INTRODUCTION

In April of 2014, the General Assembly passed and the Governor signed into law the Iowa Uniform Power of Attorney Act (Act) pertaining to powers of attorney (POAs). Under the Act, a principal gives an agent the authority to make decisions regarding the principal’s property and finances. The Act becomes effective on July 1, 2014 and will be codified in Chapter 633B of the Iowa Code. A copy of the Act is attached to these materials.

The Act repeals the current provisions of the Code with respect to POAs. In contrast to these provisions which are limited in nature, the Act constitutes a comprehensive legal framework for the creation and use of POAs and furnishes specific guidance to and protections for principals, agents and third parties.

A major aim of the Act is to enhance the effectiveness of the POA as a vehicle that an individual can use to plan for potential incapacity and to avoid a court appointed conservatorship in the event of actual incapacity. This is important because Iowa’s aging population is large and growing rapidly, and older Iowans are disproportionately vulnerable to incapacitating illnesses and conditions such as Alzheimer’s disease and other dementias.

Another major aim of the Act is to prevent, identify and redress POA abuse -- the misuse of a POA by an agent. POA abuse increasingly has been recognized as a serious problem affecting many Iowans, especially the elderly, and all too often resulting in their financial exploitation. The Act is aimed at striking a balance between preserving “the durable power of attorney as a flexible, low cost, and private form of surrogate decision making” and “deterring use of the power of attorney as a tool for financial abuse of incapacitated individuals.”

1 Copyright 2014, Josephine Gittler and Margaret Van Houten.
2 Professor of Health Management and Policy, Professor of Nursing, and Professor of Pediatrics, Director of Policy, the Hartford Center on Geriatric Nursing Excellence.
The Act is based on the Uniform Power of Attorney (UPOAA) issued by the Uniform Law Commission. After extensive review, The Iowa State Bar Association recommended the adoption of the UPOAA with some modifications and supported the Act’s enactment.

The Act contains some mandatory provisions and a number of default provisions. A default provision applies to a POA unless they are overridden by express language in the POA and is usually signaled by the phrase “unless the power of attorney otherwise provides.” The Act’s default provisions present the attorney, who is drafting a POA for a client, with a variety of drafting options that allow it to be individually tailored to a client’s interests and preferences.

This document is intended to provide attorneys with an overview of the Act. It has the following components:

- Part One: General Provisions
- Part Two: General and Specific Grants of Authority by Principal to Agent
- Part Three: Optional POA Statutory Form
- Part Four: Optional Agent’s Certification Statutory Form
- Part Five: Effect of Act on Existing and Future POAs
- Part Six: Uniformity of Application and Construction
- Part Seven: Case Law in other Jurisdictions
- Part Eight: Drafting Pointers and Client Checklist

PART ONE: GENERAL PROVISIONS

I. DEFINITIONS (SECTION 633B.102)

Section 633B.102 contains definitions of terms used throughout the Act. The following terms are defined: agent, conservator or conservatorship, durable, electronic, good faith, guardian or guardianship, incapacity, person, power of attorney, presently exercisable general power of attorney, principal, property, record, sign, state and stock and bonds.

One noteworthy change in terminology is the use of the term agent rather than the term attorney in fact. This change was made to avoid confusion among non-lawyers about the difference between an attorney in fact and an attorney at law.

Another is the use of the term incapacity rather than the term disability. This change reflects the fact that a person with a disability does not necessarily lack the capacity to manage his or her financial affairs and property.

II. APPLICABILITY OF THE ACT AND RELATIONSHIP TO OTHER LAWS

A. Applicability of the Act (Section 633B.103)

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Section 633B.103 states that the Act applies to power of attorneys that delegate decision-making authority over the principal’s property and financial affairs. It, however, excludes from the Act’s application four types of such delegations.

The first exclusion is a power coupled with an interest in the subject of the power. A UPOAA comment explains that this exclusion “addresses situations where due to the agent’s interest in the subject matter of the power, the agent is not intended to act as the principal’s fiduciary” and that “[c]ommon examples include powers granted to a creditor to perfect or protect title in, or to sell, pledged collateral.”\(^5\)

The second exclusion is a health care power of attorney. The reason for this exclusion is that Chapter 144B of the Iowa Code governs health care powers of attorney.

The third exclusion is a proxy or other delegation of voting rights or management rights with respect to an entity. According to a UPOAA comment:

“The rules with respect to those rights are controlled by entity specific statutes within a jurisdiction. Notwithstanding the exclusion of such delegations from the operation of this Act, ...[Section 633B.209] contemplates that a power granted to an agent with respect to operation of an entity or business includes the authority to “exercise in person or by proxy ... a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds.” Thus, while a person that that holds only a proxy pursuant to an entity voting statute will not be subject to the provisions of this Act, an agent that is granted [Section 633B.209] authority is subject to the Act because the principal has given the agent authority that is greater than that of a mere voting proxy. In fact, typical entity statutes contemplate that a principal’s agent .... may appoint a proxy on behalf of the agent.” (citations omitted).\(^6\)

The fourth and final exclusion is any power created on a governmental form for a government purpose. According to a UPOAA comment:

\[T]\he authority for a power created on a governmental form emanates from other law and is generally for a limited purpose. Notwithstanding this exclusion, the Act specifically provides in ... [Section 633B.209] that a grant of authority to an agent includes, with respect to the subject matter, authority to “prepare, execute, and file a record, report, or other document to safeguard or promote the principal’s interest under a statute or governmental regulation.’ ...[Section 633B.209] further clarifies that the agent has authority to “communicate with any representative or employee of a government or governmental subdivision, agent or instrumentality, on behalf of the principal.” The intent of these provisions is to minimize the need for a special power on a governmental

\(^5\) Id. at § 103 cmt.
\(^6\) Id.
form with respect to subject matter over which an agent is granted authority under the Act.⁷

B. Relationship of the Act to Other Laws (Section 633B.121, Section 623B.122, Section 633B.123, Section 633B.402)

The Act includes several provisions dealing with the relationship between the Act and other laws. Section 633B.121 provides that the principles of law and equity supplement the Act, including the law of agency, unless displaced by the Act’s provisions. Section 633B. 122 provides that the Act does not supersede other laws applicable to financial institutions or other entities that are inconsistent with provisions of the Act. Section 633B.123 provides that remedies under the Act are not exclusive and do not abrogate remedies under other laws.

Section 633B.402 provides that the Act modifies, limits and supercedes the provisions of the federal Electronic Signatures in Global and National Commerce Act (ESGNCA) with the exception of Sections 101(c) and 103 (b). These sections of the ESGNCA require that information relating to transactions affecting interstate or foreign commerce be provided or made available to a consumer in writing and that writing may be in electronic form only if certain requirements are met.

III. POA’S EXECUTION, VALIDITY AND MEANING AND EFFECT

A. Execution of POA (Section 633B.105)

Section 633B.105 provides execution requirements for POAs. A power of attorney must be signed by the principal or another person in the principal’s presence and at the principal’s direction. The POA also must be acknowledged before a notary public or other individual authorized to take acknowledgements. In order to avoid conflicts of interest, a prospective agent is prohibited from signing on behalf of the principal and from notarizing the principal’s signature.

B. Validity of POA (Section 633B.106)

Section 633B.106 provides that the Act does not affect the validity of the following: (1) POAs executed in Iowa under prior Iowa law before the Act’s effective date, (2) POAs created under the law of another jurisdiction, or (3) military POAs.

Except as otherwise provided by another Iowa law, photocopies and electronically transmitted copies have the same force and effect as the original.

C. Meaning and Effect of POA (Section 633B.107)

Under Section 633B.107, the meaning and effect of a POA is governed by the law of the jurisdiction indicated in the POA. In the absence of such an indication, the governing law is that of the jurisdiction where the POA was created.

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⁷ Id.
This provision addresses situations where the Act’s default rules with respect to the agent’s authority differ from that of the law of jurisdiction where the POA was created. According to a UPOAA comment, the intent of the provision is to assure that “the principal’s intended grant of authority will be neither enlarged nor narrowed by virtue of the agent using the power in a different jurisdiction.”

IV. DURABILITY OF POA (SECTION 633B.104) AND IMMEDIATE VS. SPRINGING POA (SECTION 633B.109)

Section 633B.104 establishes a default rule that a POA is durable. The rationale for this default rule is that a principal who becomes incapacitated generally would prefer to have the agent designated in the POA rather than a court appointed conservator make financial decisions for him or her.

In addition to the Section 633B.104 default rule that a POA is durable, Section 633B.109 establishes a related but distinct default rule that a POA becomes effective immediately. Since, however, this is a default rule, the principal may override this default rule through express language in the POA that creates a “springing” POA, contingent on a future date or an event such as the principal’s incapacity. As the UPOAA comment states, the default rule “reflects a ‘best practices’ philosophy that any agent who can be trusted to act for the principal under a springing power of attorney should be trustworthy enough to hold an immediate power.” But the comment goes on to state that “a significant number of principals still prefer springing powers, most likely to maintain privacy in the hope that they will never need a surrogate decision maker.”

Recognizing that some principals may choose to override these default rules and opt for a springing POAs, Section 633B.109 includes several provisions applicable only to springing POAs. If the principal chooses to create a springing POA triggered by the occurrence of a contingency, the POA may designate one or more individuals to verify the occurrence of the contingency that is the trigger for the springing POA. If the POA specifies that it becomes effective upon the principal’s incapacity but does not specify an individual to make the incapacity determination, a licensed physician, a licensed psychologist, a judge or an appropriate government official may make the determination. When an individual is designated to make an incapacity determination, such individual may act as the principal’s personal representative under the Health Insurance Portability and Accountability for the purpose of obtaining needed information from the principal’s health care providers and medical records.

V. PROVISIONS RELATED TO AGENTS

A. Appointment of Agent (Section 633B.113)

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8 Id. at § 107 cmt.
9 Id. at § 109 cmt.
10 Id.
Section 633B.113 establishes a default rule that an individual’s acceptance of appointment as an agent takes place when he or she begins exercising authority, performing duties as an agent, or evidencing indicia of acceptance. Under this default rule, delivery of the POA is not a prerequisite for the agent’s acceptance and for the agent to begin to act on behalf of the principal.

B. Coagents (Section 633B.111)

Section 633B.111 provides that a principal may designate a coagent or coagents in the POA. It establishes a default rule that powers held by coagents shall be exercised by majority rule and that in case of impasse an agent may petition the court to resolve the resulting conflict or a majority of agents may consent to alternative dispute resolution. This rule differs from the UPOAA default rule that coagents may exercise their authority independently.

While section 633B.111 permits coagents, this should not be interpreted as an endorsement of the practice of naming coagents. Because of potential problems associated with coagents such as difficulties in communication and conflicts between agents, the UPOAA comment suggests that a “more prudent practice is generally to name one original agent and one or more successor agents” and that “if desirable, a principal may give the original agent authority to delegate the agent’s authority during periods when the agent is temporarily unavailable to serve.”

C. Successor Agents (Section 633B.111)

Section 633B.111 provides that a principal may designate a successor agent or agents to act in the event that an agent declines to serve, resigns, dies, becomes incapacitated or is not qualified to serve.

Section 633B.111 establishes a default rule that a successor agent has the same authority as the original agent had. In some circumstances, however, this may not be appropriate in which case the principal may choose to override the default rule through express language in the POA. A UPOAA comment gives as an example a principal who wishes to authorize a spouse-agent but not an adult child successor agent to create, amend, or revoke an inter vivos trust, or to create or change survivorship and beneficiary designations.

D. Nomination of Conservators and Guardians (Section 633B.108)

Section 633B.108 provides that a principal may nominate a conservator or guardian in the event that guardianship or conservatorship proceedings are instituted after a POA is executed, and the court must appoint the most recent nominee unless good cause is shown or the nominee is disqualified. Nominating the individual, who is the agent, as conservator or guardian has the advantage of assuring continuity in the management of the principal’s property and finances. As

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11 Id. at § 111 cmt.
12 Id.
a UPOAA comment explains, it also discourages conservatorship and guardianship petitions “for the sole purpose of thwarting the agent’s authority to gain control over a vulnerable principal.”\(^\text{13}\)

An individual may also continue to use a stand-by guardianship or conservatorship.

Section 633B.108 establishes a default rule, different from the UPOAA default rule, that once the court establishes a conservatorship, a pre-existing POA is suspended unless the POA provides for its continuance or the court directs its continuance. If the POA continues, the agent is accountable to the conservator as well as the fiduciary. The UPOAA default is that the conservatorship does not suspend or terminate the POA unless there is a specific court order.

E. Agent Duties and Agent Liability (Section 633B.114)

Under existing law it is clear that an agent is a fiduciary, but the scope of an agent’s fiduciary duties has not been clear. The Act furnishes greater guidance than existing law with respect to an agent’s duties.

As it has been pointed out, a major aim of the Act is to address power of attorney abuse. One of the primary ways the Act does so is by spelling out the nature and extent of the agent’s duties.

Section 633B.114 spells out fiduciary duties of an agent that are mandatory and hence are not waivable by the principal. These duties are to act:

- in good faith,
- within the scope of authority granted in the POA, and
- in accordance with the principal’s expectations to the extent known and otherwise in the principal’s best interest.

Section 633B.114 then spells out default fiduciary duties of an agent that can be overridden by express language in a POA. These duties include:

- acting loyally for the principal’s benefit,
- avoiding conflicts of interests,
- acting with the care, competence and diligence exercised by agents in similar circumstances, and
- attempting to preserve the principal’s estate plan to the extent known and consistent with the principal’s best interest.

Section 633B.114 sets forth several provisions which further clarify the foregoing duties and which affect an agent’s liability for violation of his or her duties. Contrary to the traditional common law duty of loyalty requiring an agent to act solely for the principal’s benefit, an agent who “acts with care, competence and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act.” This provision differs from the traditional

\(^{13}\) Id. at § 108 cmt.
common law duty of loyalty requiring an agent to act solely for the principal’s benefit. The UPOAA comment explains that this “comports with the practical reality most agents under powers of attorney are family members who have inherent conflicts of interest with the principal arising from joint property ownership or inheritance expectations.”

In addition an agent who acts in good faith is not liable to any beneficiary of the principal’s estate plan for failure to preserve the plan; an agent is not liable if the value of the of the principal’s property declines absent a breach of duty; and if a principal selects an agent because she or he has, or represents himself as having, special skills or expertise, then such special skills or expertise must be considered in evaluating whether the agent has acted with care, competence and diligence unless the POA expressly provides otherwise.

Specified default duties also include:

- cooperating with the health care agent,
- keeping records, and
- making an accounting if requested by the principal, a fiduciary appointed for the principal, a governmental having authority to protect the principal’s welfare, or the personal representative or successor in interest of the principal’s interest, or if ordered by the court.

F. Judicial Review and Agent Liability (Section 633B.115, Section 633B. 116, Section 633B.117)

Several provisions of the Act relate to judicial review of an agent’s conduct and an agent’s liability for violations of the Act. These provisions are directed at identifying and redressing power of attorney abuse by agents.

Section 633B. 116 lists individuals who may petition a court to construe a POA, or to review an agent’s conduct. The listed individuals are the principal, the agent, the principal’s guardian or conservator, an individual authorized to make health care decisions for the principal, the principal’s relatives (spouse, parents, descendant or presumptive heir), a governmental agency with authority to protect the principal’s welfare (Department of Human Services), the principal’s caregiver, an individual asked to accept the POA or designated in the POA, and anyone who can demonstrate sufficient interest in the principal’s welfare.

Section 633B.117 provides that an agent, who violates the Act, is civilly liable to the principal and the principal’s successors in interest. An agent found to be liable must restore the value of the property to what it would been without the violation and reimburse for attorney fees and costs paid on behalf of the agent.

Section 633B.115 permits a principal to include an exoneration provision in a POA relieving an agent of liability for breach of fiduciary duties. But it prohibits such a provision from relieving

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14 Id. at § 114 cmt.
an agent of liability for a breach committed “in bad faith, with an improper motive or with reckless indifference to the purposes of the power of attorney or the principal’s best interest.” It likewise states that such a provision is not binding if it results from an abuse of a fiduciary or confidential relationship with the principal.

Given the seriousness of the problem of power of attorney abuse, an exoneration provision should not be routinely included in a POA. Nevertheless a UPOAA comment points out: “[i]ts inclusion may be useful in meeting particular objectives of the principal. For example, if the principal is concerned that contentious family members will attack the agent’s conduct in order to gain control of the principal’s assets, an exoneration provision may deter such action or minimize the likelihood of success on the merits.”15

G. Agent Reimbursement and Compensation (Section 633B.112)

Section 633B.112 establishes a default rule that an agent is entitled to reimbursement of expenses “reasonably incurred” on behalf of principal. As a UPOAA comments points out: “While it is unlikely that a principal would choose to alter the default rule as to expenses, a principal’s circumstances may warrant including limitations in the power of attorney as to the categories of expenses the agent may incur.”16

Section 633B.112 also establishes a default rule that an individual acting as a POA is not entitled to compensation. If an individual wishes to authorize an individual agent to be compensated, it should be specified in the POA. The default rule for a bank or trust company acting as agent is that reasonable compensation is allowed. The Act provides that compensation, when paid, must be “reasonable under the circumstances.”

H. Termination of POA and Termination of an Agent’s Authority

Section 633B.110 lists the events that will terminate a POA or an agent’s authority under a POA. The listed termination events, however, are not effective as to an agent or other individual who does not have actual knowledge that the POA or agent’s authority under a POA has been terminated and who acts in good faith under the POA.

Principal’s Revocation (Section 633B.110)

Section 633B.110 specifically lists as a termination event the principal’s revocation of a POA or an agent’s authority under a POA. The execution of a new general or plenary POA automatically revokes prior general or plenary POA which was executed in Iowa. But the execution of a new general or plenary POA does not revoke a prior POA limited to a specific action or transaction still capable of performance but not yet fully accomplished. The Iowa Act is different from the UPOAA with respect to revocation by executing a new POA. The default rule in the UPOAA is that prior POA’s are not revoked by the execution of a subsequent POA.

15 Id. at § 115 cmt.
16 Id. at § 112 cmt.
Practice Pointer: When revoking a current POA, it would be appropriate to notify in writing any currently named agent of the change. This is particularly important if the current agent is performing his or her duties.

Agent’s Resignation (Section 633B.110, Section 633B.118)

Section 633B.110 also specifically lists the agent’s resignation as a termination event. This section should be read in conjunction with Section 633B.118 which establishes a default rule that an agent must give notice of resignation to the principal. When the principal is incapacitated, the requisite notice is to a court appointed conservator, or guardian and a coagent or successor agent, and if none, notice may be given to the principal’s caregiver, another person, who the agent reasonably believes to have sufficient interest in the principal’s welfare, or adult protective services of the Department of Human Services.

Other Termination Events (Section 633B.110)

Among the other notable termination events listed in Section 633B.110 is the principal’s filing of an action for dissolution of marriage with an spouse-agent but also the filing of an action for annulment or legal separation. This is a default rule that may be overridden through express language in the POA.

VI. THIRD PARTY ACCEPTANCE AND REFUSAL OF ACKNOWLEDGED POA AND THIRD PARTY LIABILITY FOR REFUSAL (SECTION 633B.119, SECTION 633B.120)

As it has been pointed out, a major aim of the Act is to promote the use of POAs for the purpose of planning for potential incapacity and avoiding a court appointed conservator in the event of actual incapacity. But a POA cannot effectively serve this function if third parties refuse to accept a valid POA presented by an agent for a principal who has become incapacitated. In order to promote acceptance of POAs by third parties, the Act creates a broad mandate for acceptance of an acknowledged POA by third parties subject to certain (safe harbor) exceptions and gives them in return broad protections from liability for compliance with this mandate.

Section 633B.119 specifically protects third parties from liability who in good faith accept an “acknowledged” POA “without actual knowledge that it is forged, void, invalid, or terminated, that the purported agent’s authority is void, invalid or terminated, or that the agent is exceeding or improperly exercising ... [his or her] authority.” An “acknowledged” POA means a POA that has been “purportedly verified before a notary public or other individual authorized by law to take acknowledgments” (emphasis added).

Under Section 633B.119, an organizational entity is deemed to be without actual knowledge of a fact related to a POA if the employee conducting a transaction involving a POA is without actual knowledge.

Section 633B.119 does not require a third party to independently investigate and verify the validity of a POA or an agent’s exercise of authority. It, however, does allow a third party to
request the agent’s certification under oath as to any factual matter regarding the POA and an opinion of counsel as to any matter of law regarding the POA if the person making the request furnishes the reason for the request in writing.

Section 633B.120 further protects third parties from liability by enunciating clear safe harbors for third party refusal of POAs. They are:

- The person is not otherwise required to conduct business with the principal in the same circumstances;
- The transaction would be inconsistent with federal law;
- The person has actual knowledge of the termination of the agent’s authority;
- A request for a certification, translation or opinion of counsel has been refused;
- The person “in good faith believes that the power of attorney is not valid or that the agent does not have the authority to perform the act requested, or that the power of attorney does not comply with federal or state law or regulations, whether or not a certification, a translation, or an opinion of counsel under section 633B.119, subsection 4, has been requested or provided;”

A third party may not require an additional or different POA form for authority grant an agent in the POA presented unless one of the safe harbor exceptions applies.

If a refusal of a POA does not fall within one of these safe harbors, the third party is subject to court order directing its acceptance and is liable for attorney’s fees and costs as well any damages incurred for a suit to obtain such a court order. The suit must be brought within one year of the initial request for acceptance of the POA.

PART TWO: AGENT AUTHORITY (Sections 633B.202-63B.217)

Sections 633B.202-633B.217 deal with a principal’s grant of authority to an agent. In order to reduce POA abuse, they contain provisions requiring that a POA expressly authorize powers that are particularly susceptible to abuse.

Section 633B.201(1) provides a list of items that must be specifically granted in the POA before an agent may take such actions. They include the following:

- Create, amend, revoke or terminate an inter vivos trust.

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17 Section 633B.120(2).
18 The language of Section 633B.120(3) regarding damages should be subject to a technical correction. The language as passed states there is “Liability for damages sustained by the principal for reasonable attorney fees and costs . . . .” It was intended that this language read: “Liability for damages sustained by the principal and for reasonable attorney fees and costs.”
• Make a gift.
• Create or change rights of survivorship.
• Create or change a beneficiary designation.
• Delegate authority granted under the power of attorney.
• Waive the principal’s right to be a beneficiary of a joint and survivor annuity, including but not limited to a survivor benefit under a retirement plan.
• Exercise fiduciary powers that the principal has authority to delegate.
• Disclaim property, including but not limited to a power of appointment.

Section 633B.201(2) provides that even if the POA provides for one of the above listed powers, an agent who is not a spouse, ancestor or descendant of the principal may not exercise authority to create in the agent (or in an individual the agent is legally obligated to support) an interest in the Principal’s property. The comment to this section in the UPOA provides as follows: “a non-relative agent with gift making authority could not make a gift to the agent or a dependant of the agent without the principal’s express authority in the power of attorney. In contrast, a spouse-agent with express gift-making authority could implement the principal’s expectation that annual family gifts be continued without additional authority in the power of attorney.”

Section 633B.202 specifically authorizes a POA form to refer to the POA Act with respect to the general authority granted in the following sections 633B.204 through 633B.217. This will allow practitioners (and those using the statutory form) to incorporate the above provisions by reference rather than spelling out each specific provision and authority.

Section 633B.203 provides that if a POA “incorporates by reference a subject described in sections 633B.204 through 633B.217 or that grants an agent authority to do all acts that a principal could do pursuant to section 633B.201, subsection 3, a principal authorizes the agent, with respect to that subject, to do all of the following: . . . .” Following is a laundry list of general authorities often required or necessary to accomplish a specific purpose.

Sections 633B.204 through 633B.217 provide very specific powers that, with respect to the subject matter covered in each section, will be granted the agent under a POA if general authority with respect to that subject is granted. The default in these powers, in contrast to the powers in 633B.201, will grant the power unless the POA specifically provides otherwise. The specific provisions in these sections are as follows:

• Section 633B.204 Real property.
• Section 633B.205 Tangible personal property.

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19 Uniform Power of Attorney Act, supra n. 4, at § 201 cmt.
• Section 633B.206 Stocks and bonds.
• Section 633B.207 Commodities and options.
• Section 633B.208 Banks and other financial institutions.
• Section 633B.209 Operation of entity or business.
• Section 633B.210 Insurance and annuities.
• Section 633B.211 Estates, trusts, and other beneficial interests.
• Section 633B.212 Claims and litigation.
• Section 633B.213 Personal and family maintenance.
• Section 633B.214 Benefits from governmental programs or civil or military service.
• Section 633B.215 Retirement Plans.
• Section 633B.216 Taxes.
• Section 633B.217 Gifts.

PART THREE: OPTIONAL POA STATUTORY FORM (Section 633B.301)

Section 633B.301 contains a statutory form for creating a POA in accordance with the Act. It furnishes attorneys a basis for drafting a POA, and it is designed to be understandable to and used by laypersons.

The form begins with an explanation of how a POA operates and instructions about how to use the form for principals and agents. The form then calls for designation of an agent and an optional designation of a successor agent or agents.

The form next deals with the authority of the agent. It is divided into two sections--the first being the “GRANT OF GENERAL AUTHORITY” and the second being the “GRANT OF SPECIFIC AUTHORITY.”

The general authority section lists subject areas over which the principal can grant general authority to the agent. If the principal wishes to grant general authority for all of these areas to the agent, he or she can initial the line marked “All Preceding Subjects.” If the principal wishes to grant general authority only over some of these areas, the principal can initial only the lines corresponding to those subjects.

The specific authority section lists subject areas that require a specific grant of authority by the principal to the agent. The principal must initial the lines corresponding to each area over which he or she wishes to grant specific authority. It includes a warning to the principal that granting specific authority for any of these areas “could significantly reduce your property or change how your property is distributed at your death.”

An important aspect of the form is the optional SPECIAL INSTRUCTIONS section. It enables the principal to modify the provisions in the form.
The form concludes with the “IMPORTANT INFORMATION FOR THE AGENT section. “ It describes the agent’s duties under a POA, events which will terminate the POA or the agent’s authority and the agent’s liability. It includes a warning to the agent to seek legal advice “if there is anything about this document or your duties that you do not understand.”

PART FOUR: OPTIONAL AGENT’S CERTIFICATION STATUTORY FORM (SECTION 633B.301)

Section 633B.301 contains an optional form for the agent to certify the validity of the POA and his or her authority. It lists a series of factual matters about which third parties typically request certification, and it has a designated space for certification of additional factual matters.

PART FIVE: EFFECT OF ACT ON EXISTING AND FUTURE POAS

Section 633B.403 specifies that the Act applies to a POA created on or after its effective date of July 1, 2014.

Section 633B.403 likewise specifies that the Act applies to a POA created before July 1, 2014 “except as otherwise provided” in the Act. Consequently this section must be read in conjunction with Section 633B.107 that providing that the meaning and effect of a POA created in Iowa or in another jurisdiction is governed by the law under which it was created. Thus, a POA created in Iowa before July 1 is to be interpreted under Iowa law with respect to an agent’s authority and duties that was in effect at the time the POA was created.

Under Section 633B.403, however, the provisions of the Act dealing with matters other than the meaning and effect of a POA are applicable to a POA created in Iowa before July 1. Examples include, but are not limited, to the provisions of Section 633B.119 that protect third parties from liability who in good faith accept a purportedly acknowledged POA and the provisions of Section 633B.120 that set forth safe harbors for third party refusal of a POA.

Section 633B.403 also specifies that the Act applies to a judicial proceeding concerning a POA created on or after July 1 and that it applies to such a proceeding commenced after July 1 unless the court finds that the application of a provision of the Act would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party.

PART SIX: UNIFORMITY OF APPLICATION AND CONSTRUCTION

Section 633B.401 provides language contained in Uniform Acts regarding uniformity of application and construction to promote uniformity of the law among states enacting the Act. As a result of this language, cases decided in other states which have enacted the
Act can be looked at for guidance. Fifteen states and one territory (the U.S. Virgin Islands) have enacted the Uniform Power of Attorney Act (UPAA).\textsuperscript{20}

Alabama’s adoption of the UPAA became effective January 1, 2012 (\textsc{ala. stat. ann.} §26-1A-104 (West)).

Arkansas’ adoption of the UPAA became effective January 1, 2012 (\textsc{ark. stat. ann.} §28,68,104 (West)).

Colorado’s adoption of the UPAA became effective April 9, 2009 (\textsc{colo. stat. ann.} §15-14-708 (West)).

Hawaii enacted the UPAA on April 17, 2014, but it has not yet gone into effect (\textit{Recently Signed Bills, Governor of the State of Hawaii}, http://governor.hawaii.gov/blog/recently-signed-bills/ (last visited May 30, 2014)).

Idaho’s adoption of the UPAA became effective July 1, 2008 (\textsc{idaho stat. ann.} §15-12-203(West)).


Maine’s adoption of the UPAA became effective July 1, 2010 (\textsc{me. stat. ann.} §5-909 (West)).

Montana’s adoption of the UPAA became effective October 1, 2011 (\textsc{mont. stat. ann.} §72-31-203 (West)).

Nebraska’s adoption of the UPAA became effective January 1, 2013 (\textsc{neb. stat. ann.} §30-4041 (West)).

New Mexico’s adoption of the UPAA became effective July 1, 2007 (\textsc{n.m. stat. ann.}, §45-5B-403(West)).

Nevada’s adoption of the UPAA became effective on October 1, 2009 (\textsc{nev. stat. ann.} §162A.290 (West)).

Ohio’s adoption of the UPAA became effective on March 22, 2012 (\textsc{ohio stat. ann.} §1377.44 (West)).

Virginia’s adoption of the UPAA became effective on October 1, 2012 (\textsc{va. stat ann.} §64.2-1604 (West)).

West Virginia’s adoption of the UPAA became effective on June 8, 2012 (W. Va. Stat. Ann. §39B-3-101(West)).

Wisconsin’s adoption of the UPAA became effective on September 1, 2010 (Wis. Stat. Ann. §244.05 (West)).

Several states, such as Florida, have passed POA legislation that contains many of the provisions of the UPOAA, but which do not conform enough to the Uniform Act to be classified as an adopter. Accordingly, when conducting research in other states, it may be wise to increase the search to states which have relatively new statutes (since 2006) to see if those states have adopted a particular provision that would provide guidance.

PART SEVEN: CASE LAW IN OTHER JURISDICTIONS

As part of the preparation of these materials, a search was conducted of the case law in the jurisdictions that previously enacted the UPOA. Because enactment of the UPAA is fairly recent in all of these states, there is not a lot of case law interpreting the UPAA. These are the cases found that directly cite UPAA sections, as adopted in the state of jurisdiction:

**People v. Stell, 320 P.3d 382 (Colo. App. 2014) - §116 of UPAA**

The defendant’s father designated him as power of attorney (POA) in Virginia, giving him broad powers over the father’s property, and authorized him to perform any acts that the father would perform if he was acting himself. The defendant allegedly liquidated his father’s bank accounts, CDs, 401K, sold the timber on his land and also sold the land, and used the money received from these assets for his own personal use. He then allegedly convinced his father to place his assets in a trust for which the defendant was the trustee. Soon after, the defendant’s father terminated the POA and contacted the Denver District Attorney’s Office, requesting an investigation. The prosecution charged the defendant with theft, alleging he “unlawfully obtained the victim’s money, without authorization.”

One of the elements of the theft that the prosecution charged the defendant with was that the taking of the victim’s assets was done without authorization. Thus, the issue was whether the prosecution, as a matter of law, could prove that the defendant’s actions were done without authorization, despite the broad general powers the POA granted him. The court turned to both case law and statute to determine how to construe the POA. It cited cases that held the agent’s powers, however broad, must be narrowly construed in light of the circumstances and must be performed in good faith and loyalty to the principal. Then, the court cited §15-14-714(1)-(2), Agent’s Duties of Colorado’s Annotated Code, which is Section 116 (1) and (2) of the UPAA, and determined the UPAA was consistent with the case law principles. Based on these principles, the

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21 The authors thank Blerta Meliti, a third year law student at the University of Iowa College of Law and summer associate at the Davis Brown Law Firm for her research on the case law in other jurisdictions.
court decided that the circumstances warranted the question of whether defendant acted without authorization, despite his broad general powers as POA, to go to the jury.

Also, the court mentioned the POA was executed in Virginia and they would have to apply “the law of the state in which the POA was executed” but in this case, they did not have to go into that analysis because the law was the same in Colorado and Virginia, since both states had adopted the UPAA.

**Moffet v. Life Care Centers of America, 219 P. 3d 1068 (Colo. 2009) - §203 & §212 of UPAA**

The petitioner filed a wrongful death suit for the death of his mother against a nursing home facility. The petitioner held power of attorney for his mother. When he admitted his mother to the nursing home facility, he signed an agreement with the nursing home facility on his mother’s behalf. The agreement contained a clause that all disputes would go to arbitration. The petitioner argued that the Colorado Health Care Availability Act (HCAA) prohibited a person who had “a POA from entering into an arbitration agreement on behalf of a person who became incapacitated after executing the POA.”

The court looked at specific provisions of the HCAA and determined that the Act did allow arbitration to resolve disputes and did allow for delegation of authority under the law governing POAs. The court then discussed that the POA agreements in Colorado are governed by the UPAA. It wrote, “[w]hile the actual authority vested in the agent is governed by the POA document itself, the statutes demonstrate that a principal may elect to authorize her agent to make very significant decisions, including entering into or rescinding any contract, litigating any claims on behalf of the principal, and submitting to arbitration or settling a claim” (citations omitted). The court cited §15-14-726, Construction of Authority Generally of Colorado’s Annotated Code, which is Section 203 of the UPAA; and §15-14-735, Claims and Litigation of Colorado’s Annotated Code, which is Section 212 of the UPAA. Put succinctly, the court writes “under the newly-enacted UPAA, an agent is authorized to submit to arbitration unless the POA specifically limits this authority.”


Plaintiff (defendant’s stepmother) and defendant had a multiparty bank account where the defendant was designated as an owner of the account. In 1999, the plaintiff had also appointed the defendant as POA for all matters, including financial decisions. In 2003, the plaintiff executed a new POA appointing her natural children. In September 2009, the defendant withdrew a large sum of money from the account for his own use. He did not know his POA was revoked until November 2009. Her children, under their authorized POA, filed suit on her behalf against the defendant, claiming violation of the UPAA, breach of fiduciary duty, and conversion, fraud and prima facie tort.
The court found that the defendant had the right to withdraw the money in the bank account, and did not find any fraud, conversion, or prima facie tort. The court then addressed the violation of the UPAA and the breach of fiduciary duty claims. The plaintiff revoked the defendant’s POA, and upon revocation, his authority as an agent was no longer valid. The court cited §§46B-1-110(A) & 46B-1-110(B), Termination of Power of Attorney or Agent’s Authority of Colorado’s Annotated Code, which is Section 110 of the UPAA. Because his authority was revoked, the court held that the defendant did not have any fiduciary obligations to the plaintiff as her POA, even though he did not know that his POA had been revoked when he withdrew the sum from the bank account.

Furthermore, the court made it clear that §46B-1-110(D) of Colorado’s Annotated Code, or Section UPAA §110 (d), which states:

Termination of an agent's authority or of a power of attorney is not effective as to the agent or another person that, without actual knowledge of the termination, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest does not create an on-going fiduciary obligation for the individual's whose POA is revoked, even if his actions may have been done in bad faith. The section aims to protect POAs for taking action in good faith when they believe they still have the authority of being a POA.


The decedent had a life insurance policy and assigned his business partner as the beneficiary. Before he passed away, he designated his father as a power of attorney for financial matters. The decedent’s father acting as POA, changed the beneficiary of the life insurance policy to the decedent’s mother. The insurance company filed an interpleader action to determine who the decedent intended as the beneficiary, and as such, the decedent’s parents and business partner were the named defendants. The business partner filed a motion for summary judgment, arguing that the insurance policy required the decedent personally sign to change the beneficiary of insurance policy.

The court discusses §1337.42, Authority that Requires Specific Grant; Grant of General Authority of Ohio’s Annotated Code, which is Section 201 of the UPAA. The court says if the power granted to the POA under §1337.42 is explicit enough to change the beneficiary, then the decedent’s father changing the beneficiary to the decedent’s mother, had the same legal effect as if the decedent had personally made the change himself. This is because the insurance company decided to waive the policy requirement of having the decedent personally make the change. Citing case law, the court explains that in filing the interpleader action, the insurance company, under Ohio law waived all of the policy’s requirements, including the requirement of the decedent to personally change the policy’s beneficiary. Thus, the court denied the business party’s motion for summary judgment.
PART EIGHT: DRAFTING POINTERS AND CLIENT CHECKLIST

Mandatory Rules. Please note Section 633B.114(1) that provides (paraphrased):

NOTWITHSTANDING provisions in the POA, an agent shall act (i) in accordance with the principal’s reasonable expectations; (ii) in good faith, and (iii) only within the scope of authority granted in the POA.

General Matters.

- **Attorney-in-Fact is now known as Agent.** We should change our forms to provide for this change. Use “I name Mary Smith as my Agent” instead of keeping the now incorrect language “I name Mary Smith as my Attorney in Fact.”

- **Use the word Incapacity.** Instead of disability, use the word Incapacity, which is defined in the statute. Section 633B.4((7)

- **Execution.** Section 633B.105 provides that a POA under the Act must be acknowledged. This does not require that an unacknowledged pre-Act POA must be revised, since the validity of a POA is determined as of the law as of the date of signing. Section 633B.106. The Notary may not be an agent and a person signing at the agent’s direction may not be an agent named in the POA.

- **Applicable Law.** It would be a good practice to specify that Iowa law applies to the POA. In absence of that, the law of the state of execution applies. Section 633B.107.

- **The individual can now nominate his or her conservator or guardian in the POA.** This is important to ask clients whether they want to make this clear. This does not prevent the use of stand-by forms, but they need to be coordinated.

- **Effective Date.** The default rule is that a POA is effective when executed. Section 633B.109. If the client wishes to have the POA effective upon incapacity, or some other contingency or event, the POA must so provide.

Selected Default Rules

- **Durability.** Section 633B.104. As opposed to current law, a POA created under the Act does not need to have a statement that the POA survives disability. In the unlikely event the POA is *not intended* to survive disability, the POA must so provide.

- **Agent’s Duties.** Section 633B.114(2). The default rule is that an agent must act loyally for the principal’s benefit, to not create a conflict of interest that impairs the agent’s ability to act impartially in the principal’s best interest, act with the care, competence
and diligence ordinarily exercised by agents in similar circumstances, keep a record of all receipts, disbursements, and transactions made on behalf of the principal, cooperate with the health care POA and attempt to preserve the principal’s estate plan to the extent actually known by the agent, if preserving the plan is consistent with the principal’s best interests. These default provisions may be changed by the provisions of the POA.

- **Actions by coagents.** Section 633B.111. The default rule is that a majority of coagents is required to act. If one or more agents resigns or becomes unable to act, the remaining coagents may act.

- **Liability of Coagents.** Section 633B.111(3) and (4) provide the default rule that if an agent does not participate in or conceal a breach of fiduciary duty committed by another agent, that agent is not liable for the acts of the other agent. Similarly, an agent with knowledge of such a breach must notify the principal or take appropriate action if the principal is incapacitated.

- **Compensation and Reimbursement.** Section 633B.112. The default rule is that an individual agent has a right to reimbursement of expenses, but not to compensation. A bank or trust company is entitled to compensation and reimbursement of expenses. Compensation must be ‘reasonable under the circumstances.’

**Use of Statutory Form or Customized Form.** To the extent an individual has a relatively uncomplicated financial life, the statutory form may be the most appropriate and simple way to proceed. If, however, the principal has significant assets, has the potential for conflicts of interest, has business dealings with the agent, and wishes the agent to have broad powers with respect to the principal’s financial plan, including the ability to make gifts, create, amend or revoke trusts, and the like, an individually designed form would be more appropriate.

**Itemization of Powers or Incorporation by Reference.** If a listing of the specific powers is included in the POA (as is the case with the current ISBA POA Form), it is best to use the actual statutory language of sections 633B.203 through 217 to the extent possible. Generally, however, incorporation of those powers by reference should be sufficient even if an individually designed form is provided. This will likely be a matter of personal preference for the drafting attorney.
CLIENT DRAFTING CHECKLIST

Name of Principal: ________________________________________________

Name of Agent(s): ________________________________________________

If more than one agent, what are the requirements for action:

____ Unanimous Consent of Agents

____ Independent Authority of each Agent

____ Majority Consent of Agents

Succession of Agents (successor agent(s):

______________________________________________________________________________________________

____________________________

Does the client wish to appoint a conservator and/or guardian? If so, does the client currently have a standby petition for appointment of conservator and/or guardian?

______________________________________________________________________________________________

____________________________

Does the client have a current POA? If so, is the current agent (if different than proposed agent) aware of the appointment and is it appropriate to notify current agent of the change? Insert Explanation

______________________________________________________________________________________________

____________________________

Should prior POA’s be revoked? The default is that previous POA’s will be revoked.

Effective Date:

__________ Immediately (this is the default)

__________ Upon incapacity. Does the agent wish an individual(s) to be able to determine incapacity?* If yes, who is to be given this power?

__________ Upon another event (specify)____________________________

______________________________________________________________________________________________

____________________________

Should the agent be entitled to compensation? _____Yes _____ No

If yes, does the principal wish to give any guidance as to the amount of reasonable compensation?

______________________________________________________________________________________________

____________________________

Does the Principal currently have or anticipate farming, business or investment dealings with a named agent? _____Yes _________ No.

If so, please review the potential for a conflict of interest and obtain client’s view of whether transactions must be at arm’s length at fair value, or at a reduced value, whether current business arrangements (such as farm leases, compensation for entity owned by the Principal and the like) should continue or can be instituted. Would the client like to appoint a third party to negotiate conflict of interest transactions? If so, who? __________________________
Does the client wish to relieve the agent of any of the following duties

_____ Act loyally for the principal’s benefit,

_____ Not create a conflict of interest that impairs the agent’s ability to act impartially in the principal’s best interest,

_____ Act with the care, competence and diligence ordinarily exercised by agents in similar circumstances,

_____ Keep a record of all receipts, disbursements, and transactions made on behalf of the principal,

_____ Cooperate with the health care POA, and

_____ Attempt to preserve the principal’s estate plan to the extent actually known by the agent, if preserving the plan is consistent with the principal’s best interests. With respect to this, does the principal have any guidance as far as an ‘order of abatement’ with respect to preserving the estate plan?

________________________________________________________________________________

________________________________________________________________________________

Does the Client wish to exonerate the agent for breach of fiduciary duty? NOT GENERALLY RECOMMENDED

______ Yes ________ No

NOTE: This will not relieve from liability if the agent acts in bad faith, with improper motives or with reckless indifference to the purposes of the POA or the best interest of the principal.

Does the Principal wish to name a person (in addition to those set out in section 633.116) entitled to petition the court for judicial relief? _____ Yes ______ No

Name(s)

____________________________________________________________________________________________

____________________________________________

Does the Client wish to appoint an individual authorized to request an accounting of the Agent?

______ Yes ________ No

Does the client wish to give the Agent all the general authorities to act under sections 633B.204 through 217 with respect to the following matters:

_____ ALL POWERS (including gifts)

_____ Section 633B.204 Real property.

_____ Section 633B.205 Tangible personal property.

_____ Section 633B.206 Stocks and bonds.

_____ Section 633B.207 Commodities and options.

_____ Section 633B.208 Banks and other financial institutions.

_____ Section 633B.209 Operation of entity or business.

_____ Section 633B.210 Insurance and annuities.

_____ Section 633B.211 Estates, trusts, and other beneficial interests.

_____ Section 633B.212 Claims and litigation.

_____ Section 633B.213 Personal and family maintenance.

_____ Section 633B.214 Benefits from governmental programs or civil or military service.
Does the client with to authorize the Agent to do any of the following:

- Create, amend, revoke or terminate an inter vivos trust. Please note that both the POA and the Trust must authorize this action.

- Make a gift. If to the Agent, with what limits?

- Create or change rights of survivorship. If to the Agent, with what limits?

- Waive the principal’s right to be a beneficiary of a joint and survivor annuity, including but not limited to a survivor benefit under a retirement plan.

- Exercise fiduciary powers that the principal has authority to delegate. Is the principal a fiduciary of any trust or account?

- Disclaim property, including but not limited to a power of appointment. Beware of disclaimer if Medicaid eligibility is or may be involved.

- If the agent is NOT an ancestor, spouse or descendant of the agent, can the agent create an interest in the principal’s property in himself or herself?