

New Uniform Power of Attorney Act in Virginia



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Earlier this year, the Virginia legislature adopted the Uniform Power of Attorney Act. The legislation has a reenactment clause providing that the new act will not be effective unless reenacted in the 2010 Session General Assembly.

The act is a most welcomed addition to the tool kit for Virginia estate planners in drafting comprehensive and flexible legal instruments and documents.

Among other things, the new act addresses issues relating to good faith reliance, limitations on an agent's power, the frequently encountered refusal by various institutions to recognize a power of attorney, judicial review, resignation, abuses by agents and numerous other topics. There is also an optional statutory form included. Practitioners will find the statutory form to be an excellent starting point in drafting or in modifying existing documents.

While the act will doubtlessly have a profound effect on the use and acceptance of powers of attorneys in Virginia, just a few of the more notable new rules are as follows:

1. **Durability presumed.** The act deals with the issue of "durability." Under the Act, a Power of Attorney is durable unless otherwise specifically provided.
2. **Delivery of the instrument.** The act repeals former Code of Virginia Section 11-9.7, which provided that an Agent was deemed to possess powers and authority granted in an instrument notwithstanding a failure of the principal to deliver the instrument to the Agent.
3. **Powers requiring specific grants.** Under the act, express authorization by the principal is required if the Agent is authorized to exercise certain powers (so-called "hot powers"), as follows:
 1. Create, amend, revoke or terminate an inter vivos trust;
 2. Make gifts;
 3. Create or change rights of survivorship;
 4. Create or change a beneficiary designation;
 5. Delegate authority granted under the power of attorney;
 6. Waive the principal's rights to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or
 7. Exercise fiduciary powers that the principal has authority to delegate.
4. **Third Parties' Acceptance.** Under the act, a third party must either accept and acknowledge the power of attorney or request a certification, translation

New Uniform Power of Attorney Act in Virginia (Cont.)

or opinion of counsel within seven business days of presentment of the power. The third party will have to accept the power of attorney within five business days after receipt of the requested documentation. As a result, third party entities should no longer have many, if any, reasonable justifications to insist upon use of their own power of attorney form, a problem frequently encountered by practitioners, agents and their principals.

The new act, assuming it is reenacted in the 2010 legislative session, will prove very helpful to estate planning practitioners in Virginia and their clients. The terms of its built-in protections for principals, and providing far more certainty concerning a long list of issues will greatly clarify the duties and obligations of agents.