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Highlights of the Utah Uniform Power of Attorney Act

The Utah Uniform Power of Attorney Act passed in 2016 and becomes effective May 10, 2016. UCA 75-9-101 *et seq.*; H.B. 74 Bill sponsored by Rep. Lowry Snow; Floor sponsor Sen. Lyle Hillyard. Some highlights:

1. Applicability. The Act is effective May 10, 2016 but applies to all powers created before, on, or after that date (UCA § 75-9-403) except for powers coupled with an interest given to a lender, health care powers, voting proxies or management rights delegations, or powers under governmental forms. UCA § 75-9-103. Acts done before May 10, 2016 are not covered, but judicial proceedings commenced before that date are covered, unless the court finds that application of a provision would substantially interfere with the effective conduct of the proceeding or the rights of a party. UCA § 75-9-403. Sections 75-5-501 through 504 are repealed; these are the former provisions of the Utah Uniform Probate Code dealing with powers of attorney.

2. General Authority. The Act describes the powers of an agent acting under a power of attorney. Part 2 at UCA § 75-9-201 *et seq.* The powers are described in some detail and if a power grants general authority to the category, the authority described applies unless otherwise provided in the power of attorney. The Act deals with general authority matters (UCA §§ 75-9-201(3), (5), and (6) (general), 75-9-202 (incorporation by reference by subject area or citation), 75-9-203 (construction)); then authority under powers are categorized as authorities relating to:

- real property (UCA § 75-9-201);
- tangible personal property (UCA § 75-9-205);
- stocks and bonds (UCA 75-9-206);
- commodities and options (UCA § 75-9-207);
- banks and other financial institutions (UCA § 75-9-208);
- operation of entity or business (UCA § 75-9-209; powers are subject to the terms of a document or agreement governing an entity or ownership in interest);
- insurance and annuities (UCA § 75-9-210);
- estates, trusts, and other beneficial interests (UCA § 75-9-211; includes the exercise of general power of appointment, but specific authority is needed to exercise a power of appointment (UCA § 75-9-201(1)(h)));
- claims and litigation (UCA § 75-9-212; includes bankruptcy);
- personal and family maintenance (UCA § 75-9-213; not healthcare, but does have HIPAA rights to obtain health information);

- benefits from government programs or civil or military service (UCA § 75-9-214);
- retirement plans (UCA § 75-9-215; includes qualified plans, IRAs, Roth IRAs, 403(b) plans, 457(b) plans, and non-qualified deferred compensation);
- taxes (UCA § 75-9-216; includes income tax for periods where the statute of limitations has not run and the following 25 years);
- gifts (UCA § 75-9-217; this provision applies to any gift making power unless otherwise provided (UCA § 75-9-201(4)); a specific grant of power to make a gift is necessary (UCA § 75-9-201(1)(b)); unless otherwise provided, it includes exercise of a presently exercisable general power of appointment, and it limits a gift to the gift tax annual exclusion amount (including a split gift), requires consistency with the principal's estate plan (if known) and with the principal's best interest).

Drafting Considerations: Should all these powers be included? Should the statutory descriptions of authority over a given subject matter be added to broad existing forms of power (e.g., by incorporating them by reference as well as spelling out the powers desired, so the broader power applies)? Should the statutory limits on some powers (e.g., gifts) be modified to expand or contract them? For example, should larger than annual exclusion gifts be allowed? Should authority to make a gift to one's self or close relatives be further limited to prevent the holder of the power from being treated as holding a general power of appointment (e.g., limit by requiring consent of an adverse party)?

3. Special Authority. The Act also limits some forms of authority so that a specific grant is needed for an agent to have such authority. Also, the exercise of the authority must not be prohibited by another instrument. UCA § 75-9-201(1). These authorities are: create, amend, revoke, or terminate an intervivos trust; make a gift; create or change rights of survivorship; create or change beneficiary designations; delegate authority under the power; waive joint and survivor annuity rights; exercise fiduciary powers that the principal has authority to delegate; disclaim property or otherwise exercise a power of appointment. UCA § 75-9-201(1)(a)-(b). Also unless otherwise provided, an agent must be a spouse, ancestor, or descendant of the principal to create a property interest in the agent or in any individual to whom the agent owes a duty of support. UCA § 75-9-201(2). Nothing changes the rule that an agent cannot make a will for a principal.

Drafting Considerations: Should these powers or some of them be granted? Should additional special limits on them be included? Should collateral relatives who are agents be allowed to make gifts benefiting themselves? A review of other instruments will be needed to see if the power will be effective with respect to those instruments (e.g., trusts).

4. Statutory Form. The foregoing provisions apply to all estate planning powers (UCA § 75-9-403; whether created before, on, or after May 10, 2016) but are designed to be easily incorporated by reference into a statutory short form, check-the-box, power of attorney. The statutory form is not exclusive. UCA § 75-9-301. It contains general instructions for its use

and provides for reasonable compensation for the agent, unless otherwise provided in the special instructions blank space. It contains an optional nomination of guardian or conservator. It provides a general description of the agents' duties (stick to granted authority, act in good faith (honesty in fact UCA § 75-9-102(4)) and in the principal's best interest, disclose authority, act loyalty, etc.), and describes how the powers terminate and the potential liability of the agent. It also encourages seeking legal counsel if duties are not understood. There is also a statutory form of certification of validity of power of attorney and agent's authority.

Drafting Considerations: Should the statutory form be used? Will clients understand it if the terms are in the statute rather than spelled out? Will banks and others, especially in other states, understand it? Is it better to be more detailed to avoid questions or requests for opinions? Should the explanatory provisions or something like them be included in other forms of powers?

5. Durability. A power is automatically durable unless it expressly provides it terminates on the principal's incapacity. UCA § 75-9-104. Incapacity means inability to manage property because the individual either is impaired in receiving, evaluating, or communicating information or communicating decisions even with technological assistance, or else is missing or detained (including penal incarceration) or is outside the U.S. and unable to return.

Drafting Considerations: Should the power be made non-durable? Is it best to state durability even if it is not strictly necessary to do so?

6. Execution. Powers must be signed (this includes electronic signatures; UCA § 75-9-102(12) and (31)) by the principal or in the principal's conscious presence under direction by the principal and before a notary. If acknowledged before a notary, the signature is presumed genuine. UCA § 75-9-105(1).

7. Restriction on Service as Agent. No owner, operator, health care provider, or employee of a hospital skilled nursing home or residential care facility may be named as agent where the principal resides or is about to reside in such a facility, unless the person named as agent is the spouse, legal guardian, or next of kin. However, the care providers can be granted powers limited to the purpose of assisting in establishing eligibility for Medicaid. Violation is a criminal offence under UCA § 76-5-111(4)(a). UCA § 75-9-105(2).

8. Acceptance and Liability for Refusal. A person who in good faith accepts a power purportedly verified before a notary or individual authorized to take acknowledgements, without actual knowledge that the power or the agent's authority under it is void, invalid, or terminated, or that the agent is exceeding its authority, is protected in relying on the power and the authority exercised. UCA § 75-9-119(1) – (3).

However, a person asked to accept an acknowledged power may request and rely upon, without further investigation, an agent's certification under penalty of perjury of any factual matter concerning the principal, agent, or power, an English translation of the power, and an opinion of counsel as to any matter of law concerning the power if the requester provides a

written reason for the opinion request. Any translation or opinion is at the principal's expense unless the request is made more than seven business days after the power was presented for acceptance. If a person conducts activities through employees, that person is without actual knowledge if the employee dealing with the transaction is without actual knowledge of the fact at issue. UCA § 75-9-119(4) – (6). A person must accept an acknowledged power or request a certification, translation, or opinion no later than seven business days after presentation of the power. If such a request is made, the power must be accepted within five business days of receipt of the requested items. A person may not require some other form of power. UCA § 75-9-120(1).

Nevertheless, an acknowledged power need not be accepted if the person is not otherwise required to engage in a transaction with the principal, engaging in the transaction would violate federal law, a request for certification, translation, or opinion is refused, the person in good faith believes the power is not valid or the agent does not have authority (whether or not a certification, translation, or opinion is provided), or the person has actual knowledge that someone else has made a report to the Division of Aging and Adult Services 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.

A person refusing in violation of the foregoing to accept an acknowledged power (which power need not be in any particular form) is subject to a court order mandating acceptance and liability for reasonable attorney's fees in any action that confirms the validity of the power or mandates acceptance of it. UCA § 75-9-120.

Drafting Considerations: Is it a good idea to recite these provisions so persons requested to rely on the power will be aware of them?

9. Validity and Meaning. A power is effective if valid under the law at the time and place executed or the place the law of which governs its meaning. UCA § 75-9-106. It's meaning and effect is determined under the law indicated in it or, if none, where executed UCA § 75-9-107.

Drafting Considerations: Should a choice of law provision be used?

10. Conservatorship and Guardianship. The power may nominate a conservator or guardian who is to be appointed except for good cause. UCA § 75-9-108(1). The agent is responsible to any later appointed conservator or fiduciary over property of the principal as well as to the principal. The appointment does not terminate the power, only the court may limit or terminate the agent's authority. UCA § 75-9-108(2).

Drafting Considerations: Is it desirable to name a guardian or conservator? Is the person named consistent with any guardian named in a health care directive or other instrument?

11. Effective Time and Termination. The power is effective when executed, unless otherwise provided. It may be made effective on a contingency, and may authorize one or more

persons to determine if the contingency has occurred. If triggered by incapacity and no person is so designated, incapacity may be determined by a physician, an attorney at law, a judge, or an appropriate governmental official. The person authorized by the principal to determine capacity is a personal representative to obtain medical information under HIPAA. UCA § 75-9-109.

There is a distinction between termination of the power and the end of a particular agent's authority under it. The power itself terminates when the principal dies, becomes incapacitated (unless durable), the power provides that it terminates, its purposes are accomplished, it is revoked by the principal, or the agent dies, becomes incapacitated, or resigns and there is no successor. The agent's authority terminates on revocation of the authority, the agent's death, incapacity, or resignation, an action is filed for divorce, annulment, or separation of the agent's marriage to the principal (unless otherwise provided), or the power terminates. There is no time limit for termination of authority; it continues until terminated by an applicable event. The termination of authority is not effective if the agent without knowledge of the termination acts in good faith under the power.

The execution of a power does not revoke prior powers unless otherwise provided. Revocation or amendment is accomplished by substantial compliance with any exclusive means provided under the power, or if none, by any means providing clear and convincing evidence of the principal's intent. UCA § 75-9-110. An agent may resign by the method prescribed in the power, or if none, by giving notice to the principal, or if the principal is incapacitated, to a guardian (if any), co-agent, or successor agent, and if none, to the principal's caregiver, to a person reasonably believed to have sufficient interest in the welfare of the principal, or to a governmental agency with authority to protect the principal. UCA § 75-9-118.

Drafting Considerations: Should a springing power or immediate power be used? Should a person be named to determine incapacity in a springing power? Should the power restrict who can determine certain kinds of incapacity (which includes being missing or detained)? Should the HIPAA power be limited to a person determining mental or physical incapacity? Should early termination or a time limit be provided? Should other existing powers of attorney be revoked? Only if general in scope? Should methods of revocation or resignation be included?

12. Co-agents and Successors. Co-agents act separately unless otherwise provided. Successors may be named or someone may be designated to name a successor. Unless otherwise provided, the same authority passes to a successor. An agent not participating in or concealing a breach by another Co-agent or predecessor agent is not liable for the breach. After accepting appointment, the agent with knowledge of a breach must inform the principal, or if the principal is incapacitated, take reasonable action to safeguard the principal's best interests; otherwise the agent may become liable for the damage that could have been avoided. UCA § 75-9-111.

Drafting Considerations: Is separate action desirable? Is unanimous action or majority action desired? Is full co-fiduciary liability desired? Should a successor have the same full authority as the predecessor?

13. Compensation. Agents are entitled to reasonable compensation and expense reimbursement, unless otherwise provided.

Drafting Considerations: Should compensation be allowed? Should a rate of compensation be provided?

14. Duties and Liability. Duties begin on acceptance, which is accomplished by exercise of a granted authority or by assertion or conduct indicating acceptance. UCA § 75-9-113. However, acceptance of appointment including through the exercise of one authority under a power, does not impose a further obligation to act under the power. UCA § 75-9-114(2). Any action taken under the power will create some duties in the part of the agent some of which cannot be altered.

The unalterable duties of an agent are to act in accordance with the principal's reasonable expectation to the extent known, otherwise in the principal's best interest, to act in good faith (honesty in fact), to act only within the scope of granted authority, and to comply with the terms of the power. UCA § 75-9-114(1).

The duties of an agent which apply unless otherwise provided, are to act loyally, not create a conflict of interest, act with ordinary care, competence, and diligence, keep a record of transactions, cooperate with a health care agent, attempt to preserve the principal's estate plan (if known) where such preservation is in the principal's best interest based on all relevant factors. An agent acting in good faith who fails to preserve the estate plan is not liable to any beneficiary.

When the agent acts with care, competence, and diligence for the best interest of the principal, the agent is not liable solely because the agent also benefits or has a conflicting interest with the principal. An agent selected for special skill needs to use it. There is no liability for decrease in value without a breach of duty. Authorized delegation of authority creates no liability for an act, error of judgment, or default of the delegee if the delegating agent exercises care, competence, and diligence in selecting and monitoring the delegee.

Until incapacity or death of the principal, the agent need not disclose receipts, disbursements, or transactions unless ordered by a court, or unless requested by the principal, a fiduciary of the principal, or a governmental agency with authority to protect the principal, or where disclosure is required under the power. Unless otherwise provided, on the principal's incapacity, such information may be requested by and must be provided to an interested person (defined at UCA § 75-1-201 (24) to broadly include family, creditors, beneficiaries, and others), or on death such information may be requested and must be provided to a personal representative or successor to the principal's estate. UCA § 75-9-114.

An agent may be exonerated of liability for breach of duty except for any committed with dishonesty, with an improper motive, or with reckless indifference to the purposes of the power. An exoneration inserted as the result of abuse of a confidential fiduciary relationship with the principal is not enforceable UCA § 75-9-115.

If the agent violates its duty, the liability is to the principal or the principal's successors for restoring the value of the property to what it would have been absent the violation, plus reimbursing the principal or his or her successors for any attorney fees and costs paid on the agent's behalf. UCA § 75-9-117.

Drafting Considerations: Should a particular form of acceptance be provided? Should acceptance be made to trigger the duty to use and continue to use the power in case of the principal's incapacity (like a substitute for a trustee)? Should issues of loyalty or conflicting interests be dealt with, for example to allow certain potential conflicts but not others? Should record keeping and disclosure be limited? Should certain estate planning matters be made unalterable? Should delegation responsibility be broadened? Should additional disclosures be required? Should disclosure duties be limited during life either before or after incapacity (otherwise after incapacity, any "interest person," which includes creditors, may make a request), or at death (e.g., only to the personal representative)? Should the agent be exonerated to the full extent allowable?

15. Judicial Construction and Review. A principal with capacity can obtain the dismissal of an action to construe a power, review the agent's conduct, and grant appropriate relief; otherwise, a court may do such things at the request of a broad range of persons: the principal or agent, a guardian, conservator, or fiduciary acting for the principal, a health care decision maker, the principal's spouse, parent, or decedent, a presumptive heir, a person named as beneficiary of property or of a contractual right on death or of a trust created by the principal with an interest in the principal's estate, a governmental agency with protection authority, the principal's care giver, or another person with sufficient interest in the principal's welfare. UCA § 75-9-116.

16. Other Laws. General principles of law and equity supplement these statutory provisions and these provisions do not supersede other law applicable to financial institutions. The statutory remedies are not exclusive. UCA §§ 75-9-121, 75-9-122, and 75-9-123.