.22 (2002); Unif. Ltd. Partnership Act § 118 (2001); and Unif.  
5 Ltd. Liability Co. Act § 404(e) (1996).

6 Paragraph (4) excludes from the Act any power created on a governmental form for a  
7 governmental purpose. Like the excluded powers in paragraphs (2) and (3), the authority  
8 for a power created on a governmental form emanates from other law and is generally for  
9 a limited purpose. Notwithstanding this exclusion, the Act specifically provides in  
10 paragraph (7) of Section 203 that a grant of authority to an agent includes, with respect to  
11 that subject matter, authority to "prepare, execute, and file a record, report, or other  
12 document to safeguard or promote the principal's interest under a statute or governmental  
13 regulation." Section 203, paragraph (8), further clarifies that the agent has the authority  
14 to "communicate with any representative or employee of a government or governmental  
15 subdivision, agency, or instrumentality, on behalf of the principal." The intent of these  
16 provisions is to minimize the need for a special power on a governmental form with  
17 respect to any subject matter over which an agent is granted authority under the Act.

18 **§5-904. Power of attorney is durable**

19 A power of attorney created under this Part is durable unless it expressly provides  
20 that it is terminated by the incapacity of the principal.

21 **Uniform Comment**

22 (This is Section 104 of the UPOAA)

23 Section 104 establishes that a power of attorney created under the Act is durable  
24 unless it expressly states otherwise. This default rule is the reverse of the approach under  
25 the Uniform Durable Power of Attorney Act and based on the assumption that most  
26 principals prefer durability as a hedge against the need for guardianship. See also Section  
27 107 Comment (noting that the default rules of the jurisdiction's law under which a power  
28 of attorney is created, including the default rule for durability, govern the meaning and  
29 effect of a power of attorney).

30 **§5-905. Execution of power of attorney; notices**

31 (a). A power of attorney must be signed by the principal or in the principal's  
32 conscious presence by another individual directed by the principal to sign the principal's  
33 name on the power of attorney. A signature on a power of attorney is presumed to be  
34 genuine if the principal acknowledges the signature before a notary public or other  
35 individual authorized by law to take acknowledgments.

36 (b). A power of attorney is not valid unless it contains the following notices  
37 substantially in the following form:

38 "Notice to the Principal: As the "Principal" you are using this power of attorney to grant  
39 power to another person (called the Agent) to make decisions about your property and to  
40 use your property on your behalf. Under this power of attorney you give your Agent  
41 broad and sweeping powers to sell or otherwise dispose of your property without notice

1 to you. Under this document your Agent will continue to have these powers after you  
2 become incapacitated. The powers that you give your Agent are explained more fully in  
3 the Maine Uniform Power of Attorney Act, Maine Revised Statutes, Title 18-A, Article 5,  
4 Part 9. You have the right to revoke this power of attorney at any time as long as you are  
5 not incapacitated. If there is anything about this power of attorney that you do not  
6 understand you should ask a lawyer to explain it to you.

7 Notice to the Agent: As the "Agent" you are given power under this power of attorney to  
8 make decisions about the property belonging to the Principal and to dispose of the  
9 Principal's property on the Principal's behalf in accordance with the terms of this power  
10 of attorney. This power of attorney is valid only if the Principal is of sound mind when  
11 the Principal signs it. When you accept the authority granted under this power of attorney  
12 a special legal relationship is created between you and the Principal. This relationship  
13 imposes upon you legal duties that continue until you resign or the power of attorney is  
14 terminated or revoked. The duties are more fully explained in the Maine Uniform Power  
15 of Attorney Act, Maine Revised Statutes, Title 18-A, Article 5, Part 9. As the Agent, you  
16 are generally not entitled to use the Principal's property for your own benefit or to make  
17 gifts to yourself or others unless the power of attorney gives you such authority. If you  
18 violate your duty under this power of attorney you may be liable for damages and may be  
19 subject to criminal prosecution. You must stop acting on behalf of the Principal if you  
20 learn of any event that terminates this power of attorney or your authority under this  
21 power of attorney. Events of termination are more fully explained in the Maine Uniform  
22 Power of Attorney Act and include, but are not limited to, revocation of your authority or  
23 of the power of attorney by the Principal, the death of the Principal or the commencement  
24 of divorce proceedings between you and the Principal. If there is anything about this  
25 power of attorney or your duties under it that you do not understand you should ask a  
26 lawyer to explain it to you."

#### 27 **Uniform Comment**

28  
29 (This is Section 105 of the UPOAA)

30 While notarization of the principal's signature is not required to create a valid power  
31 of attorney, this section strongly encourages the practice by according acknowledged  
32 signatures a statutory presumption of genuineness. Furthermore, because Section 119  
33 (Acceptance of and Reliance Upon Acknowledged Power of Attorney) and alternative  
34 Sections 120 (Alternative A—Liability for Refusal to Accept Acknowledged Power of  
35 Attorney, and Alternative B—Liability for Refusal to Accept Acknowledged Statutory  
36 Form Power of Attorney ) do not apply to unacknowledged powers, persons who are  
37 presented with an unacknowledged power of attorney may be reluctant to accept it. As a  
38 practical matter, an acknowledged signature is required if the power of attorney will be  
39 recorded by the agent in conjunction with the execution of real estate documents on  
40 behalf of the principal. See R.P.D., Annotation, *Recording Laws as Applied to Power of*  
41 *Attorney under which Deed or Mortgage is Executed*, 114 A.L.R. 660 (1938).

42 This section, at a minimum, requires that the power of attorney be signed by the  
43 principal or by another individual who the principal has directed to sign the principal's  
44 name. If another individual is directed to sign the principal's name, the signing must  
45 occur in the principal's "conscious presence." The 1990 amendments to the Uniform  
46 Probate Code codified the "conscious presence" test for the execution of wills (Section 2-

1 502(a)(2)), which generally requires that the signing is sufficient if it takes place within  
2 the range of the senses—usually sight or hearing—of the individual who directed that  
3 another sign the individual's name. *See* Unif. Probate Code § 2-502 cmt. (2003). For a  
4 discussion of acknowledgment of a signature by an individual whose name is signed by  
5 another, see R.L.M., Annotation, *Formal Acknowledgment of Instrument by One Whose*  
6 *Name is Signed thereto by Another as an Adoption of the Signature*, 57 A.L.R. 525  
7 (1928).

#### 8 **Maine Comment**

9 Subsection (b) is a deviation from the Uniform Act and continues, in part, Maine law  
10 regarding required notices in the power of attorney. The change, however, is that the  
11 notice may now be substantially similar to the statutory language as opposed to verbatim.  
12 Under prior law the verbatim requirement would frequently invalidate otherwise valid  
13 powers of attorney if, for example, the notice was missing a comma.

#### 14 **§5-906. Validity of power of attorney**

15 (a). A power of attorney executed in this State on or after July 1, 2010 is valid if its  
16 execution complies with section 5-905.

17 (b). A power of attorney executed in this State before July 1, 2010 is valid if its  
18 execution complied with the law of this State as it existed at the time of execution.

19 (c). A power of attorney executed other than in this State is valid in this State if,  
20 when the power of attorney was executed, the execution complied with:

21 (1). The law of the jurisdiction that determines the meaning and effect of the power  
22 of attorney pursuant to section 5-907; or

23 (2). The requirements for a military power of attorney pursuant to 10 United States  
24 Code, Section 1044b, as amended.

25 (d). Except as otherwise provided by statute other than this Part, a photocopy or  
26 electronically transmitted copy of an original power of attorney has the same effect as the  
27 original.

#### 28 **Uniform Comment**

29 (This is Section 106 of the UPOAA)

30 One of the purposes of the Uniform Power of Attorney Act is promotion of the  
31 portability and use of powers of attorney. Section 106 makes clear that the Act does not  
32 affect the validity of pre-existing powers of attorney executed under prior law in the  
33 enacting jurisdiction, powers of attorney validly created under the law of another  
34 jurisdiction, and military powers of attorney. While the effect of this section is to  
35 recognize the validity of powers of attorney created under other law, it does not abrogate  
36 the traditional grounds for contesting the validity of execution such as forgery, fraud, or  
37 undue influence.

38 This section also provides that unless another law in the jurisdiction requires  
39 presentation of the original power of attorney, a photocopy or electronically transmitted

1 copy has the same effect as the original. An example of another law that might require  
2 presentation of the original power of attorney is the jurisdiction's recording act. *See, e.g.*,  
3 Restatement (Third) of Property (Wills & Don. Trans.) § 6.3 cmt. e (2003) (noting that in  
4 order to record a deed, "some states require that the document of transfer be signed,  
5 sealed, attested, and acknowledged").

6 **§5-907. Meaning and effect of power of attorney**

7 The meaning and effect of a power of attorney is determined by the law of the  
8 jurisdiction indicated in the power of attorney and, in the absence of an indication of  
9 jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.

10 **Uniform Comment**

11 (This is Section 107 of the UPOAA)

12 This section recognizes that a foreign power of attorney, or one executed before the  
13 effective date of the Uniform Power of Attorney Act, may have been created under  
14 different default rules than those in this Act. Section 107 provides that the meaning and  
15 effect of a power of attorney is to be determined by the law under which it was created.  
16 For example, the law in another jurisdiction may provide for different default rules with  
17 respect to durability of a power of attorney (*see* Section 104), the authority of coagents  
18 (*see* Section 111) or the scope of specific authority such as the authority to make gifts  
19 (*see* Section 217). Section 107 clarifies that the principal's intended grant of authority  
20 will be neither enlarged nor narrowed by virtue of the agent using the power in a different  
21 jurisdiction. For a discussion of the issues that can arise with inter-jurisdictional use of  
22 powers of attorney, see Linda S. Whitton, *Crossing State Lines with Durable Powers*,  
23 *Prob. & Prop.*, Sept./Oct. 2003, at 28.

24 This section also establishes an objective means for determining what jurisdiction's  
25 law the principal intended to govern the meaning and effect of a power of attorney. The  
26 phrase, "the law of the jurisdiction indicated in the power of attorney," is intentionally  
27 broad, and includes any statement or reference in a power of attorney that indicates the  
28 principal's choice of law. Examples of an indication of jurisdiction include a reference to  
29 the name of the jurisdiction in the title or body of the power of attorney, citation to the  
30 jurisdiction's power of attorney statute, or an explicit statement that the power of attorney  
31 is created or executed under the laws of a particular jurisdiction. In the absence of an  
32 indication of jurisdiction in the power of attorney, Section 107 provides that the law of  
33 the jurisdiction in which the power of attorney was executed controls. The distinction  
34 between "the law of the jurisdiction indicated in the power of attorney" and "the law of  
35 the jurisdiction in which the power of attorney was executed" is an important one. The  
36 common practice of property ownership in more than one jurisdiction increases the  
37 likelihood that a principal may execute in one jurisdiction a power of attorney that was  
38 created and intended to be interpreted under the laws of another jurisdiction. A clear  
39 indication of the jurisdiction's law that is intended to govern the meaning and effect of a  
40 power of attorney is therefore advisable in all powers of attorney. *See, e.g.*, Section 301  
41 (providing for the name of the jurisdiction to appear in the title of the statutory form  
42 power of attorney).



1 **§5-908. Nomination of conservator or guardian; relation of agent to court-**  
2 **appointed fiduciary**

3 **(a). In a power of attorney, a principal may nominate a conservator of the principal's**  
4 **estate or guardian of the principal's person for consideration by the court if protective**  
5 **proceedings for the principal's estate or person are begun after the principal executes the**  
6 **power of attorney. Except for good cause shown or disqualification, the court shall make**  
7 **its appointment in accordance with the principal's most recent nomination.**

8 **(b). If, after a principal executes a power of attorney, a court appoints a conservator**  
9 **of the principal's estate or other fiduciary charged with the management of some or all of**  
10 **the principal's property, the agent is accountable to the fiduciary as well as to the**  
11 **principal. The power of attorney is not terminated and the agent's authority continues**  
12 **unless limited, suspended or terminated by the court.**

13 **Uniform Comment**

14 (This is Section 108 of the UPOAA)

15 Section 108(b) is a departure from the Uniform Durable Power of Attorney Act  
16 which gave a court-appointed fiduciary the same power to revoke or amend a power of  
17 attorney as the principal would have if not incapacitated. *See* Unif. Durable Power of  
18 Atty. Act § 3(a) (1987). In contrast, this Act gives deference to the principal's choice of  
19 agent by providing that the agent's authority continues, notwithstanding the later court  
20 appointment of a fiduciary, unless the court acts to limit or terminate the agent's authority.  
21 This approach assumes that the later-appointed fiduciary's authority should supplement,  
22 not truncate, the agent's authority. If, however, a fiduciary appointment is required  
23 because of the agent's inadequate performance or breach of fiduciary duties, the court,  
24 having considered this evidence during the appointment proceedings, may limit or  
25 terminate the agent's authority contemporaneously with appointment of the fiduciary.  
26 Section 108(b) is consistent with the state legislative trend that has departed from the  
27 Uniform Durable Power of Attorney Act. *See, e.g.,* 755 Ill. Comp. Stat. Ann. 45/2-10  
28 (West 1992); Ind. Code Ann. § 30-5-3-4 (West 1994); Kan. Stat. Ann. § 58-662 (2005);  
29 Mo. Ann. Stat. § 404.727 (West 2001); N.J. Stat. Ann. § 46:2B-8.4 (West 2003); N.M.  
30 Stat. Ann. § 45-5-503A (LexisNexis 2004); Utah Code Ann. § 75-5-501 (Supp. 2006);  
31 Vt. Stat. Ann. tit. 14, § 3509(a) (2002); Va. Code Ann. § 11-9.1B (2006). Section 108(b)  
32 is also consistent with the Uniform Health-Care Decisions Act § 6(a) (1993), which  
33 provides that a guardian may not revoke the ward's advance health-care directive unless  
34 the court appointing the guardian expressly so authorizes. Furthermore, it is consistent  
35 with the Uniform Guardianship and Protective Proceedings Act (1997), which provides  
36 that a guardian or conservator may not revoke the ward's or protected person's power of  
37 attorney for health-care or financial management without first obtaining express authority  
38 of the court. *See* Unif. Guardianship & Protective Proc. Act § 316(c) (guardianship), §  
39 411(d) (protective proceedings).

40 Deference for the principal's autonomous choice is evident both in the presumption  
41 that an agent's authority continues unless limited or terminated by the court, and in the  
42 directive that the court shall appoint a fiduciary in accordance with the principal's most  
43 recent nomination (*see* subsection (a)). Typically, a principal will nominate as  
44 conservator or guardian the same individual named as agent under the power of attorney.

1 Favoring the principal's choice of agent and nominee, an approach consistent with most  
2 statutory hierarchies for guardian selection (*see* Unif. Guardianship & Protective Proc.  
3 Act § 310(a)(2) (1997)), also discourages guardianship petitions filed for the sole purpose  
4 of thwarting the agent's authority to gain control over a vulnerable principal. *See* Unif.  
5 Guardianship & Protective Proc. Act § 310 cmt. (1997). *See also* Linda S. Ershow-  
6 Levenberg, *When Guardianship Actions Violate the Constitutionally-Protected Right of*  
7 *Privacy*, NAELA News, Apr. 2005, at 1 (arguing that appointment of a guardian when  
8 there is a valid power of attorney in place violates the alleged incapacitated person's  
9 constitutionally protected rights of privacy and association).

10 **§5-909. When power of attorney effective**

11 (a). A power of attorney is effective when executed unless the principal provides in  
12 the power of attorney that it becomes effective at a future date or upon the occurrence of  
13 a future event or contingency.

14 (b). If a power of attorney becomes effective upon the occurrence of a future event  
15 or contingency, the principal, in the power of attorney, may authorize one or more  
16 persons to determine in a writing or other record that the event or contingency has  
17 occurred.

18 (c). If a power of attorney becomes effective upon the principal's incapacity and the  
19 principal has not authorized a person to determine whether the principal is incapacitated,  
20 or the person authorized is unable or unwilling to make the determination, the power of  
21 attorney becomes effective upon a determination in a writing or other record by:

22 (1). A physician that the principal is incapacitated within the meaning of section  
23 5-902, subsection (e), paragraph (1); or

24 (2). An attorney at law, a judge or an appropriate governmental official that the  
25 principal is incapacitated within the meaning of section 5-902, subsection (e),  
26 paragraph (2).

27 (d). A person authorized by the principal in the power of attorney to determine that  
28 the principal is incapacitated may act as the principal's personal representative pursuant  
29 to the federal Health Insurance Portability and Accountability Act of 1996, 42 United  
30 States Code, Section 1320d, et seq., as amended, and applicable regulations, to obtain  
31 access to the principal's health care information and communicate with the principal's  
32 health care provider.

33 **Uniform Comment**

34 (This is Section 109 of the UPOAA)

35 This section establishes a default rule that a power of attorney is effective when  
36 executed. If the principal chooses to create what is commonly known as a "springing" or  
37 contingent power of attorney—one that becomes effective at a future date or upon a future  
38 event or contingency—the principal may authorize the agent or someone else to provide  
39 written verification that the event or contingency has occurred (subsection (b)). Because  
40 the person authorized to verify the principal's incapacitation will likely need access to the  
41 principal's health information, subsection (d) qualifies that person to act as the principal's

1 "personal representative" for purposes of the Health Insurance Portability and  
2 Accountability Act (HIPAA). *See* 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that  
3 for purposes of disclosing an individual's protected health information, "a covered entity  
4 must . . . treat a personal representative as the individual"). Section 109 does not,  
5 however, empower the agent to make health-care decisions for the principal. *See* Section  
6 103 and comment (discussing exclusion from this Act of powers to make health-care  
7 decisions).

8 The default rule reflects a "best practices" philosophy that any agent who can be  
9 trusted to act for the principal under a springing power of attorney should be trustworthy  
10 enough to hold an immediate power. Survey evidence suggests, however, that a  
11 significant number of principals still prefer springing powers, most likely to maintain  
12 privacy in the hope that they will never need a surrogate decision maker. *See* Linda S.  
13 Whitton, *National Durable Power of Attorney Survey Results and Analysis*, National  
14 Conference of Commissioners on Uniform State Laws, 6-7 (2002),  
15 <http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm> (reporting that 23% of  
16 lawyer respondents found their clients preferred springing powers, 61% reported a  
17 preference for immediate powers, and 16% saw no trend; however, 89% stated that a  
18 power of attorney statute should authorize springing powers).

19 If the principal's incapacity is the trigger for a springing power of attorney and the  
20 principal has not authorized anyone to make that determination, or the authorized person  
21 is unable or unwilling to make the determination, this section provides a default  
22 mechanism to trigger the power. Incapacity based on the principal's impairment may be  
23 verified by a physician or licensed psychologist (subsection (c)(1)), and incapacity based  
24 on the principal's unavailability (*i.e.*, the principal is missing, detained, or unable to return  
25 to the United States) may be verified by an attorney at law, judge, or an appropriate  
26 governmental official (subsection (c)(2)). Examples of appropriate governmental  
27 officials who may be in a position to determine that the principal is incapacitated within  
28 the meaning of Section 102(5)(B) include an officer acting under authority of the United  
29 States Department of State or uniformed services of the United States or a sworn federal  
30 or state law enforcement officer. The default mechanism for triggering a power of  
31 attorney is available only when no incapacity determination has been made. It is not  
32 available to challenge the determination made by the principal's authorized designee.

33 **§5-910. Termination of power of attorney or agent's authority**

34 **(a). A power of attorney terminates when:**

35 **(1). The principal dies;**

36 **(2). The principal becomes incapacitated, if the power of attorney is not durable;**

37 **(3). The principal revokes the power of attorney;**

38 **(4). The power of attorney provides that it terminates;**

39 **(5). The purpose of the power of attorney is accomplished; or**

1           (6). The principal revokes the agent’s authority or the agent dies, becomes  
2           incapacitated or resigns and the power of attorney does not provide for another agent  
3           to act under the power of attorney.

4           (b). An agent’s authority terminates:

5           (1). When the principal revokes the authority;

6           (2). When the agent dies, becomes incapacitated or resigns;

7           (3). When an action is filed for the termination or annulment of the agent’s marriage  
8           to the principal or their legal separation, unless the power of attorney otherwise  
9           provides;

10           (4). Upon the sooner to occur of either the marriage of the principal to a person other  
11           than the agent if upon or after execution of the power of attorney the principal and the  
12           agent are or became registered domestic partners, the filing with the domestic partner  
13           registry, in accordance with Title 22, section 2710, subsection 4, of a notice  
14           consenting to the termination of a registered domestic partnership of the principal and  
15           the agent or upon service, in accordance with Title 22, section 2710, subsection 4, of  
16           a notice of intent to terminate the registered domestic partnership of the principal and  
17           the agent; or

18           (5). The power of attorney terminates.

19           (c). Unless the power of attorney otherwise provides, an agent’s authority is  
20           exercisable until the authority terminates under subsection (b), notwithstanding a lapse of  
21           time since the execution of the power of attorney.

22           (d). Termination of an agent’s authority or of a power of attorney is not effective as  
23           to the agent or another person that, without actual knowledge of the termination, acts in  
24           good faith under the power of attorney. An act so performed, unless otherwise invalid or  
25           unenforceable, binds the principal and the principal’s successors in interest.

26           (e). Incapacity of the principal of a power of attorney that is not durable does not  
27           revoke or terminate the power of attorney as to an agent or other person that, without  
28           actual knowledge of the incapacity, acts in good faith under the power of attorney. An  
29           act so performed, unless otherwise invalid or unenforceable, binds the principal and the  
30           principal’s successors in interest.

31           (f). The execution of a power of attorney does not revoke a power of attorney  
32           previously executed by the principal unless the subsequent power of attorney provides  
33           that the previous power of attorney is revoked or that all other powers of attorney are  
34           revoked.

35                                 **Uniform Comment**

36                                 (This is Section 110 of the UPOAA)

37                                 This section addresses termination of a power of attorney or an agent's authority  
38                                 under a power of attorney. It first lists termination events (*see* subsections (a) and (b)),  
39                                 and then lists circumstances that, in contrast, either do not invalidate the power of

1 attorney (*see* subsections (c) and (f)) or the actions taken pursuant to the power of  
2 attorney (*see* subsections (d) and (e)).

3 Subsection (c) provides that a power of attorney under the Act does not become  
4 "stale." Unless a power of attorney provides for termination upon a certain date or after  
5 the passage of a period of time, lapse of time since execution is irrelevant to validity, a  
6 concept carried over from the Uniform Durable Power of Attorney Act. *See* Unif.  
7 Durable Power of Atty. Act § 1 (as amended in 1987). Similarly, subsection (f) clarifies  
8 that a subsequently executed power of attorney will not revoke a prior power of attorney  
9 by virtue of inconsistency alone. To effect a revocation, a subsequently executed power  
10 of attorney must expressly revoke a previously executed power of attorney or state that all  
11 other powers of attorney are revoked. The requirement of express revocation prevents  
12 inadvertent revocation when the principal intends for one agent to have limited authority  
13 that overlaps with broader authority held by another agent. For example, the principal  
14 who has given one agent a very broad power of attorney, including general authority with  
15 respect to real property, may later wish to give another agent limited authority to execute  
16 closing documents with respect to out-of-town real estate.

17 Subsections (d) and (e) emphasize that even a termination event is not effective as to  
18 the agent or person who, without actual knowledge of the termination event, acts in good  
19 faith under the power of attorney. For example, the principal's death terminates a power  
20 of attorney (*see* subsection (a)(1)), but an agent who acts in good faith under a power of  
21 attorney without actual knowledge of the principal's death will bind the principal's  
22 successors in interest with that action (*see* subsection (d)). The same result is true if the  
23 agent knows of the principal's death, but the person who accepts the agent's apparent  
24 authority has no actual knowledge of the principal's death. *See* Restatement (Third) of  
25 Agency § 3.11 (2006) (stating that "termination of actual authority does not by itself end  
26 any apparent authority held by an agent"). *See also* Section 119(c) (stating that "[a]  
27 person that in good faith accepts an acknowledged power of attorney without actual  
28 knowledge that the power of attorney is . . . terminated . . . may rely upon the power of  
29 attorney as if the power of attorney were . . . still in effect . . ."). These concepts are also  
30 carried forward from the Uniform Durable Power of Attorney Act. *See* Unif. Durable  
31 Power Atty. Act § 4 (1987).

32 Of special note in the list of termination events is subsection (b)(3) which provides  
33 that a spouse-agent's authority is revoked when an action is filed for the dissolution or  
34 annulment of the agent's marriage to the principal, or their legal separation. Although the  
35 filing of an action for dissolution or annulment might render a principal particularly  
36 vulnerable to self-interested actions by a spouse-agent, subsection (b)(3) is not mandatory  
37 and may be overridden in the power of attorney. There may be special circumstances  
38 precipitating the dissolution, such as catastrophic illness and the need for public benefits,  
39 that would prompt the principal to specify that the agent's authority continues  
40 notwithstanding dissolution, annulment or legal separation.

41 **Maine Comment**

42 Subsection (b)(4) adds as an event of termination of the agent's authority the  
43 termination, or commencement of termination, of a registered domestic partnership other  
44 than by marriage between the principal and agent.

1           **§5-911. Coagents and successor agents**

2           (a). A principal may designate 2 or more persons to act as coagents. Unless the  
3 power of attorney otherwise provides, each coagent may exercise its authority  
4 independently.

5           (b). A principal may designate one or more successor agents to act if an agent  
6 resigns, dies, becomes incapacitated, is not qualified to serve or declines to serve. A  
7 principal may grant authority to designate one or more successor agents to an agent or  
8 other person designated by name, office or function. Unless the power of attorney  
9 otherwise provides, a successor agent:

10           (1). Has the same authority as that granted to the original agent; and

11           (2). May not act until all predecessor agents have resigned, died, become  
12 incapacitated, are no longer qualified to serve or have declined to serve.

13           (c). Except as otherwise provided in the power of attorney and subsection (d), an  
14 agent that does not participate in or conceal a breach of fiduciary duty committed by  
15 another agent, including a predecessor agent, is not liable for the actions of the other  
16 agent.

17           (d). An agent that has actual knowledge of a breach or imminent breach of fiduciary  
18 duty by another agent shall notify the principal and, if the principal is incapacitated, take  
19 any action reasonably appropriate in the circumstances to safeguard the principal's best  
20 interest. An agent that fails to notify the principal or take action as required by this  
21 subsection is liable for the reasonably foreseeable damages that could have been avoided  
22 if the agent had notified the principal or taken such action.

23                                   **Uniform Comment**

24           (This is Section 111 of the UPOAA)

25           This section provides several default rules that merit careful consideration by the  
26 principal. Subsection (a) states that if a principal names coagents, each coagent may  
27 exercise its authority independently unless otherwise directed in the power of attorney.  
28 The Act adopts this default position to discourage the practice of executing separate, co-  
29 extensive powers of attorney in favor of different agents, and to facilitate transactions  
30 with persons who are reluctant to accept a power of attorney from only one of two or  
31 more named agents. This default rule should not, however, be interpreted as encouraging  
32 the practice of naming coagents. For a principal who can still monitor the activities of an  
33 agent, naming coagents multiplies monitoring responsibilities and significantly increases  
34 the risk that inconsistent actions will be taken with the principal's property. For the  
35 incapacitated principal, the risk is even greater that coagents will use the power of  
36 attorney to vie for control of the principal and the principal's property. Although the  
37 principal can override the default rule by requiring coagents to act by majority or  
38 unanimous consensus, such a requirement impedes use of the power of attorney,  
39 especially among agents who do not share close physical or philosophical proximity. A  
40 more prudent practice is generally to name one original agent and one or more successor  
41 agents. If desirable, a principal may give the original agent authority to delegate the

1 agent's authority during periods when the agent is temporarily unavailable to serve (*see*  
2 Section 201(a)(5)).

3 Subsection (b) states that unless a power of attorney otherwise provides, a successor  
4 agent has the same authority as that granted to the original agent. While this default  
5 provision ensures that the scope of authority granted to the original agent can be carried  
6 forward by successors, a principal may want to consider whether a successor agent is an  
7 appropriate person to exercise all of the authority given to the original agent. For  
8 example, authority to make gifts, to create, amend, or revoke an inter vivos trust, or to  
9 create or change survivorship and beneficiary designations (*see* Section 201(a)) may be  
10 appropriate for a spouse-agent, but not for an adult child who is named as the successor  
11 agent.

12 Subsection (c) provides a default rule that an agent is not liable for the actions of  
13 another agent unless the agent participates in or conceals the breach of fiduciary duty  
14 committed by that other agent. Consequently, absent specification to the contrary in the  
15 power of attorney, an agent has no duty to monitor another agent's conduct. However,  
16 subsection (d) does require that an agent that has actual knowledge of a breach or  
17 imminent breach of fiduciary duty must notify the principal, and if the principal is  
18 incapacitated, take reasonably appropriate action to safeguard the principal's best interest.  
19 Subsection (d) provides that if an agent fails to notify the principal or to take action to  
20 safeguard the principal's best interest, that agent is only liable for the reasonably  
21 foreseeable damages that could have been avoided had the agent provided the required  
22 notification.

23 **§5-912. Reimbursement and compensation of agent**

24 Unless the power of attorney otherwise provides, an agent is entitled to  
25 reimbursement of expenses reasonably incurred on behalf of the principal and to  
26 compensation that is reasonable under the circumstances.

27 **Uniform Comment**

28 (This is Section 112 of the UPOAA)

29 This section provides a default rule that an agent is entitled to reimbursement of  
30 expenses reasonably incurred on behalf of the principal and to reasonable compensation.  
31 While it is unlikely that a principal would choose to alter the default rule as to expenses, a  
32 principal's circumstances may warrant including limitations in the power of attorney as to  
33 the categories of expenses the agent may incur; likewise, the principal may choose to  
34 specify the terms of compensation rather than leave that determination to a  
35 reasonableness standard. Although many family-member agents serve without  
36 compensation, payment of compensation to the agent may be advantageous to the  
37 principal in circumstances where the principal needs to spend down income or resources  
38 to meet qualifications for public benefits.

1       **§5-913. Agent's acceptance**

2           Except as otherwise provided in the power of attorney, a person accepts appointment  
3 as an agent under a power of attorney by exercising authority or performing duties as an  
4 agent or by any other assertion or conduct indicating acceptance.

5   **Uniform Comment**

6           (This is Section 113 of the UPOAA)

7           This section establishes a default rule for agent acceptance of appointment under a  
8 power of attorney. Unless a different method is provided in the power of attorney, an  
9 agent's acceptance occurs upon exercise of authority, performance of duties, or any other  
10 assertion or conduct indicating acceptance. Acceptance is the critical reference point for  
11 commencement of the agency relationship and the imposition of fiduciary duties (*see*  
12 Section 114(a)). Because a person may be unaware that the principal has designated the  
13 person as an agent in a power of attorney, clear demarcation of when an agency  
14 relationship commences is necessary to protect both the principal and the agent. *See*  
15 Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary*  
16 *Relationships*, 36 Ga. L. Rev. 1, 41 (2001) (noting that "fiduciary duties should be  
17 imposed only to the extent the attorney-in-fact knows of the role, is able to accept  
18 responsibility, and affirmatively accepts"). The Act also provides a default method for  
19 agent resignation (*see* Section 118), which terminates the agency relationship (*see* Section  
20 110(b)(2)).

21       **§5-914. Agent's duties**

22           (a). Notwithstanding provisions in the power of attorney, an agent that has accepted  
23 appointment shall:

24               (1). Act in accordance with the principal's reasonable expectations to the extent  
25 actually known by the agent and otherwise in the principal's best interest;

26               (2). Act in good faith; and

27               (3). Act only within the scope of authority granted in the power of attorney.

28           (b). Except as otherwise provided in the power of attorney, an agent that has  
29 accepted appointment shall:

30               (1). Act loyally for the principal's benefit;

31               (2). Act so as not to create a conflict of interest that impairs the agent's ability to act  
32 impartially in the principal's best interest;

33               (3). Act with the care, competence and diligence ordinarily exercised by agents in  
34 similar circumstances;

35               (4). Keep a record of all receipts, disbursements and transactions made on behalf of  
36 the principal;

37               (5). Cooperate with a person that has authority to make health care decisions for the  
38 principal to carry out the principal's reasonable expectations to the extent actually  
39 known by the agent and, otherwise, act in the principal's best interest; and



1 (6). Attempt to preserve the principal's estate plan, to the extent actually known by  
2 the agent, if preserving the plan is consistent with the principal's best interest based  
3 on all relevant factors, including:

4 (i) The value and nature of the principal's property;

5 (ii) The principal's foreseeable obligations and need for maintenance;

6 (iii) Minimization of taxes, including income, estate, inheritance, generation-  
7 skipping transfer and gift taxes; and

8 (iv) Eligibility for a benefit, a program or assistance under a statute, rule or  
9 regulation.

10 (c). An agent that acts in good faith is not liable to any beneficiary of the principal's  
11 estate plan for failure to preserve the plan.

12 (d). An agent that acts with care, competence and diligence for the best interest of  
13 the principal is not liable solely because the agent also benefits from the act or has an  
14 individual or conflicting interest in relation to the property or affairs of the principal.

15 (e). If an agent is selected by the principal because of special skills or expertise  
16 possessed by the agent or in reliance on the agent's representation that the agent has  
17 special skills or expertise, the special skills or expertise must be considered in  
18 determining whether the agent has acted with care, competence and diligence under the  
19 circumstances.

20 (f). Absent a breach of duty to the principal, an agent is not liable if the value of the  
21 principal's property declines.

22 (g). An agent that exercises authority to delegate to another person the authority  
23 granted by the principal or that engages another person on behalf of the principal is not  
24 liable for an act, error of judgment or default of that person if the agent exercises care,  
25 competence and diligence in selecting and monitoring the person.

26 (h). Except as otherwise provided in the power of attorney, an agent is not required  
27 to disclose receipts, disbursements or transactions conducted on behalf of the principal  
28 unless ordered by a court or requested by the principal, a guardian, a conservator, another  
29 fiduciary acting for the principal, a governmental agency having authority to protect the  
30 welfare of the principal or, upon the death of the principal, by the personal representative  
31 or successor in interest of the principal's estate. If so requested, within 30 days the agent  
32 shall comply with the request or provide a writing or other record substantiating why  
33 additional time is needed and shall comply with the request within an additional 30 days.

34 **Uniform Comment**

35 (This is Section 114 of the UPOAA)

36 Although well settled that an agent under a power of attorney is a fiduciary, there is  
37 little clarity in state power of attorney statutes about what that means. *See generally*  
38 *Karen E. Boxx, The Durable Power of Attorney's Place in the Family of Fiduciary*  
39 *Relationships*, 36 Ga. L. Rev. 1 (2001); *Carolyn L. Dessin, Acting as Agent under a*  
40 *Financial Durable Power of Attorney: An Unscripted Role*, 75 Neb. L. Rev. 574 (1996).

1 Among states that address agent duties, the standard of care varies widely and ranges  
2 from a due care standard (*see, e.g.*, 755 Ill. Comp. Stat. Ann. 45/2-7 (West 1992); Ind.  
3 Code Ann. § 30-5-6-2 (West 1994)) to a trustee-type standard (*see, e.g.*, Fla. Stat. Ann. §  
4 709.08(8) (West 2000 & Supp. 2006); Mo. Ann. Stat. § 404.714 (West 2001)). Section  
5 114 clarifies agent duties by articulating minimum mandatory duties (subsection (a)) as  
6 well as default duties that can be modified or omitted by the principal (subsection (b)).

7 The mandatory duties—acting in accordance with the principal's reasonable  
8 expectations, if known, and otherwise in the principal's best interest; acting in good faith;  
9 and acting only within the scope of authority granted—may not be altered in the power of  
10 attorney. Establishing the principal's reasonable expectations as the primary guideline for  
11 agent conduct is consistent with a policy preference for "substituted judgment" over "best  
12 interest" as the surrogate decision-making standard that better protects an incapacitated  
13 person's self-determination interests. *See Wingspan—The Second National Guardianship*  
14 *Conference, Recommendations*, 31 Stetson L. Rev. 595, 603 (2002). *See also* Unif.  
15 *Guardianship & Protective Proc. Act* § 314(a) (1997).

16 The Act does not require, nor does common practice dictate, that the principal state  
17 expectations or objectives in the power of attorney. In fact, one of the advantages of a  
18 power of attorney over a trust or guardianship is the flexibility and informality with  
19 which an agent may exercise authority and respond to changing circumstances. However,  
20 when a principal's subjective expectations are potentially inconsistent with an objective  
21 best interest standard, good practice suggests memorializing those expectations in a  
22 written and admissible form as a precaution against later challenges to the agent's conduct  
23 (*see* Section 116).

24 If a principal's expectations potentially conflict with a default duty under the Act,  
25 then stating the expectations in the power of attorney, or altering the default rule to  
26 accommodate the expectations, or both, is advisable. For example, a principal may want  
27 to invest in a business owned by a family member who is also the agent in order to  
28 improve the economic position of the agent and the agent's family. Without the  
29 principal's clear expression of this objective, investment by the agent of the principal's  
30 property in the agent's business may be viewed as breaching the default duty to act  
31 loyally for the principal's benefit (subsection (b)(1)) or the default duty to avoid conflicts  
32 of interest that impair the agent's ability to act impartially for the principal's best interest  
33 (subsection (b)(2)).

34 Two default duties in this section protect the principal's previously-expressed choices.  
35 These are the duty to cooperate with the person authorized to make health-care decisions  
36 for the principal (subsection (b)(5)) and the duty to preserve the principal's estate plan  
37 (subsection (b)(6)). However, an agent has a duty to preserve the principal's estate plan  
38 only to the extent the plan is actually known to the agent and only if preservation of the  
39 estate plan is consistent with the principal's best interest. Factors relevant to determining  
40 whether preservation of the estate plan is in the principal's best interest include the value  
41 of the principal's property, the principal's need for maintenance, minimization of taxes,  
42 and eligibility for public benefits. The Act protects an agent from liability for failure to  
43 preserve the estate plan if the agent has acted in good faith (subsection (c)).

1 Subsection (d) provides that an agent acting with care, competence, and diligence for  
2 the best interest of the principal is not liable solely because the agent also benefits from  
3 the act or has a conflict of interest. This position is a departure from the traditional  
4 common law duty of loyalty which required an agent to act solely for the benefit of the  
5 principal. *See* Restatement (Second) of Agency § 387 (1958); *see also* Unif. Trust Code  
6 § 802(a) (2003) (requiring a trustee to administer a trust "solely in the interests" of the  
7 beneficiary). Subsection (d) is modeled after state statutes which provide that loyalty to  
8 the principal can be compatible with an incidental benefit to the agent. *See* Cal. Prob.  
9 Code § 4232(b) (West Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/2-7 (West 1992); Ind.  
10 Code Ann. § 30-5-9-2 (West 1994 & Supp. 2005). The Restatement (Third) of Agency §  
11 8.01 (2006) also contemplates that loyal service to the principal may be concurrently  
12 beneficial to the agent (*see* Reporter's note a). *See also* John H. Langbein, *Questioning*  
13 *the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 943  
14 (2005) (arguing that the sole interest test for loyalty should be replaced by the best  
15 interest test). The public policy which favors best interest over sole interest as the  
16 benchmark for agent loyalty comports with the practical reality that most agents under  
17 powers of attorney are family members who have inherent conflicts of interest with the  
18 principal arising from joint property ownership or inheritance expectations.

19 Subsection (e) provides additional protection for a principal who has selected an  
20 agent with special skills or expertise by requiring that such skills or expertise be  
21 considered when evaluating the agent's conduct. If a principal chooses to appoint a  
22 family member or close friend to serve as an agent, but does not intend that agent to serve  
23 under a higher standard because of special skills or expertise, the principal should  
24 consider including an exoneration provision within the power of attorney (*see* comment  
25 to Section 115).

26 Subsections (f) and (g) state protections for an agent that are similar in scope to those  
27 applicable to a trustee. Subsection (f) holds an agent harmless for decline in the value of  
28 the principal's property absent a breach of fiduciary duty (*cf.* Unif. Trust Code § 1003(b)  
29 (2003)). Subsection (g) holds an agent harmless for the conduct of a person to whom the  
30 agent has delegated authority, or who has been engaged by the agent on the principal's  
31 behalf, provided the agent has exercised care, competence, and diligence in selecting and  
32 monitoring the person (*cf.* Unif. Trust Code § 807(c) (2003)).

33 Subsection (h) codifies the agent's common law duty to account to a principal (*see*  
34 Restatement (Third) of Agency § 8.12 (2006); Restatement (First) of Agency § 382  
35 (1933)). Rather than create an affirmative duty of periodic accounting, subsection (h)  
36 states that the agent is not required to disclose receipts, disbursements or transactions  
37 unless ordered by a court or requested by the principal, a fiduciary acting for the  
38 principal, or a governmental agency with authority to protect the welfare of the principal.  
39 If the principal is deceased, the principal's personal representative or successor in interest  
40 may request an agent to account. While there is no affirmative duty to account unless  
41 ordered by the court or requested by one of the foregoing persons, subsection (b)(4) does  
42 create a default duty to keep records.

43 The narrow categories of persons that may request an agent to account are consistent  
44 with the premise that a principal with capacity should control to whom the details of

1 financial transactions are disclosed. If a principal becomes incapacitated or dies, then the  
2 principal's fiduciary or personal representative may succeed to that monitoring function.  
3 The inclusion of a governmental agency (such as Adult Protective Services) in the list of  
4 persons that may request an agent to account is patterned after state legislative trends and  
5 is a response to growing national concern about financial abuse of vulnerable persons.  
6 *See* 755 Ill. Comp. Stat. Ann. 45/2-7.5 (West Supp. 2006 & 2006 Ill. Legis. Serv. 1754);  
7 20 Pa. Cons. Stat. Ann. § 5604(d) (West 2005); Vt. Stat. Ann. tit.14, § 3510(b) (2002 &  
8 2006-3 Vt. Adv. Legis. Serv. 228). *See generally* Donna J. Rabiner, David Brown &  
9 Janet O'Keeffe, *Financial Exploitation of Older Persons: Policy Issues and*  
10 *Recommendations for Addressing Them*, 16 J. Elder Abuse & Neglect 65 (2004). As an  
11 additional protective counter-measure to the narrow categories of persons who may  
12 request an agent to account, the Act contains a broad standing provision for seeking  
13 judicial review of an agent's conduct. *See* Section 116 and Comment.

14 **§5-915. Exoneration of agent**

15 A provision in a power of attorney relieving an agent of liability for breach of duty is  
16 binding on the principal and the principal's successors in interest except to the extent the  
17 provision:

18 (a). Relieves the agent of liability for breach of duty committed dishonestly, with an  
19 improper motive or with reckless indifference to the purposes of the power of attorney or  
20 the best interest of the principal; or

21 (b). Was inserted as a result of an abuse of a confidential or fiduciary relationship  
22 with the principal.

23 **Uniform Comment**

24 (This is Section 115 of the UPOAA)

25 This section permits a principal to exonerate an agent from liability for breach of  
26 fiduciary duty, but prohibits exoneration for a breach committed dishonestly, with  
27 improper motive, or with reckless indifference to the purposes of the power of attorney or  
28 the best interest of the principal. The mandatory minimum standard of conduct required  
29 of an agent is equivalent to the good faith standard applicable to trustees. A trustee's  
30 failure to adhere to that standard cannot be excused by language in the trust instrument.  
31 *See* Unif. Trust Code § 1008 cmt. (2003) (noting that "a trustee must always act in good  
32 faith with regard to the purposes of the trust and the interests of the beneficiaries"). *See*  
33 *also* Section 102(4) (defining good faith for purposes of the Act as "honesty in fact").  
34 Section 115 provides, as an additional measure of protection for the principal, that an  
35 exoneration provision is not binding if it was inserted as the result of abuse of a  
36 confidential or fiduciary relationship with the principal. While as a matter of good  
37 practice an exoneration provision should be the exception rather than the rule, its  
38 inclusion in a power of attorney may be useful in meeting particular objectives of the  
39 principal. For example, if the principal is concerned that contentious family members  
40 will attack the agent's conduct in order to gain control of the principal's assets, an  
41 exoneration provision may deter such action or minimize the likelihood of success on the  
42 merits.

1 **§5-916. Judicial relief**

2 (a). The following persons may petition the Probate Court or the Superior Court for  
3 the county in which either the principal or the agent resides to construe a power of  
4 attorney or review the agent's conduct and grant appropriate relief:

5 (1). The principal or the agent;

6 (2). A guardian, conservator or other fiduciary acting for the principal;

7 (3). A person authorized to make health care decisions for the principal;

8 (4). The principal's spouse, registered domestic partner, parent or descendant;

9 (5). An individual who would qualify as a presumptive heir of the principal;

10 (6). A person named as a beneficiary to receive any property, benefit or contractual  
11 right on the principal's death or as a beneficiary of a trust created by or for the  
12 principal that has a financial interest in the principal's estate;

13 (7). A governmental agency having regulatory authority to protect the welfare of the  
14 principal;

15 (8). The principal's caregiver or another person that demonstrates sufficient interest  
16 in the principal's welfare; and

17 (9). A person asked to accept the power of attorney.

18 (b). Upon motion by the principal, the court shall dismiss a petition filed under this  
19 section, unless the court finds that the principal lacks capacity to revoke the agent's  
20 authority or the power of attorney.

21 **Uniform Comment**

22 (This is Section 116 of the UPOAA)

23 The primary purpose of this section is to protect vulnerable or incapacitated  
24 principals against financial abuse. Subsection (a) sets forth broad categories of persons  
25 who have standing to petition the court for construction of the power of attorney or  
26 review of the agent's conduct, including in the list a "person that demonstrates sufficient  
27 interest in the principal's welfare" (subsection (a)(8)). Allowing any person with  
28 sufficient interest to petition the court is the approach taken by the majority of states that  
29 have standing provisions. See Cal. Prob. Code § 4540 (West Supp. 2006); Colo. Rev.  
30 Stat. Ann. § 15-14-609 (West 2005); 755 Ill. Comp. Stat. Ann. 45/2-10 (West 1992); Ind.  
31 Code Ann. § 30-5-3-5 (West 1994); Kan. Stat. Ann. § 58-662 (2005); Mo. Ann. Stat. §  
32 404.727 (West 2001); N.H. Rev. Stat. Ann. § 506:7 (LexisNexis 1997 & Supp. 2005);  
33 Wash. Rev. Code Ann. § 11.94.100 (Supp. 2006); Wis. Stat. Ann. § 243.07(6r) (West  
34 2001). But cf. 20 Pa. Cons. Stat. Ann. § 5604 (West 2005) (limiting standing to an  
35 agency acting pursuant to the Older Adults Protective Services Act); Vt. Stat. Ann. tit.14,  
36 § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228) (limiting standing to the  
37 commissioner of disabilities, aging, and independent living).

38 In addition to providing a means for detecting and redressing financial abuse by  
39 agents, this section protects the self-determination rights of principals. Subsection (b)

1 states that the court must dismiss a petition upon the principal's motion unless the court  
2 finds that the principal lacks the capacity to revoke the agent's authority or the power of  
3 attorney. Contrasted with the breadth of Section 116 is Section 114(h) which narrowly  
4 limits the persons who can request an agent to account for transactions conducted on the  
5 principal's behalf. The rationale for narrowly restricting who may request an agent to  
6 account is the preservation of the principal's financial privacy. See Section 114  
7 Comment. Section 116 operates as a check-and-balance on the narrow scope of Section  
8 114(h) and provides what, in many circumstances, may be the only means to detect and  
9 stop agent abuse of an incapacitated principal.

10 **§5-917. Agent's liability**

11 An agent that violates this chapter is liable to the principal or the principal's  
12 successors in interest for the amount required to:

13 (a). Restore the value of the principal's property to what it would have been had the  
14 violation not occurred; and

15 (b). Reimburse the principal or the principal's successors in interest for the  
16 attorney's fees and costs paid on the agent's behalf.

17 **Uniform Comment**

18 (This is Section 117 of the UPOAA)

19 This section provides that an agent's liability for violating the Act includes not only  
20 the amount necessary to restore the principal's property to what it would have been had  
21 the violation not occurred, but also any amounts for attorney's fees and costs advanced  
22 from the principal's property on the agent's behalf. This section does not, however, limit  
23 the agent's liability exposure to these amounts. Pursuant to Section 123, remedies under  
24 the Act are not exclusive. If a jurisdiction has enacted separate statutes to deal with  
25 financial abuse, an agent may face additional civil or criminal liability. For a discussion  
26 of state statutory responses to financial abuse, see Carolyn L. Dessin, *Financial Abuse of*  
27 *the Elderly: Is the Solution a Problem?*, 34 McGeorge L. Rev. 267 (2003).

28 **§5-918. Agent's resignation; notice**

29 Unless the power of attorney provides a different method for an agent's resignation,  
30 an agent may resign by giving notice to the principal and, if the principal is incapacitated:

31 (a). To the conservator or guardian, if one has been appointed for the principal, and a  
32 coagent or successor agent; or

33 (b). If there is no person described in subsection (a), to:

34 (1). The principal's caregiver;

35 (2). Another person reasonably believed by the agent to have sufficient interest in the  
36 principal's welfare; or

37 (3). A governmental agency having authority to protect the welfare of the principal.

38 **Uniform Comment**

1 (This is Section 118 of the UPOAA)

2 Section 118 provides a default procedure for an agent's resignation. An agent who no  
3 longer wishes to serve should formally resign in order to establish a clear demarcation of  
4 the end of the agent's authority and to minimize gaps in fiduciary responsibility before a  
5 successor accepts the office. If the principal still has capacity when the agent wishes to  
6 resign, this section requires only that the agent give notice to the principal. If, however,  
7 the principal is incapacitated, the agent must, in addition to giving notice to the principal,  
8 give notice as set forth in paragraphs (1) or (2).

9 Paragraph (1) provides that notice must be given to a fiduciary, if one has been  
10 appointed, and to a coagent or successor agent, if any. If the principal does not have an  
11 appointed fiduciary and no coagent or successor agent is named in the power of attorney,  
12 then the agent may choose among the notice options in paragraph (2). Paragraph (2)  
13 permits the resigning agent to give notice to the principal's caregiver, a person reasonably  
14 believed to have sufficient interest in the principal's welfare, or a governmental agency  
15 having authority to protect the welfare of the principal. The choice among these options  
16 is intentionally left to the agent's discretion and is governed by the same standards as  
17 apply to other agent conduct. See Section 114(a) (requiring the agent to act in accordance  
18 with the principal's reasonable expectations, if known, and otherwise in the principal's  
19 best interest).

20 **§5-919. Acceptance of and reliance upon acknowledged power of attorney**

21 (a). For purposes of this section and section 5-920, "acknowledged" means  
22 purportedly verified before a notary public or other individual authorized to take  
23 acknowledgements.

24 (b). A person that in good faith accepts an acknowledged power of attorney without  
25 actual knowledge that the signature is not genuine may rely upon the presumption under  
26 section 5-905 that the signature is genuine.

27 (c). A person that in good faith accepts an acknowledged power of attorney without  
28 actual knowledge that the power of attorney is void, invalid or terminated, that the  
29 purported agent's authority is void, invalid or terminated or that the agent is exceeding or  
30 improperly exercising the agent's authority may rely upon the power of attorney as if the  
31 power of attorney were genuine, valid and still in effect, the agent's authority were  
32 genuine, valid and still in effect and the agent had not exceeded and had properly  
33 exercised the authority.

34 (d). A person that is asked to accept an acknowledged power of attorney may  
35 request, and rely upon, without further investigation:

36 (1). An agent's certification under penalty of perjury of any factual matter  
37 concerning the principal, agent or power of attorney;

38 (2). An English translation of the power of attorney if the power of attorney contains,  
39 in whole or in part, language other than English; and





1        **§5-920. Liability for refusal to accept acknowledged power of attorney**

2            **(a).** Except as otherwise provided in subsection (b):

3            (1). A person shall either accept an acknowledged power of attorney or request a  
4            certification, a translation or an opinion of counsel under section 5-919, subsection  
5            (d) no later than 7 business days after presentation of the power of attorney for  
6            acceptance;

7            (2). If a person requests a certification, a translation or an opinion of counsel under  
8            section 5-919, subsection (d), the person shall accept the power of attorney no later  
9            than 5 business days after receipt of the certification, translation or opinion of  
10           counsel; and

11           (3). A person may not require an additional or different form of power of attorney for  
12           authority granted in the power of attorney presented.

13           **(b).** A person is not required to accept an acknowledged power of attorney if:

14           (1). The person is not otherwise required to engage in a transaction with the principal  
15           in the same circumstances;

16           (2). Engaging in a transaction with the agent or the principal in the same  
17           circumstances would be inconsistent with federal law;

18           (3). The person has actual knowledge of the termination of the agent’s authority or of  
19           the power of attorney before exercise of the power;

20           (4). A request for a certification, a translation or an opinion of counsel under section  
21           5-919, subsection (d) is refused;

22           (5). The person in good faith believes that the power is not valid or that the agent  
23           does not have the authority to perform the act requested, whether or not a  
24           certification, a translation or an opinion of counsel under section 5-919, subsection  
25           (d) has been requested or provided; or

26           (6). The person makes, or has actual knowledge that another person has made, a  
27           report to the Department of Health and Human Services stating a good faith belief that  
28           the principal may be subject to physical or financial abuse, neglect, exploitation or  
29           abandonment by the agent or a person acting for or with the agent.

30           **(c).** A person that refuses in violation of this section to accept an acknowledged  
31           power of attorney is subject to:

32           (1). A court order mandating acceptance of the power of attorney; and

33           (2). Liability for reasonable attorney’s fees and costs incurred in any action or  
34           proceeding that confirms the validity of the power of attorney or mandates  
35           acceptance of the power of attorney.

36    **Uniform Comment to Alternative A**

37           (This is Section 120 of the UPOAA)

1 As a complement to Section 119, Section 120 enumerates the bases for legitimate  
2 refusals of a power of attorney as well as sanctions for refusals that violate the Act. Like  
3 Section 119, Section 120 does not apply to unacknowledged powers of attorney.  
4 Enacting jurisdictions are provided a choice between alternative Sections 120.  
5 Alternatives A and B are identical except that Alternative B applies only to  
6 acknowledged statutory form powers of attorney while Alternative A applies to all  
7 acknowledged powers of attorney.

8 Subsection (b) of Alternative A provides the bases upon which an acknowledged  
9 power of attorney may be refused without liability. The last paragraph of subsection (b)  
10 permits refusal of an otherwise valid acknowledged power of attorney that does not meet  
11 any of the other bases for refusal if the person in good faith believes that the principal is  
12 subject to abuse by the agent or someone acting in concert with the agent (paragraph (6)).  
13 A refusal under this paragraph is protected if the person makes, or knows another person  
14 has made, a report to the governmental agency authorized to protect the welfare of the  
15 principal. Pennsylvania has a similar provision. *See* 20 Pa. Cons. Stat. Ann. § 5608(a)  
16 (West 2005).

17 Unless a basis exists in subsection (b) for refusing an acknowledged power of  
18 attorney, subsection (a) requires that, within seven business days after the power of  
19 attorney is presented, a person must either accept the power of attorney or request a  
20 certification, a translation, or an opinion of counsel pursuant to Section 119. If a request  
21 under Section 119 is made, the person must decide to accept or reject the power of  
22 attorney no later than five business days after receipt of the requested document  
23 (subsection (a)(2)). Provided no basis exists for refusing the power of attorney,  
24 subsection (a)(3) prohibits a person from requesting an additional or different form of  
25 power of attorney for authority granted in the power of attorney presented.

26 Subsection (c) of Alternative A provides that a person that refuses an acknowledged  
27 power of attorney in violation of Section 120 is subject to a court order mandating  
28 acceptance and to reasonable attorney's fees and costs incurred in the action to confirm  
29 the validity of the power of attorney or to mandate acceptance. Statutory liability for  
30 unreasonable refusal of a power of attorney is based on a growing state legislative trend.  
31 *See, e.g.,* Alaska Stat. § 13.26.353(c) (2004); Cal. Prob. Code § 4306(a) (West Supp.  
32 2006); Fla. Stat. Ann. § 709.08(11) (West 2000 & Supp. 2006); 755 Ill. Comp. Stat. Ann.  
33 45/ 2-8 (West 1992); Ind. Code Ann. § 30-5-9-9 (West Supp. 2005); Minn. Stat. Ann. §  
34 523.20 (West 2006); N.Y. Gen. Oblig. Law § 5-1504 (McKinney 2001); N.C. Gen. Stat.  
35 § 32A-41 (2005); 20 Pa. Cons. Stat. Ann. § 5608 (West 2005); S.C. Code Ann. § 62-5-  
36 501(F)(1) (Supp. 2005).

#### 37 **Maine Comment**

38 Maine uses Alternative A.

#### 39 **§5-921. Principles of law and equity**

40 Unless displaced by a provision of this Part, the principles of law and equity  
41 supplement this Part.

#### 42 **Uniform Comment**

1 (This is Section 121 of the UPOAA)

2 The Act is supplemented by common law, including the common law of agency,  
3 where provisions of the Act do not displace relevant common law principles. The  
4 common law of agency is articulated in the Restatement of Agency and includes  
5 contemporary and evolving rules of decision developed by the courts in exercise of their  
6 power to adapt the law to new situations and changing conditions. The common law also  
7 includes the traditional and broad equitable jurisdiction of the court, which this Act in no  
8 way restricts.

9 The statutory text of the Uniform Power of Attorney Act is also supplemented by  
10 these comments, which, like the comments to any Uniform Act, may be relied on as a  
11 guide for interpretation. *See* *Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085,  
12 1090 (Del. 1995) (interpreting Uniform Commercial Code); *Yale University v.*  
13 *Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of  
14 Institutional Funds Act); 2B Norman Singer, *Southerland Statutory Construction* § 52.5  
15 (6th ed. 2000).

16 **§5-922. Laws applicable to financial institutions and entities**

17 This Part does not supersede any other law applicable to financial institutions or other  
18 entities, and the other law controls if inconsistent with this Part.

19 **Uniform Comment**

20 (This is Section 122 of the UPOAA)

21 This section addresses concerns of representatives from the banking and insurance  
22 industries that there may be regulations which govern those entities that conflict with  
23 provisions of this Act. Although no specific conflicts were identified during the drafting  
24 process, Section 122 provides that in the event a law applicable to a financial institution  
25 or other entity is inconsistent with this Act, the other law will supersede this Act to the  
26 extent of the inconsistency. This concern about inconsistency with the requirements of  
27 other law is already substantially addressed in Section 120, which provides, in pertinent  
28 part, that a person is not required to accept a power of attorney if, "the person is not  
29 otherwise required to engage in a transaction with the principal in the same  
30 circumstances," or "engaging in a transaction with the agent or the principal in the same  
31 circumstances would be inconsistent with federal law."

32 **§5-923. Remedies under other law**

33 The remedies under this Part are not exclusive and do not abrogate any right or  
34 remedy under the law of this State other than this Part.

35 **Uniform Comment**

36 (This is Section 123 of the UPOAA)

37 The remedies under the Act are not intended to be exclusive with respect to causes of  
38 action that may accrue in relation to a power of attorney. The Act applies to many persons,  
39 individual and entity (*see* Section 102(6) (defining "person" for purposes of the Act)), that  
40 may serve as agents or that may be asked to accept a power of attorney. Likewise, the Act

1 applies to many subject areas (*see* Article 2) over which principals may delegate authority to  
2 agents. Remedies under other laws which govern such persons and subject matters should be  
3 considered by aggrieved parties in addition to remedies available under this Act. *See, e.g.,*  
4 Section 117 Comment.

5 **SUBPART 2**

6 **AUTHORITY**

7 **§5-931. Authority that requires specific grant; grant of general authority**

8 (a). An agent under a power of attorney may do the following on behalf of the  
9 principal or with the principal's property only if the power of attorney expressly grants  
10 the agent the authority and exercise of the authority is not otherwise prohibited by another  
11 agreement or instrument to which the authority or property is subject:

12 (1). Create, amend, revoke or terminate an inter vivos trust;

13 (2). Make a gift;

14 (3). Create or change rights of survivorship;

15 (4). Create or change a beneficiary designation;

16 (5). Delegate authority granted under the power of attorney;

17 (6). Waive the principal's right to be a beneficiary of a joint and survivor annuity,  
18 including a survivor benefit under a retirement plan;

19 (7). Exercise fiduciary powers that the principal has authority to delegate; or

20 (8). Disclaim property, including a power of appointment.

21 (b). Notwithstanding a grant of authority to do an act described in subsection (a),  
22 unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse,  
23 registered domestic partner or descendant of the principal may not exercise authority  
24 under a power of attorney to create in the agent, or in an individual to whom the agent  
25 owes a legal obligation of support, an interest in the principal's property, whether by gift,  
26 right of survivorship, beneficiary designation, disclaimer or otherwise.

27 (c). Subject to subsections (a), (b), (d) and (e), if a power of attorney grants to an  
28 agent authority to do all acts that a principal could do, the agent has the general authority  
29 described in sections 5-934 through 5-946.

30 (d). Unless the power of attorney otherwise provides, a grant of authority to make a  
31 gift is subject to section 5-947.

32 (e). Subject to subsections (a), (b) and (d), if the subjects over which authority is  
33 granted in a power of attorney are similar or overlap, the broadest authority controls.

34 (f). Authority granted in a power of attorney is exercisable with respect to property  
35 that the principal has when the power of attorney is executed or acquires later, whether or  
36 not the property is located in this State and whether or not the authority is exercised or the  
37 power of attorney is executed in this State.

1 (g). An act performed by an agent pursuant to a power of attorney has the same  
2 effect and inures to the benefit of and binds the principal and the principal's successors in  
3 interest as if the principal had performed the act.

4 **Uniform Comment**

5 (This is Section 201 of the UPOAA)

6 This section distinguishes between grants of specific authority that require express  
7 language in a power of attorney and grants of general authority. Section 201(a)  
8 enumerates the acts that require an express grant of specific authority and which may not  
9 be inferred from a grant of general authority. This approach follows a growing trend  
10 among states to require express specific authority for such actions as making a gift,  
11 creating or revoking a trust, and using other non-probate estate planning devices such as  
12 survivorship interests and beneficiary designations. *See, e.g.,* Cal. Prob. Code § 4264  
13 (West Supp. 2006); Kan. Stat. Ann. § 58-654(f) (2005); Mo. Ann. Stat. § 404.710 (West  
14 2001); Wash. Rev. Code Ann. § 11.94.050 (West Supp. 2006). The rationale for  
15 requiring a grant of specific authority to perform the acts enumerated in subsection (a) is  
16 the risk those acts pose to the principal's property and estate plan. Although risky, such  
17 authority may nevertheless be necessary to effectuate the principal's property  
18 management and estate planning objectives. Ideally, these are matters about which the  
19 principal will seek advise before granting authority to an agent.

20 The Act does not contain statutory construction language for any of the acts  
21 enumerated in subsection (a) other than the making of gifts (*see* Section 217). Because a  
22 gift of the principal's property reduces the principal's estate, the Act, like a number of  
23 state statutes, sets default per-donee limits on gift amounts. *See, e.g.,* N.Y. Gen. Oblig.  
24 Law § 5-1502M (McKinney 2001); 20 Pa. Cons. Stat. Ann. § 5603(a)(2)(ii) (West 2005).  
25 However, as with any authority incorporated by reference in a power of attorney, the  
26 principal may enlarge or restrict the default parameters set by the Act.

27 With respect to other acts listed in Section 201(a), the Act contemplates that the  
28 principal will specify any special instructions in the power of attorney to further define or  
29 limit the authority granted. For example, if a principal grants authority to create or  
30 change rights of survivorship (subsection (a)(3)) or beneficiary designations (subsection  
31 (a)(4)) the principal may choose to restrict that authority to specifically identified  
32 property interests, accounts, or contracts. Principals should carefully consider not only  
33 whether to authorize any of the acts listed in Section 201(a), but also whether to limit the  
34 scope of such actions.

35 Subsection (b) contains an additional safeguard for the principal. It establishes as a  
36 default rule that an agent who is not an ancestor, spouse, or descendant of the principal  
37 may not exercise authority to create in the agent or in an individual the agent is legally  
38 obligated to support, an interest in the principal's property. For example, a non-relative  
39 agent with gift making authority could not make a gift to the agent or a dependant of the  
40 agent without the principal's express authority in the power of attorney. In contrast, a  
41 spouse-agent with express gift-making authority could implement the principal's  
42 expectation that annual family gifts be continued without additional authority in the  
43 power of attorney.

1 Notwithstanding a grant of authority to perform any of the enumerated acts in  
2 subsection (a), an agent is bound by the mandatory fiduciary duties set forth in Section  
3 114(a) as well as the default duties that the principal has not modified. For a list of these  
4 default rules, see Section 301 Comment. If the principal's expectations for the  
5 performance of authorized acts potentially conflict with those duties, then clarification of  
6 the principal's expectations, modification of the default duties, or both, may be advisable.  
7 *See* Section 114 Comment.

8 Authority for acts and subject matters other than those listed in Section 201(a) may  
9 be granted either through incorporation by reference (*see* Section 202) or, if the principal  
10 wishes to grant comprehensive general authority, by a grant of authority to do all the acts  
11 that a principal could do. A broad grant of general authority is interpreted under the Act  
12 as including all of the subject matters and authority described in Sections 204 through  
13 216 (*see* subsection (c)).

14 **§5-932. Incorporation of authority**

15 (a). An agent has authority described in this subpart if the power of attorney refers to  
16 general authority with respect to the descriptive term for the subjects stated in sections  
17 5-934 through 5-947 or cites the section in which the authority is described.

18 (b). A reference in a power of attorney to general authority with respect to the  
19 descriptive term for a subject in sections 5-934 through 5-947 or a citation to a section of  
20 sections 5-934 through 5-947 incorporates the entire section as if it were set out in full in  
21 the power of attorney.

22 (c). A principal may modify authority incorporated by reference.

23 **Uniform Comment**

24 (This is Section 202 of the UPOAA)

25 This section provides two methods for incorporating into a power of attorney the  
26 Act's statutory construction for authority over various subject matters. A reference in a  
27 power of attorney to the descriptive term for a subject in Sections 204 through 217, or to  
28 the section number, incorporates the entire statutory section as if it were set out in full in  
29 the power of attorney. Subsection (c) provides that a principal may modify any authority  
30 incorporated by reference. The optional statutory form power of attorney provided in  
31 Section 301 uses the descriptive terms in Sections 204 through 217 to incorporate  
32 statutory construction for authority granted on the form and provides a "Special  
33 Instructions" section where the principal may modify any authority incorporated by  
34 reference.

35 **§5-933. Construction of authority generally**

36 Except as otherwise provided in the power of attorney, by executing a power of  
37 attorney that incorporates by reference a subject described in sections 5-934 through  
38 5-947 or that grants to an agent authority to do all acts that a principal could do pursuant  
39 to section 5-931, subsection (c), a principal authorizes the agent, with respect to that  
40 subject, to:

1           (a). Demand, receive and obtain by litigation or otherwise, money or another thing of  
2 value to which the principal is, may become or claims to be entitled and conserve, invest,  
3 disburse or use anything so received or obtained for the purposes intended;

4           (b). Contract in any manner with any person, on terms agreeable to the agent, to  
5 accomplish a purpose of a transaction and perform, rescind, cancel, terminate, reform,  
6 restate, release or modify the contract or another contract made by or on behalf of the  
7 principal;

8           (c). Execute, acknowledge, seal, deliver, file or record any instrument or  
9 communication the agent considers desirable to accomplish a purpose of a transaction,  
10 including creating at any time a schedule listing some or all of the principal's property  
11 and attaching it to the power of attorney;

12           (d). Initiate, participate in, submit to alternative dispute resolution, settle, oppose or  
13 propose or accept a compromise with respect to a claim existing in favor of or against the  
14 principal or intervene in litigation relating to the claim;

15           (e). Seek on the principal's behalf the assistance of a court or other governmental  
16 agency to carry out an act authorized in the power of attorney;

17           (f). Engage, compensate and discharge an attorney, accountant, discretionary  
18 investment manager, expert witness or other advisor;

19           (g). Prepare, execute and file a record, report or other document to safeguard or  
20 promote the principal's interest under a statute, rule or regulation;

21           (h). Communicate with any representative or employee of a government or  
22 governmental subdivision, agency or instrumentality on behalf of the principal;

23           (i). Access communications intended for and communicate on behalf of the  
24 principal, whether by mail, electronic transmission, telephone or other means; and

25           (j). Do any lawful act with respect to the subject and all property related to the  
26 subject.

27   **Uniform Comment**

28           (This is Section 203 of the UPOAA)

29           This section is based on Section 3 of the Uniform Statutory Form Power of Attorney  
30 Act. It describes incidental types of authority that accompany all authority granted to an  
31 agent under each of Sections 204 through 217, unless this incidental authority is modified  
32 in the power of attorney. The actions authorized in Section 203 are of the type often  
33 necessary for the exercise or implementation of authority over the subjects described in  
34 Sections 204 through 217. *See* Unif. Statutory Form Power of Atty. Act prefatory note  
35 (1988). Paragraph (10), which states that an agent is authorized to "do any lawful act  
36 with respect to the subject and all property related to the subject," emphasizes that a grant  
37 of general authority is intended to be comprehensive unless otherwise limited by the Act  
38 or the power of attorney. Paragraphs (8) and (9) were added to the section to clarify that  
39 this comprehensive authority includes authorization to communicate with government

1 employees on behalf of the principal, to access communications intended for the  
2 principal, and to communicate on behalf of the principal using all modern means of  
3 communication.

4 **§5-934. Real property**

5 Unless the power of attorney otherwise provides, language in a power of attorney  
6 granting general authority with respect to real property authorizes the agent to:

7 (a). Demand, buy, lease, receive, accept as a gift or as security for an extension of  
8 credit or otherwise acquire or reject an interest in real property or a right incident to real  
9 property;

10 (b). Sell; exchange; convey with or without covenants, representations or warranties;  
11 quitclaim; release; surrender; retain title for security; encumber; partition; consent to  
12 partitioning; subject to an easement or covenant; subdivide; apply for zoning or other  
13 governmental permits; plat or consent to platting; develop; grant an option concerning;  
14 lease; sublease; contribute to an entity in exchange for an interest in that entity; or  
15 otherwise grant or dispose of an interest in real property or a right incident to real  
16 property;

17 (c). Pledge or mortgage an interest in real property or right incident to real property  
18 as security to borrow money or pay, renew or extend the time of payment of a debt of the  
19 principal or a debt guaranteed by the principal;

20 (d). Release, assign, satisfy or enforce by litigation or otherwise a mortgage, deed of  
21 trust, conditional sale contract, encumbrance, lien or other claim to real property that  
22 exists or is asserted;

23 (e). Manage or conserve an interest in real property or a right incident to real  
24 property owned or claimed to be owned by the principal, including:

25 (1). Insuring against liability or casualty or other loss;

26 (2). Obtaining or regaining possession of or protecting the interest or right by  
27 litigation or otherwise;

28 (3). Paying, assessing, compromising or contesting taxes or assessments or applying  
29 for and receiving refunds in connection with them; and

30 (4). Purchasing supplies, hiring assistance or labor and making repairs or alterations  
31 to the real property;

32 (f). Use, develop, alter, replace, remove, erect or install structures or other  
33 improvements upon real property in or incident to which the principal has, or claims to  
34 have, an interest or right;

35 (g). Participate in a reorganization with respect to real property or an entity that owns  
36 an interest in or right incident to real property and receive, hold and act with respect to  
37 stocks and bonds or other property received in a plan of reorganization, including:

38 (1). Selling or otherwise disposing of them;



1 (2). Exercising or selling an option, right of conversion or similar right with respect  
2 to them; and

3 (3). Exercising any voting rights in person or by proxy;

4 (h). Change the form of title of an interest in or right incident to real property; and

5 (i). Dedicate to public use, with or without consideration, easements or other real  
6 property in which the principal has, or claims to have, an interest.

7 **No Uniform Comment**

8 (This is Section 204 of the UPOAA)

9 **§5-935. Tangible personal property**

10 Unless the power of attorney otherwise provides, language in a power of attorney  
11 granting general authority with respect to tangible personal property authorizes the agent  
12 to:

13 (a). Demand, buy, receive, accept as a gift or as security for an extension of credit or  
14 otherwise acquire or reject ownership or possession of tangible personal property or an  
15 interest in tangible personal property;

16 (b). Sell; exchange; convey with or without covenants, representations or warranties;  
17 quitclaim; release; surrender; create a security interest in; grant options concerning; lease;  
18 sublease; or otherwise dispose of tangible personal property or an interest in tangible  
19 personal property;

20 (c). Grant a security interest in tangible personal property or an interest in tangible  
21 personal property as security to borrow money or pay, renew or extend the time of  
22 payment of a debt of the principal or a debt guaranteed by the principal;

23 (d). Release, assign, satisfy or enforce by litigation or otherwise a security interest,  
24 lien or other claim on behalf of the principal with respect to tangible personal property or  
25 an interest in tangible personal property;

26 (e). Manage or conserve tangible personal property or an interest in tangible personal  
27 property on behalf of the principal, including:

28 (1). Insuring against liability or casualty or other loss;

29 (2). Obtaining or regaining possession of or protecting the property or interest by  
30 litigation or otherwise;

31 (3). Paying, assessing, compromising or contesting taxes or assessments or applying  
32 for and receiving refunds in connection with them;

33 (4). Moving the property from place to place;

34 (5). Storing the property for hire or on a gratuitous bailment;

35 (6). Using and making repairs, alterations or improvements to the property; and

36 (7). Changing the form of title of an interest in tangible personal property.

1 **No Uniform Comment**

2 (This is Section 205 of the UPOAA)

3 **§5-936. Stocks and bonds**

4 Unless the power of attorney otherwise provides, language in a power of attorney  
5 granting general authority with respect to stocks and bonds authorizes the agent to:

6 (a). Buy, sell and exchange stocks and bonds;

7 (b). Establish, continue, modify or terminate an account with respect to stocks and  
8 bonds;

9 (c). Pledge stocks and bonds as security to borrow, pay, renew or extend the time of  
10 payment of a debt of the principal;

11 (d). Receive certificates and other evidences of ownership with respect to stocks and  
12 bonds; and

13 (e). Exercise voting rights with respect to stocks and bonds in person or by proxy,  
14 enter into voting trusts and consent to limitations on the right to vote.

15 **Uniform Comment**

16 (This is Section 206 of the UPOAA)

17 The substance of this section remains unchanged from Section 6 the Uniform  
18 Statutory Form Power of Attorney Act; however, the wording is revised to reflect that  
19 "stocks and bonds" is now a defined term in the Act. See Section 102(14).

20 **§5-937. Commodities and options**

21 Unless the power of attorney otherwise provides, language in a power of attorney  
22 granting general authority with respect to commodities and options authorizes the agent  
23 to:

24 (a). Buy, sell, exchange, assign, settle and exercise commodity futures contracts and  
25 call or put options on stocks or stock indexes traded on a regulated option exchange; and

26 (b). Establish, continue, modify and terminate option accounts.

27 **No Uniform Comment**

28 (This is Section 207 of the UPOAA)

29 **§5-938. Banks and other financial institutions**

30 Unless the power of attorney otherwise provides, language in a power of attorney  
31 granting general authority with respect to banks and other financial institutions authorizes  
32 the agent to:

33 (a). Continue, modify and terminate an account or other banking arrangement made  
34 by or on behalf of the principal;

1           (b). Establish, modify and terminate an account or other banking arrangement with a  
2 bank, trust company, savings and loan association, credit union, thrift company,  
3 brokerage firm or other financial institution selected by the agent;

4           (c). Contract for services available from a financial institution, including renting a  
5 safe deposit box or space in a vault;

6           (d). Withdraw, by check, order, electronic funds transfer or otherwise, money or  
7 property of the principal deposited with or left in the custody of a financial institution;

8           (e). Receive statements of account, vouchers, notices and similar documents from a  
9 financial institution and act with respect to them;

10           (f). Enter a safe deposit box or vault and withdraw or add to the contents;

11           (g). Borrow money and pledge as security personal property of the principal  
12 necessary to borrow money or pay, renew or extend the time of payment of a debt of the  
13 principal or a debt guaranteed by the principal;

14           (h). Make, assign, draw, endorse, discount, guarantee and negotiate promissory  
15 notes, checks, drafts and other negotiable or nonnegotiable paper of the principal or  
16 payable to the principal or the principal's order, transfer money, receive the cash or other  
17 proceeds of those transactions and accept a draft drawn by a person upon the principal  
18 and pay it when due;

19           (i). Receive for the principal and act upon a sight draft, warehouse receipt or other  
20 document of title, whether tangible or electronic, or other negotiable or nonnegotiable  
21 instrument;

22           (j). Apply for, receive and use letters of credit, credit and debit cards, electronic  
23 transaction authorizations and traveler's checks from a financial institution and give an  
24 indemnity or other agreement in connection with letters of credit; and

25           (k). Consent to an extension of the time of payment with respect to commercial  
26 paper or a financial transaction with a financial institution.

27                                   **No Uniform Comment**

28           (This is Section 208 of the UPOAA)

29           **§5-939. Operation of entity or business**

30           Subject to the terms of a document or an agreement governing an entity or an entity  
31 ownership interest, and unless the power of attorney otherwise provides, language in a  
32 power of attorney granting general authority with respect to operation of an entity or  
33 business authorizes the agent to:

34           (a). Operate, buy, sell, enlarge, reduce or terminate an ownership interest;

35           (b). Perform a duty or discharge a liability and exercise in person or by proxy a right,  
36 power, privilege or option that the principal has, may have or claims to have;

- 1           (c). Enforce the terms of an ownership agreement;
- 2           (d). Initiate, participate in, submit to alternative dispute resolution, settle, oppose or  
3 propose or accept a compromise with respect to litigation to which the principal is a party  
4 because of an ownership interest;
- 5           (e). Exercise in person or by proxy, or enforce by litigation or otherwise, a right,  
6 power, privilege or option the principal has or claims to have as the holder of stocks and  
7 bonds;
- 8           (f). Initiate, participate in, submit to alternative dispute resolution, settle, oppose or  
9 propose or accept a compromise with respect to litigation to which the principal is a party  
10 concerning stocks and bonds;
- 11           (g). With respect to an entity or business owned solely by the principal:
- 12           (1). Continue, modify, renegotiate, extend and terminate a contract made by or on  
13 behalf of the principal with respect to the entity or business before execution of the  
14 power of attorney;
- 15           (2). Determine:
- 16                   (i) The location of its operation;
- 17                   (ii) The nature and extent of its business;
- 18                   (iii) The methods of manufacturing, selling, merchandising, financing,  
19 accounting and advertising employed in its operation;
- 20                   (iv) The amount and types of insurance carried; and
- 21                   (v) The mode of engaging, compensating and dealing with its employees and  
22 accountants, attorneys or other advisors;
- 23           (3). Change the name or form of organization under which the entity or business is  
24 operated and enter into an ownership agreement with other persons to take over all or  
25 part of the operation of the entity or business; and
- 26           (4). Demand and receive money due or claimed by the principal or on the principal's  
27 behalf in the operation of the entity or business and control and disburse the money in  
28 the operation of the entity or business;
- 29           (h). Put additional capital into an entity or business in which the principal has an  
30 interest;
- 31           (i). Join in a plan of reorganization, consolidation, conversion, domestication or  
32 merger of the entity or business;
- 33           (j). Sell or liquidate all or part of an entity or business;
- 34           (k). Establish the value of an entity or business under a buy-out agreement to which  
35 the principal is a party;

1 (l). Prepare, sign, file and deliver reports, compilations of information, returns or  
2 other papers with respect to an entity or business and make related payments; and

3 (m). Pay, compromise or contest taxes, assessments, fines or penalties and perform  
4 any other act to protect the principal from illegal or unnecessary taxation, assessments,  
5 fines or penalties, with respect to an entity or business, including attempts to recover, in  
6 any manner permitted by law, money paid before or after the execution of the power of  
7 attorney.

8 **Uniform Comment**

9 (This is Section 209 of the UPOAA)

10 The substance of this section remains unchanged from Section 9 of the Uniform  
11 Statutory Form Power of Attorney Act; however, the wording is updated to encompass all  
12 modern business and entity forms, including limited liability companies, limited liability  
13 partnerships, and entities that may be organized other than for a business purpose.

14 **§5-940. Insurance and annuities**

15 Unless the power of attorney otherwise provides, language in a power of attorney  
16 granting general authority with respect to insurance and annuities authorizes the agent to:

17 (a). Continue, pay the premium or make a contribution on, modify, exchange,  
18 rescind, release or terminate a contract procured by or on behalf of the principal that  
19 insures or provides an annuity to either the principal or another person, whether or not the  
20 principal is a beneficiary under the contract;

21 (b). Procure new, different and additional contracts of insurance and annuities for the  
22 principal and the principal's spouse, registered domestic partner, children and other  
23 dependents and select the amount, type of insurance or annuity and mode of payment;

24 (c). Pay the premium or make a contribution on, modify, exchange, rescind, release  
25 or terminate a contract of insurance or annuity procured by the agent;

26 (d). Apply for and receive a loan secured by a contract of insurance or annuity;

27 (e). Surrender and receive the cash surrender value on a contract of insurance or  
28 annuity;

29 (f). Exercise an election;

30 (g). Exercise investment powers available under a contract of insurance or annuity;

31 (h). Change the manner of paying premiums on a contract of insurance or annuity;

32 (i). Change or convert the type of insurance or annuity with respect to which the  
33 principal has or claims to have authority described in this section;

34 (j). Apply for and procure a benefit or assistance under a statute or regulation to  
35 guarantee or pay premiums of a contract of insurance on the life of the principal;



1 (5). Initiate, participate in, submit to alternative dispute resolution, settle, oppose or  
2 propose or accept a compromise with respect to litigation to remove, substitute or  
3 surchARGE a fiduciary;

4 (6). Conserve, invest, disburse or use anything received for an authorized purpose;  
5 and

6 (7). Transfer an interest of the principal in real property, stocks and bonds, accounts  
7 with financial institutions or securities intermediaries, insurance, annuities and other  
8 property to the trustee of a revocable trust created by the principal as settler.

9 **Uniform Comment**

10 (This is Section 211 of the UPOAA)

11 This section, which corresponds to Section 11 of the Uniform Statutory Form Power  
12 of Attorney Act, has been revised to clarify that an agent's authority includes authority to  
13 exercise, for the benefit of the principal, a presently exercisable general power of  
14 appointment held by the principal (subsection (b)(3)). "Presently exercisable general  
15 power of appointment" is defined for purposes of the Act in Section 102(8).

16 **§5-942. Claims and litigation**

17 Unless the power of attorney otherwise provides, language in a power of attorney  
18 granting general authority with respect to claims and litigation authorizes the agent to:

19 (a). Assert and maintain before a court or administrative agency a claim, claim for  
20 relief, cause of action, counterclaim, offset, recoupment or defense, including an action to  
21 recover property or other thing of value, recover damages sustained by the principal,  
22 eliminate or modify tax liability or seek an injunction, specific performance or other  
23 relief;

24 (b). Bring an action to determine adverse claims or intervene or otherwise participate  
25 in litigation;

26 (c). Seek an attachment, garnishment, order of arrest or other preliminary,  
27 provisional or intermediate relief and use an available procedure to effect or satisfy a  
28 judgment, order or decree;

29 (d). Make or accept a tender, offer of judgment or admission of facts, submit a  
30 controversy on an agreed statement of facts, consent to examination and bind the  
31 principal in litigation;

32 (e). Submit to alternative dispute resolution, settle and propose or accept a  
33 compromise;

34 (f). Waive the issuance and service of process upon the principal, accept service of  
35 process, appear for the principal, designate persons upon which process directed to the  
36 principal may be served, execute and file or deliver stipulations on the principal's behalf,  
37 verify pleadings, seek appellate review, procure and give surety and indemnity bonds,  
38 contract and pay for the preparation and printing of records and briefs, receive, execute  
39 and file or deliver a consent, waiver, release, confession of judgment, satisfaction of

1 judgment, notice, agreement or other instrument in connection with the prosecution,  
2 settlement or defense of a claim or litigation;

3 (g). Act for the principal with respect to bankruptcy or insolvency, whether voluntary  
4 or involuntary, concerning the principal or some other person, or with respect to a  
5 reorganization, receivership or application for the appointment of a receiver or trustee  
6 that affects an interest of the principal in property or other thing of value;

7 (h). Pay a judgment, award or order against the principal or a settlement made in  
8 connection with a claim or litigation; and

9 (i). Receive money or other thing of value paid in settlement of or as proceeds of a  
10 claim or litigation.

11 **No Uniform Comment**

12 (This is Section 212 of the UPOAA)

13 **§5-943. Personal and family maintenance**

14 (a). Unless the power of attorney otherwise provides, language in a power of  
15 attorney granting general authority with respect to personal and family maintenance  
16 authorizes the agent to:

17 (1). Perform the acts necessary to maintain the customary standard of living of the  
18 principal, the principal's spouse and the following individuals, whether living when  
19 the power of attorney is executed or later born:

20 (i) The principal's children;

21 (ii) Other individuals legally entitled to be supported by the principal; and

22 (iii) The individuals whom the principal has customarily supported or indicated  
23 the intent to support;

24 (2). Make periodic payments of child support and other family maintenance required  
25 by a court or governmental agency or an agreement to which the principal is a party;

26 (3). Provide living quarters for the individuals described in paragraph (1) by:

27 (i) Purchase, lease or other contract; or

28 (ii) Paying the operating costs, including interest, amortization payments,  
29 repairs, improvements and taxes, for premises owned by the principal or  
30 occupied by those individuals;

31 (4). Provide normal domestic help, usual vacations and travel expenses and funds for  
32 shelter, clothing, food, appropriate education, including postsecondary and vocational  
33 education, and other current living costs for the individuals described in paragraph  
34 (1);

35 (5). Pay expenses for necessary health care and custodial care on behalf of the  
36 individuals described in paragraph (1);



1 (6). Act as the principal's personal representative pursuant to the federal Health  
2 Insurance Portability and Accountability Act of 1996, 42 United States Code, Section  
3 1320d et seq., as amended, and applicable regulations, in making decisions related to  
4 the past, present or future payment for the provision of health care consented to by  
5 the principal or anyone authorized under the law of this State to consent to health care  
6 on behalf of the principal;

7 (7). Continue any provision made by the principal for automobiles or other means of  
8 transportation, including registering, licensing, insuring and replacing them, for the  
9 individuals described in paragraph (1);

10 (8). Maintain credit and debit accounts for the convenience of the individuals  
11 described in paragraph (1) and open new accounts; and

12 (9). Continue payments incidental to the membership or affiliation of the principal in  
13 a religious institution, club, society, order or other organization or to continue  
14 contributions to those organizations.

15 (b). Authority with respect to personal and family maintenance is neither dependent  
16 upon, nor limited by, authority that an agent may or may not have with respect to gifts  
17 under this Part.

18 **Uniform Comment**

19 (This is Section 213 of the UPOAA)

20 This section, based on Section 13 of the Uniform Statutory Form Power of Attorney  
21 Act, contains three important changes. The first is clarification in subsection (a)(1) of  
22 who qualifies to benefit from payments for personal and family maintenance. Paragraph  
23 (1) states that the individuals who may benefit include not only the principal's children  
24 and other individuals legally entitled to be supported by the principal, but also  
25 "individuals whom the principal has customarily supported or indicated the intent to  
26 support," "whether living when the power of attorney is executed or later born." This  
27 definition is broad enough to include common recipients of family support such as  
28 parents and later-born grandchildren if such support is intended by the principal.

29 The second important addition to Section 213 is the inclusion of paragraph (6) in  
30 subsection (a) which qualifies the agent to act as the principal's "personal representative"  
31 for purposes of the Health Insurance Portability and Accountability Act (HIPAA) so that  
32 the agent can communicate with health care providers in order to pay medical bills. *See*  
33 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that for purposes of disclosing an  
34 individual's protected health information, "a covered entity must . . . treat a personal  
35 representative as the individual"). Section 213 does not, however, empower the agent to  
36 make health-care decisions for the principal. *See* Section 103 and comment (discussing  
37 exclusion from this Act of powers to make health-care decisions).

38 The third important addition to this section is subsection (b) which provides that  
39 authority under Section 213 is neither dependent upon, nor limited by, authority that an  
40 agent may or may not have with respect to making gifts. Although payments made for  
41 the benefit of persons under Section 213 may in fact be subject to gift tax treatment,  
42 subsection (b) clarifies that the authority for personal and family maintenance payments

1 by an agent emanates from this section rather than Section 217. This is an important  
2 distinction because the Act requires a grant of specific authority under Section 201(a) to  
3 authorize gift making, and the default provisions of Section 217 limit the amounts of  
4 those gifts. The authority to make payments under Section 213 is not constrained by  
5 either of these provisions.

6 **§5-944. Benefits from governmental programs or civil or military service**

7 (a). As used in this section, "benefit from governmental programs or civil or military  
8 service" means any benefit, program or assistance provided under a statute, rule or  
9 regulation including Social Security, Medicare and Medicaid.

10 (b). Unless the power of attorney otherwise provides, language in a power of  
11 attorney granting general authority with respect to benefits from governmental programs  
12 or civil or military service authorizes the agent to:

13 (1). Execute vouchers in the name of the principal for allowances and  
14 reimbursements payable by the United States or a foreign government or by a state or  
15 subdivision of a state to the principal, including allowances and reimbursements for  
16 transportation of the individuals described in section 5-943, subsection (a), paragraph  
17 (1) and for shipment of their household effects;

18 (2). Take possession and order the removal and shipment of property of the principal  
19 from a post, warehouse, depot, dock or other place of storage or safekeeping, either  
20 governmental or private, and execute and deliver a release, voucher, receipt, bill of  
21 lading, shipping ticket, certificate or other instrument for that purpose;

22 (3). Enroll in, apply for, select, reject, change, amend or discontinue, on the  
23 principal's behalf, a benefit or program;

24 (4). Prepare, file and maintain a claim of the principal for a benefit or assistance,  
25 financial or otherwise, to which the principal may be entitled under a statute, rule or  
26 regulation;

27 (5). Initiate, participate in, submit to alternative dispute resolution, settle, oppose or  
28 propose or accept a compromise with respect to litigation concerning any benefit or  
29 assistance the principal may be entitled to receive under a statute, rule or regulation;  
30 and

31 (6). Receive the financial proceeds of a claim described in subsection (4) and  
32 conserve, invest, disburse or use for a lawful purpose anything so received.

33 **No Uniform Comment**

34 (This is Section 214 of the UPOAA)

35 **§5-945. Retirement plans**

36 (a). As used in this section, "retirement plan" means a plan or account created by an  
37 employer, the principal or another individual to provide retirement benefits or deferred  
38 compensation of which the principal is a participant, beneficiary or owner, including a  
39 plan or account under the following sections of the federal Internal Revenue Code:

- 1      (1). An individual retirement account under 26 United States Code, Section 408, as  
2      amended;
- 3      (2). A Roth individual retirement account under 26 United States Code, Section  
4      408A, as amended;
- 5      (3). A deemed individual retirement account under 26 United States Code, Section  
6      408(q), as amended;
- 7      (4). An annuity or mutual fund custodial account under 26 United States Code,  
8      Section 403(b), as amended;
- 9      (5). A pension, profit-sharing, stock bonus or other retirement plan qualified under  
10      26 United States Code, Section 401(a), as amended;
- 11      (6). A plan under 26 United States Code, Section 457(b), as amended; and
- 12      (7). A nonqualified deferred compensation plan under 26 United States Code,  
13      Section 409A, as amended.

14      (b). Unless the power of attorney otherwise provides, language in a power of  
15      attorney granting general authority with respect to retirement plans authorizes the agent  
16      to:

- 17      (1). Select the form and timing of payments under a retirement plan and withdraw  
18      benefits from a plan;
- 19      (2). Make a rollover, including a direct trustee-to-trustee rollover, of benefits from  
20      one retirement plan to another;
- 21      (3). Establish a retirement plan in the principal's name;
- 22      (4). Make contributions to a retirement plan;
- 23      (5). Exercise investment powers available under a retirement plan; and
- 24      (6). Borrow from, sell assets to or purchase assets from a retirement plan.

25                                    **Uniform Comment**

26                    (This is Section 215 of the UPOAA)

27                    This section, based on Section 15 of the Uniform Statutory Form Power of Attorney  
28                    Act, has been substantially updated to reflect changes in the laws governing retirement  
29                    plans. A significant departure from the Uniform Statutory Form Power of Attorney Act  
30                    is the deletion of default authority in the agent to waive the right of the principal to be a  
31                    beneficiary of a joint or survivor annuity (see Unif. Statutory Form Power of Atty. Act §  
32                    15 (1988)). Under this Act, the authority to waive the principal's right to be a beneficiary  
33                    of a joint and survivor annuity must be given by a specific grant pursuant to Section  
34                    201(a).

35                    **§5-946. Taxes**

36                    Unless the power of attorney otherwise provides, language in a power of attorney  
37                    granting general authority with respect to taxes authorizes the agent to:

1           (a). Prepare, sign and file federal, state, local and foreign income, gift, payroll,  
2 property, Federal Insurance Contributions Act and other tax returns, claims for refunds,  
3 requests for extension of time, petitions regarding tax matters and any other tax-related  
4 documents, including receipts, offers, waivers, consents, including consents and  
5 agreements under 26 United States Code, Section 2032A, as amended, closing  
6 agreements and any power of attorney required by the federal Internal Revenue Service  
7 or other taxing authority with respect to a tax year upon which the statute of limitations  
8 has not run and the following 25 tax years;

9           (b). Pay taxes due, collect refunds, post bonds, receive confidential information and  
10 contest deficiencies determined by the federal Internal Revenue Service or other taxing  
11 authority;

12           (c). Exercise any election available to the principal under federal, state, local or  
13 foreign tax law; and

14           (d). Act for the principal in all tax matters for all periods before the federal Internal  
15 Revenue Service or other taxing authority.

16   **No Uniform Comment**

17           (This is Section 216 of the UPOAA)

18           **§5-947. Gifts**

19           (a). As used in this section, a gift "for the benefit of" a person includes a gift to a  
20 trust, an account under the Maine Uniform Transfers to Minors Act and a tuition savings  
21 account or prepaid tuition plan as defined under 26 United States Code, Section 529, as  
22 amended.

23           (b). An agent may make a gift of the principal's property only as the agent  
24 determines is consistent with the principal's objectives if actually known by the agent  
25 and, if unknown, as the agent determines is consistent with the principal's best interest  
26 based on all relevant factors, including:

27                   (1). The value and nature of the principal's property;

28                   (2). The principal's foreseeable obligations and need for maintenance;

29                   (3). Minimization of taxes, including income, estate, inheritance, generation-  
30 skipping transfer and gift taxes;

31                   (4). Eligibility for a benefit, a program or assistance under a statute, rule or  
32 regulation; and

33                   (5). The principal's personal history of making or joining in making gifts.

34   **Uniform Comment**

35           (This is Section 217 of the UPOAA)

36           This section provides default limitations on an agent's authority to make a gift of the  
37 principal's property. Authority to make a gift must be made by a specific grant in a power  
38 of attorney (*see* Section 201(a)(2); *see also* Section 301). The mere granting to an agent

1 of authority to make gifts does not, however, grant an agent unlimited authority. The  
2 agent's authority is subject to this section unless enlarged or further limited by an express  
3 modification in the power of attorney. Without modification, the authority of an agent  
4 under this section is limited to gifts in an amount per donee not to exceed the annual  
5 dollar limits of the federal gift tax exclusion, or twice that amount if the principal and the  
6 principal's spouse consent to make a split gift.

7 Subsection (a) of this section clarifies the fact that a gift includes not only outright  
8 gifts, but also gifts for the benefit of a person. Subsection (a) provides examples of gifts  
9 made for the benefit of a person, but these examples are not intended to be exclusive.

10 Subsection (c) emphasizes that exercise of authority to make a gift, as with exercise  
11 of all authority under a power of attorney, must be consistent with the principal's  
12 objectives. If these objectives are not known, then gifts must be consistent with the  
13 principal's best interest based on all relevant factors. Subsection (c) provides examples of  
14 factors relevant to the principal's best interest, but these examples are illustrative rather  
15 than exclusive.

16 To the extent that a principal's objectives with respect to the making of gifts may  
17 potentially conflict with an agent's default duties under the Act, the principal should  
18 carefully consider stating those objectives in the power of attorney, or altering the default  
19 rules to accommodate the objectives, or both. *See* Section 114 Comment.

#### 20 **Maine Comment**

21 Maine deviates from the Uniform Act by removing entirely the requirement that the  
22 default gifting powers be limited to an amount per donee not to exceed the annual dollar  
23 limits of the federal gift tax exclusion or, if the principal's spouse consented to a split gift,  
24 in an amount per donee not to exceed twice the annual federal gift tax exclusion limit.

#### 25 **General Uniform Comment**

26 Article 2 is based in part on the predecessor Uniform Statutory Form Power of  
27 Attorney Act, approved in 1988. It provides the default statutory construction for  
28 authority granted in a power of attorney. Sections 204 through 217 describe authority  
29 with respect to various subject matters. These descriptions may be incorporated by  
30 reference in the optional statutory form (Section 301) or in an individually drafted power  
31 of attorney. Incorporation is accomplished either by referring to the descriptive term for  
32 the subject or by providing a citation to the section in which the authority is described  
33 (Section 202). A principal may also modify any authority incorporated by reference  
34 (Section 202(c)). Section 203 supplements Sections 204 through 217 by providing  
35 general terms of construction that apply to all grants of authority under those sections  
36 unless otherwise indicated in the power of attorney.

37 Most of the language in Sections 204 through 216 of Article 2 comes directly from  
38 the Uniform Statutory Form Power of Attorney Act. The language has been revised  
39 where necessary to reflect modern custom and practice. Where significant changes have  
40 been made, they are noted in a comment to the relevant section. In general, there are two  
41 important differences between the statutory treatment of authority in this Act and in the  
42 Uniform Statutory Form Power of Attorney Act. First, this Act includes a section that  
43 provides a default rule for the parameters of gift making authority (Section 217). Second,

1 this Act identifies specific acts that may be authorized only by an express grant in the  
2 power of attorney (Section 201(a)). Express authorization for the acts listed in Section  
3 201(a) is required because of the risk those acts pose to the principal's property and estate  
4 plan. The purpose of Section 201(a) is to make clear that authority for these acts may not  
5 be inferred from a grant of general authority.

6 **SUBPART 3**

7 **STATUTORY FORMS**

8 **§5-951. Agent's certification**

9 The following optional form may be used by an agent to certify facts concerning a  
10 power of attorney.

11 **AGENT'S CERTIFICATION AS TO THE VALIDITY OF POWER OF**  
12 **ATTORNEY AND AGENT'S AUTHORITY**

13 State of .....

14 County of .....

15 I, .....(Name of Agent), certify under penalty  
16 of perjury that .....(name of Principal) granted me  
17 authority as an agent or successor agent in a power of attorney dated  
18 .....

19 I further certify that to my knowledge:

20 (1) The Principal is alive and has not revoked the Power of Attorney or my authority  
21 to act under the Power of Attorney and the Power of Attorney and my authority to act  
22 under the Power of Attorney have not terminated;

23 (2) If the Power of Attorney was drafted to become effective upon the happening of  
24 an event or contingency, the event or contingency has occurred;

25 (3) If I was named as a successor agent, the prior agent is no longer able or willing to  
26 serve; and

27 (4)

28 .....

29 .....

30 .....

31 .....

32 (Insert other relevant statements)

33 **SIGNATURE AND ACKNOWLEDGMENT**

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Agent's Signature

Date

.....

Agent's Name Printed

.....

Agent's Address

.....

Agent's Telephone Number

This document was acknowledged before me on .....

(Date)

by .....

(name of Agent)

..... (Seal, if any)

Signature of Notary/Attorney

My commission expires: .....

This document prepared by:

.....

**Uniform Comment**

(This is Section 302 of the UPOAA)

This section provides an optional form that may be used by an agent to certify facts concerning a power of attorney. Although the form contains statements of fact about which persons commonly request certification, other factual statements may be added to the form for the purpose of providing an agent certification pursuant to Section 119.

**General Uniform Comment**

Article 3 provides a concise, optional statutory form for creating a power of attorney under this Act (Section 301). With the proliferation of power of attorney forms in the public domain, the advantage of a statutorily-sanctioned form is the promotion of uniformity in power of attorney practice. In states such as Illinois and New York, where

1 state-sanctioned statutory forms have existed for many years, the statutory form is widely  
2 used by both lawyers and lay persons. The familiarity and common understanding  
3 achieved with the use of one statutory form also facilitates acceptance of powers of  
4 attorney. In the twenty years preceding this Act, the number of states with statutory  
5 forms has increased from only a few to eighteen.

6 In addition to the statutory form power of attorney, Article 3 provides an optional  
7 form for agent certification of facts pertaining to a power of attorney (Section 302).  
8 Pursuant to Section 119, a person may request an agent to certify any factual matter  
9 concerning the principal, agent, or power of attorney. The form in Section 302 is  
10 intended to facilitate agent compliance with these requests. The form lists factual matters  
11 about which persons commonly request certification (e.g., the principal is alive and has  
12 not revoked the power of attorney or the agent's authority), and provides a designated  
13 space for certification of additional factual statements. Both the statutory form power of  
14 attorney and the agent certification form may be tailored to accommodate individual  
15 circumstances and objectives.

#### 16 SUBPART 4

#### 17 MISCELLANEOUS PROVISIONS

#### 18 §5-961. Uniformity of application and construction

19 In applying and construing this uniform act, consideration must be given to the need  
20 to promote uniformity of the law with respect to its subject matter among the states that  
21 enact it.

#### 22 **No Uniform Comment**

23 (This is Section 401 of the UPOAA)

#### 24 §5-962. Relation to Electronic Signatures in Global and National Commerce Act

25 This Part modifies, limits and supersedes the federal Electronic Signatures in Global  
26 and National Commerce Act, 15 United States Code, Section 7001 et seq., but does not  
27 modify, limit or supersede 15 United States Code, Section 7001(c), or authorize  
28 electronic delivery of any of the notices described in 15 United States Code, Section  
29 7003(b).

#### 30 **No Uniform Comment**

31 (This is Section 402 of the UPOAA)

#### 32 §5-963. Effect on existing powers of attorney

33 Except as otherwise provided in this Part, on July 1, 2010:

34 (a). This Part applies to a power of attorney created before, on or after July 1, 2010;

35 (b). This Part applies to a judicial proceeding concerning a power of attorney  
36 commenced on or after July 1, 2010; and



1 (c). This Part applies to a judicial proceeding concerning a power of attorney  
2 commenced before July 1, 2010, unless the court finds that application of a provision of  
3 this Part would substantially interfere with the effective conduct of the judicial  
4 proceeding or prejudice the rights of a party, in which case that provision does not apply  
5 and the superseded law applies.

6 An act done before July 1, 2010 is not affected by this Part.

7 **No Uniform Comment**

8 (This is Section 403 of the UPOAA)

9 **§5-964. Effective date**

10 This Part takes effect July 1, 2010.

11 **No Uniform Comment**

12 (This is Section 405 of the UPOAA)

13 **Sec. 3. 22 MRSA §1711-C, sub-§1, ¶A**, as amended by PL 1999, c. 512, Pt. A,  
14 §5 and affected by §7, is further amended to read:

15 A. "Authorized representative of an individual" or "authorized representative"  
16 means an individual's legal guardian; agent pursuant to Title 18-A, section 5-802;  
17 ~~attorney-in-fact agent~~ pursuant to Title 18-A, ~~section 5-506~~ Article 5, Part 9; or other  
18 authorized representative or, after death, that person's personal representative or a  
19 person identified in subsection 3-B. For a minor who has not consented to health  
20 care treatment in accordance with the provisions of state law, "authorized  
21 representative" means the minor's parent, legal guardian or guardian ad litem.

22 **Sec. 4. 22 MRSA §8621, sub-§6**, as enacted by PL 1993, c. 692, §1, is amended  
23 to read:

24 **6. Durable health care power of attorney.** "Durable health care power of attorney"  
25 has the same meaning as "power of attorney for health care" contained in Title 18-A,  
26 section ~~5-506~~ 5-801.

27 **Sec. 5. Legislative intent.** This Act is the Maine enactment of the Uniform Power  
28 of Attorney Act as approved by the National Conference of Commissioners on Uniform  
29 State Laws in 2006. The text of the uniform act has been changed to conform to Maine  
30 statutory conventions. Unless otherwise noted in a Maine comment, the changes are  
31 technical in nature and it is the intent of the Legislature that this Act be interpreted as  
32 substantively the same as the Uniform Power of Attorney Act.

33 **Sec. 6. Effective date.** This Act takes effect July 1, 2010.

34 **SUMMARY**

35 The Maine Uniform Power of Attorney Act, Maine UPOAA, replaces and expands  
36 the provisions relating to powers of attorney in Maine's Probate Code, currently in the  
37 Maine Revised Statutes, Title 18-A, Article 5, Part 5. Durable powers of attorney have

1       been allowed since the late 1960s or early 1970s in almost every state. A durable power  
2       of attorney survives the incapacity of the principal to avoid the need to bring expensive  
3       and time-consuming guardianship or conservatorship actions to care for the principal's  
4       assets. Under Maine UPOAA, the agent serves in the same way a guardian or  
5       conservator would in relation to the principal's property. Maine UPOAA requires that  
6       certain powers, mostly related to estate planning, be expressly and specifically conferred  
7       rather than be accepted as general powers. Maine UPOAA also provides civil penalties  
8       for refusal by a 3rd party to accept a properly executed power of attorney if that 3rd party  
9       holds assets of the principal. Maine UPOAA does, however, create reasonable  
10       exceptions to the requirement that a 3rd party accept a properly executed and  
11       acknowledged power of attorney and it creates certain protections for persons who accept  
12       a power of attorney in good faith. Maine UPOAA contains provisions that protect a  
13       principal and the principal's successors in interest from an agent who violates its  
14       provisions. Finally, Maine UPOAA does not contain provisions related to so-called  
15       durable health care powers of attorney as currently provided in Article 5, Part 5 of  
16       Maine's Probate Code; however, Maine UPOAA does not affect Maine's Uniform  
17       Health-care Decisions Act in Article 5, Part 8 of Maine's Probate Code, which already,  
18       and concurrently, allows for the creation of so-called durable health care powers of  
19       attorney.

20               This bill includes Uniform Comments and Maine Comments where applicable.