

Avoiding Liability When Accepting or Rejecting a Durable Power of Attorney

Author: ANDREW H. HOOK, CELA, CFP® AND THOMAS D. BEGLEY, JR., CELA

ANDREW H. HOOK, CELA, CFP®¹ is a member of the law firm of Oast & Hook, P.C. in Portsmouth and Virginia Beach, Virginia. He is also a Fellow of the American College of Trust and Estate Counsel. His e-mail is hook@oasthook.com. THOMAS D. BEGLEY, JR., CELA, is a member of the law firm of Begley & Bookbinder, P.C., in Moorestown, New Jersey. He is also a past Director of the board of directors of the National Academy of Elder Law Attorneys. His e-mail is tom@begleylawyer.com. Messrs. Begley and Hook are both Certified Elder Law Attorneys (“CELAs”), and are the authors of the treatise, *Representing the Elderly or Disabled Client*, published by Warren, Gorham & Lamont, a division of Thomson Reuters. Copyright © 2008, Oast & Hook, P.C.

Third parties are often requested to rely and act upon the authority of an agent under a durable power of attorney (“DPA”). For example, it is not uncommon for a child who has been designated as an agent for a parent under a DPA to use the DPA to access that parent’s bank accounts or to change the beneficiary designation on life insurance or annuity contracts.

The effectiveness of a DPA is contingent upon whether third parties will rely on the authority granted to an agent. Unfortunately, financial exploitation by agents purportedly acting pursuant to a “valid” DPA has become a widespread phenomenon and is a major concern for principals as well as third parties. As a matter of fact, there is probably no other third-party entity more familiar with financial abuse by an agent purportedly acting pursuant to a valid DPA than a financial institution. It is completely understandable that financial institutions may be leery of allowing an agent wielding a DPA to access a principal’s accounts, especially when there may be large sums of money involved. Third parties face many risks when accepting DPAs, such as fraud, the risk that the DPA or the agent’s authority has been revoked, or that the agent is exceeding the authority granted to him in the DPA.² However, many state statutes still do not offer protection for third parties, including financial institutions, against fraud.

In addition to the risks associated with a third party’s acceptance of a DPA, the third party risks facing liability for nonacceptance. If a third party’s refusal to accept a DPA is unreasonable or not in good faith, that third party will often be subject to a court order mandating acceptance and/or liability for damages and costs, including reasonable attorney’s fees.³ As a result, most third parties have internal procedures in place for reviewing and accepting DPAs.

For example, some financial institutions may require that a DPA be executed on their own internal DPA form. Other financial institutions, while recognizing DPAs that are not executed on their own form, may limit the types and amounts of transactions which an agent may engage in on the principal’s behalf. Some financial institutions may require additional information from an agent, such as an affidavit that the DPA or the agent’s authority has not been revoked or terminated or that the principal is not deceased. Third parties must use discretion when deciding whether to accept or reject a DPA. If there is any question as to the validity of the agent’s authority, most financial institutions will instruct their employees to refer the matter to their legal department for a final determination.

In the October 2007 issue of *Estate Planning*,⁴ we discussed the evolution of DPAs and analyzed the Uniform Power of Attorney Act (“UPOAA”), a product of a 2002 survey⁵ conducted by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). According to the survey responses, at least 80% of attorney-respondents polled admitted to occasionally experiencing difficulty obtaining third-party acceptance of an agent’s authority under a DPA.⁶ The results of the

survey revealed many areas of state DPA laws in need of change and uniformity, including (1) protecting the reliance of third parties on DPAs and (2) implementing remedies and sanctions for third-party refusal to honor a DPA.

As a result of the 2002 survey and a study of all state DPA legislation, the UPOAA was promulgated in 2006 by NCCUSL in an effort to bring uniformity to an area of the law that has been rapidly emerging as a significant, if not vital, estate planning tool. The UPOAA is an endeavor by NCCUSL to “codify both state legislative trends and collective best practices, and strike a balance between the need for flexibility and acceptance of an agent’s authority by third parties and the need to prevent and redress financial abuse.”⁷

During the three-year drafting process for the UPOAA, NCCUSL worked closely with representatives from the American Bankers Association and the National Conference of Lawyers and Corporate Fiduciaries to discuss drafts of the UPOAA with bank, trust company, and investment company counsel.⁸ The American Bankers Association assembled an informal work group of counsel from these constituencies for the purpose of identifying power of attorney issues most important to financial institutions.⁹ These issues were addressed by the drafting committee through modifications and revisions to the UPOAA.¹⁰ The final provisions, which embody the collective input of these constituencies, explicitly protect good faith acceptance and refusal of DPAs, and recognize liability for a refusal that does not fall within certain safe harbors in the act.¹¹

Concerns of financial institutions regarding DPAs

Since its inception in 2006, the UPOAA has been enacted by only two states—New Mexico and Idaho. However, bills have been presented to the state legislatures in Indiana, Maine, Maryland, Michigan, Mississippi, and Virginia. These states are all carefully studying the UPOAA and assessing the impact its enactment will have on various constituencies within their state, especially financial institutions.

In Virginia, for example, the Virginia Bar Association formed a legislative committee for the purpose of reviewing the UPOAA and drafting a bill to be presented to the Virginia General Assembly. Among those on the Virginia Bar Association committee were attorneys working for banks who took particular interest in the provisions of the UPOAA pertaining to protecting the reliance of third parties on a DPA, and implementing remedies and sanctions for third-party refusal to honor a DPA. These attorneys on the Virginia Bar Association legislative committee served as liaisons to the Virginia Bankers Association (“VBA”), keeping the VBA apprised of the Virginia UPOAA proposal and soliciting feedback from the VBA about the proposal.

Initially, the VBA indicated that they were satisfied with the statutory form under the UPOAA, as they felt it would benefit both those seeking to establish DPAs as well as those asked to rely on them, such as banks.¹² However, the VBA did find problems with section 119 of the UPOAA which imposes a “good faith” standard on those asked to accept an acknowledged DPA and section 120 of the UPOAA dealing with a person's liability for refusing to accept an acknowledged DPA.

Section 119(c) of the UPOAA provides:

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

The VBA expressed apprehension that the “good faith” standard of section 119 would give an aggrieved principal the ability to pursue the “deep pockets” of a bank that has accepted a DPA in the event that a dishonest agent misappropriates the principal's money.¹³ The VBA felt that “because a bank will generally be required to accept a power of attorney under UPOAA Section 120, this risk would be much more significant under this legislation than it is today, since banks will undoubtedly accept powers of attorney that they would not have accepted in the past.”¹⁴ Essentially, banks are concerned that a court would require them to prove the honest intentions of the bank employee in order to avail themselves of the Act's protections.

Alleviating bankers' concerns regarding liability

Members of the Virginia Bar Association committee submitted the VBA concerns to representatives of the UPOAA drafting committee. Through various e-mails, memoranda, and telephone conferences, representatives from the UPOAA drafting committee have attempted to alleviate the bankers' concerns as follows:

Under common law, a principal is not subject to liability for an agent's false representations to third parties regarding his authority unless the agent acts with actual or apparent authority in making the representations and the third party does not have notice that the representations are false.¹⁵ However, third parties have argued that they should bear no liability for accepting a POA that turns out to be a forgery because they have no control over where the POA originated or how it was executed.¹⁶

The UPOAA responds to this somewhat persuasive argument of third parties by making a fundamental change from the common law rule. The UPOAA attempts to promote third-party acceptance by placing

the risk that a DPA is invalid on the principal rather than on the person who accepts the DPA.¹⁷ Essentially, the UPOAA relieves third parties from the role of policing the use of POAs. Holding third parties responsible for a forged POA is the reason why most third parties will accept a POA executed only on their own form.¹⁸

Under the UPOAA, a third party may rely in good faith on the “purported” validity of an acknowledged DPA, the “purported” validity of the agent’s authority, and the propriety of the agent’s exercise of authority, unless the person has actual knowledge to the contrary.¹⁹ As a member of the UPOAA drafting committee pointed out, the “good faith” standard is a lower standard than the ordinary care standard (i.e., what an ordinarily prudent person would do in the same or similar circumstances).²⁰

The good faith standard was specifically included in the UPOAA at the request of bankers to clarify that persons who accept DPAs are not held to the “ordinary care” negligence standard.²¹ In other words, third parties presented with a DPA don’t have to be ordinarily prudent, only “honest.”²² Furthermore, third persons who conduct activities through employees are held to be without actual knowledge of a fact “if the employee conducting the transaction involving the power of attorney is without actual knowledge of the fact.”²³ Thus, a financial institution is protected against liability for accepting a forged, invalid, or revoked DPA, provided that the employee did so honestly and without actual knowledge that it was forged, invalid, or revoked.²⁴

The UPOAA explicitly rejects an “imputed knowledge” standard in the context of acceptance of DPAs by financial institutions because to impute knowledge to all branches of a financial institution when notice of a fact is given to one office would create unmanageable burdens for financial institutions which may be presented with hundreds of DPAs per week.²⁵ The UPOAA’s broad protections for a good faith acceptance of a DPA combined with the Act’s explicit rejection of any imputed knowledge standard substantially narrows the bases for liability of a financial institution.²⁶ Additionally, under the UPOAA, financial institutions are afforded the opportunity to request and rely upon, without further investigation, an opinion of counsel as to any matter of law concerning the DPA.²⁷ This opinion of counsel must be provided at the principal’s expense unless the request is made more than seven business days after the power of attorney is presented for acceptance.²⁸

In addition to section 119 of the UPOAA, the VBA also expressed concerns about section 120 of the Act. UPOAA section 120 enumerates bases for legitimate refusals of acknowledged DPAs and includes two optional liability provisions.

The first option, “Alternative A,” applies to any and all acknowledged DPAs. The second option, “Alternative B,” is identical to Alternative A, except that it applies only to acknowledged statutory short form DPAs. The bases for refusal and sanctions are the same in both options. Under section 120 of UPOAA, an individual is justified in rejecting a DPA if:

- (1) the person is not otherwise required to engage in a transaction with the principal in the same circumstances;
- (2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;
- (3) the person has actual knowledge of the termination of the agent’s authority or of the power of attorney before the exercise of the power;
- (4) a request for a certification, a translation, or an opinion of counsel under section 119(d) is refused;
- (5) the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under section 119(d) has been requested or provided; or
- (6) the person makes, or has actual knowledge that another person has made, a report to the [local adult protective services office] stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.²⁹

It is important to note that while studying and drafting their version of the UPOAA, members of the Virginia Bar Association legislative committee, at the request of the bank attorneys on the committee, altered the language of section 120 to read that an individual is not required to accept an acknowledged DPA if “the person is not otherwise required to engage in the transaction with the principal in the same circumstances, or the principal has otherwise relieved the person from an obligation to engage in the

transaction with an agent representing the principal under a power of attorney.” (underlined language added). By adding this language, members of the committee wanted to give third parties the ability to prohibit the use of DPAs by contract so that third parties will not have to deal with agents. This additional provision gives third parties similar powers to those of some government agencies such as the Department of Veterans Affairs and the Social Security Administration, which do not recognize DPAs or an agent's authority.

However, even with this additional power added by the Virginia Bar Association legislative committee, the VBA was worried that section 120 would not serve the interests of principals of powers of attorney and would unfairly expose banks and others who are routinely asked to rely on such powers to new risks of liability.³⁰ Specifically, the VBA indicated:

...Section [120] requires that a person presented with an acknowledged power of attorney accept such power for use (subject to the right to request a certification, translation, or opinion of counsel) or face potential liability for failing to do so. Under current law, a person has the discretion to accept or refuse such power. Banks often exercise this discretion by refusing to accept a power of attorney where circumstances exist suggesting that the principal (the bank customer) may be harmed if the power is accepted. Section [120] would make it harder for banks to refuse powers of attorney under such circumstances.³¹

Representatives from the UPOAA drafting committee addressed this concern by pointing out that in the 13 states with statutory liability for failure to accept a DPA, there are no reported cases of actual financial institution liability for refusals. These provisions appear to be working as intended to discourage arbitrary refusals. The greater risk of liability to financial institutions may actually be posed by state statutes that are silent about who bears the risk of loss from DPA fraud or forgery or statutes that fail to provide protections for good faith acceptances and refusals.³²

Under the UPOAA, the statutory safe harbors for rejecting a DPA cover any reasonable basis upon which a financial institution may wish to reject a DPA.³³ A financial institution is permitted to refuse a valid DPA if the representative from the financial institution believes in good faith that the “principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.”³⁴ Only when a refusal does not meet one of the foregoing safe harbors will a financial institution be subject to a court order mandating acceptance and liability for reasonable attorney's fees and costs associated with an action to confirm the validity of the DPA. While the UPOAA does not require financial institutions to operate as watch dogs for financial abuse or to substantiate their decisions to accept or reject a DPA, it does afford financial institutions the necessary tools and protections to do so if they so choose.³⁵

Conclusion

Addressing financial abuse perpetrated with a DPA has become problematic for both principals and third parties. Third parties face significant risks with every DPA they accept or reject. The UPOAA embodies a number of important provisions that protect third parties for both good faith acceptance and good faith refusals of a DPA. While Virginia is still currently in the process of reviewing the UPOAA, it is just one example of a state's journey to navigate the UPOAA and assess its potential effects on third parties. Many more states are expected to follow suit and encounter the same issues as they begin studying the impact of UPOAA on third parties within their own state.¹

Much of the information for this article is based on the forthcoming Second Edition of *Tax Management, Estates, Gifts, and Trusts Portfolios, Durable Powers of Attorney* by Andrew H. Hook, and published by Tax Management, Inc., a subsidiary of The Bureau of National Affairs, Inc., 2000. The Second Edition is due to be published in 2008. Additionally, the authors would like to thank Lisa V. Johnson, an attorney with the law firm of Oast & Hook for her assistance in researching and writing this article. The authors would also like to thank Linda Whitton, Professor of Law at Valparaiso University School of Law, for the wealth of information she has provided regarding the UPOAA and for her assistance in editing this article.²

Wentworth, *Durable Powers of Attorney: Considering the Financial Institution's Perspective*, available at www.abanet.org/rppt/publications/magazine/2003/nd/wentworth.html.³

See, for example, Uniform Power of Attorney Act (“UPOAA”) §120(c); Cal. Prob. Code §4406; Fla. Stat. §709.08(11).⁴

See Hook and Begley, "Elder Law: The New Uniform Power of Attorney Act: From Infancy to Adolescence," 34 ETPL 36 (Oct. 2007). ⁵

Whitton, National Durable Power of Attorney Survey Results and Analysis, National Conference of Commissioners on Uniform State Laws (2002), available at www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm. ⁶

Id. ⁷

UPOAA, Prefatory Note (2006), available at www.law.upenn.edu/bll/archives/ulc/dpoaa/2006final.htm. ⁸

Linda S. Whitton, Hot Button Issues on the New Uniforms: The Controversial Provisions of the UTC, UPOAA, and UPMIFA, Balancing the Buttons on the Uniform Power of Attorney Act (2007 Linda S. Whitton). ⁹

Memo from Linda S. Whitton, Reporter, Uniform Power of Attorney Act, Professor of Law, Valparaiso University School of Law, to Andrew H. Hook, Attorney at Law, *The Uniform Power of Attorney Act and Financial Institutions* (2008) (copy on file with Andrew H. Hook). ¹⁰

Id. ¹¹

Whitton, *supra* note 8. ¹²

Letter from Joseph E. Spruill, III, General Counsel, Virginia Bankers Association to Jay Turner, Senior Counsel, SunTrust Banks, Inc. (1/17/08) (copy on file with author). ¹³

See letter from Joseph E. Spruill, III, *supra* note 12. ¹⁴

Id. ¹⁵

Restatement (Third) of Agency §6.11. ¹⁶

E-mail from Linda Whitton to Andrew Hook, et al. (3/23/08) (copy on file with author). ¹⁷

UPOAA §119 (comment). ¹⁸

E-mail from Linda Whitton to Andrew Hook, et al. (3/23/08) (copy on file with author). ¹⁹

UPOAA §119 (comment). ²⁰

E-mail from Linda Whitton to Andrew H. Hook (2/9/08) (copy on file with author). ²¹

Id. ²²

Id. ²³

Memo from Linda S. Whitton, Reporter, Uniform Power of Attorney Act, Professor of Law, Valparaiso University School of Law, to Andrew H. Hook, Attorney at Law, *The Uniform Power of Attorney Act and Financial Institutions* (2008) (copy on file with Andrew H. Hook), citing UPOAA §119(f). ²⁴

Memo from Linda S. Whitton, Reporter, Uniform Power of Attorney Act, Professor of Law, Valparaiso University School of Law, to Andrew H. Hook, Attorney at Law, *The Uniform Power of Attorney Act and Financial Institutions* (2008) (copy on file with Andrew H. Hook). ²⁵

Id. ²⁶

Id. ²⁷

UPOAA §119(d)(3). ²⁸

UPOAA §119(e). ²⁹

UPOAA §120(b). ³⁰

See letter from Joseph E. Spruill, III, *supra* note 12. ³¹

Id. ³²

Memo from Linda S. Whitton, Reporter, Uniform Power of Attorney Act, Professor of Law, Valparaiso University School of Law, to Andrew H. Hook, Attorney at Law, *The Uniform Power of Attorney Act and Financial Institutions* (2008) (copy on file with Andrew H. Hook). ³³

Id. ³⁴

Id. citing UPOAA §120(b)(6), Alternative A; §120(d)(6), Alternative B. In order for refusal on this basis to be protected, the third person must make, or have actual knowledge that the other person has made, a report of this belief to adult protective services. *Id.* ³⁵

Memo from Linda S. Whitton, Reporter, Uniform Power of Attorney Act, Professor of Law, Valparaiso University School of Law, to Andrew H. Hook, Attorney at Law, *The Uniform Power of Attorney Act and Financial Institutions* (2008) (copy on file with Andrew H. Hook).