



The Judiciary, State of Hawai‘i

Testimony to the House Committee on Judiciary

The Hon. Karl Rhoads, Chair
The Hon. Sharon E. Har, Vice Chair

Thursday, February 20, 2014
1:00 p.m.
State Capitol, Conference Room 325

WRITTEN TESTIMONY ONLY

By

R. Mark Browning
Deputy Chief Judge, Senior Family Judge
Family Court of the First Circuit

Bill No. and Title: House Bill No. 2054, Relating to the Uniform Power of Attorney Act

Purpose: Establishes the Uniform Power of Attorney Act. Defines the levels of authority granted in a power of attorney to the principal's agent. Requires the agent to act in good faith and within the scope of authority granted in the power of attorney. Provides sample documents to be used to create a statutory form power of attorney. Repeals Chapter 551D, Hawai‘i Revised Statutes.

Judiciary's Position:

The Judiciary takes no position on the merits of House Bill No. 2054. However, the Judiciary respectfully suggests exempting powers of attorney regarding care of minors and disabled adults for the following reasons.

1. The bill is entirely focused on matters of “property” as defined on page 3, from line 14.
2. The exemption suggested by the Judiciary is similar to the bill’s exemption of health care decisions (page 4, line 18).



House Bill No. 2054, Relating to the Uniform Power of Attorney Act
House Committee on Judiciary
Thursday, February 20, 2014 at 1:00 p.m.
Page 2

3. Powers of attorney regarding the care of minors and disabled adults are widely used in this state because of the strength of families. For example, many kupuna (grandparents) have the responsibility of raising their grandchildren due to a variety of factors such as the parents being too immature; they may need to work on another island, or they may be incapacitated because of substance abuse. Another example would be one sibling taking care of a disabled adult sibling. These families will probably have no knowledge of this law and may be subject to unintended consequences caused by the passage of this bill.

We respectfully suggest the following amendment to this bill by adding the following language at page 5, from line 4:

(5) A power created by a legal parent or legal guardian placing the care of a minor or a disabled adult under another person.

Thank you for the opportunity to provide testimony on this matter.

NEIL ABERCROMBIE
GOVERNOR OF HAWAII

DIRECTOR OF HEALTH



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Committee on Judiciary

HB2054, RELATING TO THE UNIFORM POWER OF ATTORNEY ACT

Testimony of Wes Lum
Director, Executive Office on Aging
Attached Agency to the Department of Health

Thursday, February 20, 2014; Conference Room 325

1:00 p.m.

EOA's Position: The Executive Office on Aging (EOA) supports the intent of this bill.

Purpose and Justification: The durable power of attorney is widely viewed as a mechanism to effectively plan for incapacity. This measure is based on the Uniform Power of Attorney Act of 2006 which clarifies the divergent law. The bill will provide protections for the good faith acceptance of the power of attorney.

This bill will preserve the durable power of attorney as a low-cost and flexible form of surrogate financial decision making in the event of incapacity. The timely management of an incapacitated principal's finances are crucial. The implications are especially critical for an incapacitated principal with on-going Medicaid coverage. Without the ability to access financial accounts the accumulation of monthly income can easily jeopardize continued eligibility.

This measure makes mandatory provisions providing safeguards for the protection of the principal, the agent and others who are asked to rely on the agent's authority. Thank you for the opportunity to testify.



TO: House Committee on Judiciary

DATE: Thursday, February 20, 2014, 1:00 p.m.
Conference Room 325

RE: **HB 2054 – RELATING TO THE UNIFORM POWER OF ATTORNEY
ACT**

Chair Rhoads, Vice-Chair Har and Members of the Committee:

My name is Barbara Kim Stanton, State Director of AARP Hawaii. AARP is a membership organization of people 50 and older with approximately 148,000 members in Hawaii. AARP fights on issues that matter to Hawaii families, including the high cost of long-term care; access to affordable, quality health care for all generations; providing the tools needed to save for retirement; and serving as a reliable source of information on issues critical to Americans age 50+.

AARP strongly supports enactment of HB 2054, the Uniform Power of Attorney Act (UPOAA) in Hawaii as well as in every state.

Powers of attorney (POA) are essential tools for delegating authority to others to handle financial matters in many situations. It is a legal document used by an individual (the principal) to name someone else (the agent) to make financial decisions and act on the principal's behalf. To be useful as an incapacity planning tool, a POA must give broad authority to the agent.

A power of attorney, whether general or durable, is private; there is no oversight by a court as there is supposed to be for a guardian or conservator. State laws often are unclear about the duty owed by the agent to the principal. This combination of broad consent, lack of oversight, and unclear duties makes it possible for agents to misuse their authority.

The power of attorney has been called a "license to steal" and this misuse of authority is a form of financial exploitation. This concerns us greatly and why we think it's critical that state laws help prevent, detect and redress power of attorney abuse. Power of attorney abuse can take many forms, including:

- Forging the principal's signature on a power of attorney or making a fraudulent document;
- Spending the principal's money for the benefit of the agent;

- Making gifts when the power of attorney does not provide authority to do that; and
- Undermining the principal's estate plan by giving assets to unintended recipients.

Additionally, a power of attorney will not be useful if third parties, such as financial institutions, refuse to honor an agent's directions. Third parties that refuse to honor a power of attorney because they believe the agent is misusing authority may help prevent exploitation of the principal. Sometimes, however, third parties refuse to honor the POA for less legitimate reasons, such as because it is old or from another state.

While the Act can't prevent bad actors from committing theft and other forms of abuse, it does set forth clear agent duties and prohibitions that will make civil actions and criminal prosecutions more effective. Highlights include provisions that:

- Contain mandatory and default duties that prohibit self-dealing and mandate preservation of the principal's estate plan;
- Makes clear that a power of attorney terminates when the principal dies;
- Set forth the powers that an agent cannot exercise unless the power of attorney expressly authorizes such actions;
- Establish liability for agents who violate the power of attorney law;
- Address third-party acceptance of and reliance upon a power of attorney; and
- List circumstances under which a third party may legitimately refuse to accept a power of attorney and provide sanctions for unlawful refusals.

To date, thirteen states have enacted the Uniform Power of Attorney Act, and Alaska, Connecticut, Mississippi, and the Virgin Islands are considering it now. By enacting the UPOAA, Hawaii could strengthen its power of attorney law to better protect its residents and to benefit its businesses and courts.

Thank you for the opportunity to testify.

**TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION**

ON H.B. NO. 2054

RELATING TO THE UNIFORM POWER OF ATTORNEY ACT

**BEFORE THE HOUSE COMMITTEE ON
JUDICIARY**

DATE: Thursday, February 20, 2014, at 1:00 p.m.
Conference Room 325, State Capitol

PERSON(S) TESTIFYING: KEN TAKAYAMA,
Commission to Promote Uniform Legislation

To Chair Rhoads, Vice Chair Har, and Members of the Committee:

My name is Ken Takayama, and I am testifying on behalf of the Commission to Promote Uniform Legislation (the "Commission"), in support of H. B. No. 2054, Relating to **THE UNIFORM POWER OF ATTORNEY ACT**.

The catalyst for the Uniform Power of Attorney Act ("the Act") was a national review of state power of attorney legislation. Subsequently, a national survey was conducted to ascertain whether there was actual divergence of opinion about default rules for powers of attorney or only the lack of a detailed uniform model. The survey responses demonstrated a consensus of opinion in excess of seventy percent on nearly a dozen items that a power of attorney statute should include.

Informed by the review and the survey results, the Uniform Law Commission convened a drafting committee to develop the Act. The drafting process also incorporated input from the American College of Trust and Estate Counsel, the ABA Section of Real Property, Probate and Trust Law, the ABA Commission on Law and Aging, the Joint Editorial Board for Uniform Trust and Estate Acts, the National Conference of Lawyers and Corporate Fiduciaries, the American Bankers Association, AARP, other professional groups, as well as numerous individual lawyers and corporate counsel. As a result of this process, **the Act codifies both state legislative trends**

and collective best practices, and strikes a balance between the need for flexibility and acceptance of an agent's authority and the need to prevent and redress financial abuse.

Among other things, the Act:

- (1) Makes powers of attorney durable unless stated otherwise;
- (2) Establishes the duties of an agent to act in good faith and loyalty, and to carry out the principal's reasonable expectations;
- (3) Allows third parties who accept powers of attorney in good faith to rely upon them as valid (even if not) if there is no actual knowledge of invalidity;
- (4) Prohibits third parties from requiring additional or different forms of power of attorney;
- (5) Provides certain exceptions when third parties are not required to accept a power of attorney;
- (6) Provides liability for reasonable attorney's fees and costs if a court order is needed to enforce a power of attorney;
- (7) Offers clearer guidelines for the Agent, (who is often a trusted friend or family member) such as:
 - (A) Recognizing that an agent who acts with care, competence and diligence for the best interest of the principal is not liable solely because he or she also benefits from the act or has conflicting interests.
 - (B) Provides default rules on powers granted to the agent under a power of attorney in the areas of real property, tangible personal property, stocks and bonds, commodities and options, banks and financial institutions, operation of an entity or business, insurance and annuities, estates, trusts, and other beneficial interests, claims and litigation, personal and family maintenance, benefits from governmental programs or civil or military service, retirement plans, taxes, and gifts.
 - (C) Permits a Principal to include in the power of attorney an exoneration provision for the benefit of the agent.
 - (D) Provides ways for the Agent to give notice of resignation if the Principal is incapacitated.

- (8) Promotes acceptance of a power of attorney by third parties by:
 - (A) Prohibiting a person from requiring an additional or different form of power of attorney for authority granted in the power of attorney presented.
 - (B) Providing broad protections for the good faith acceptance or refusal of an acknowledged power of attorney.
 - (C) Recognizing portability of powers of attorney validly created in other states.
- (9) Provides an additional protective measure for the Principal by providing that third persons may refuse the power if they have made (or know that another person has made) a report to the appropriate adult protective service agency that the principal may be subject to physical or financial abuse, neglect, exploitation or abandonment by the Agent or person acting for or with the agent.

A summary of the Act's provisions is attached.

Separate from and in addition to the benefits conferred by the Act itself in statutorily establishing rules and clarifying powers and authorities, there is an added benefit that comes from promoting uniformity and standardization of state laws concerning powers of attorney. We live in a society that is not only aging, but is also considerably more mobile. As a result, people are more likely to change their state of residence during their later years—they will be more likely to need assistance from friends or family members who live in other states—or both. There will be distinct benefit for people in different states being able to operate under uniform laws and standardized rules in using powers of attorney to carry out their personal affairs and those of their families and friends. The Uniform Power of Attorney Act has been enacted in 13 states and the U.S. Virgin Islands.

Thank you again for this opportunity to testify in support of H.B. No. 2054.



Uniform Law Commission

The National Conference of Commissioners on Uniform State Laws



Contact Us: 312.450.6600

Power of Attorney Summary

The concept of a “power of attorney” was first incorporated into the Uniform Probate Code in 1969 to offer an inexpensive method of surrogate decision making to those whose modest assets did not justify pre-incapacity planning with a trust or post-incapacity property management with a guardianship. After more than three decades, the durable power of attorney is now used by both the wealthy and the non-wealthy for incapacity planning as well as convenience. The Uniform Power of Attorney Act (2006) (UPOAA) is necessary because over the years many states adopted non-uniform provisions to deal with issues on which the Uniform Probate Code and the original Uniform Durable Power of Attorney Act are silent. The UPOAA, which provides uniformity on these issues, enhances the usefulness of durable powers while protecting the principal, the agent, and those who deal with the agent.

A national study of durable powers of attorney, conducted in 2002, revealed the need to address numerous issues not contemplated in the original Uniform Durable Power of Attorney Act such as the authority of multiple agents, the authority of later-appointed guardians, and the impact of dissolution or annulment of the principal's marriage to the agent. The study also revealed other topics about which the states had legislated, although not necessarily in a divergent manner, including: successor agents, execution requirements, portability, sanctions for dishonor of a power of attorney, and restrictions on powers that alter a principal's estate plan. In a national survey, trust and estate lawyers' responses demonstrated a high degree of consensus about the need to improve portability and acceptance of powers of attorneys as well as the need to better protect incapacitated principals.

The UPOAA, which supersedes the Uniform Durable Power of Attorney Act, the Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code, consists of four articles. The first contains all of the general provisions that pertain to creation and use of a power of attorney. While most of these provisions are default rules that can be altered by the power of attorney, certain mandatory provisions in Article 1 serve as safeguards for the protection of the principal, the agent, and persons who are asked to rely on the agent's authority. Article 2 provides default definitions for the various areas of authority that can be granted to an agent. The genesis for most of these definitions is the Uniform Statutory Form Power of Attorney Act (1988); however, the language is updated where necessary to reflect modern day transactions. Article 2 also identifies certain areas of authority that must be granted with express language because of the propensity of such authority to dissipate the principal's property or alter the principal's estate plan. Article 3 contains an optional statutory form that is designed for use by lawyers as well as lay persons. Step-by-step prompts are given for designation of the agent, successor agents, and the grant of authority. Article 3 also contains a sample agent certification form. Article 4 contains miscellaneous provisions concerning the relationship of the Act to other law and pre-existing powers of attorney.

The UPOAA seeks to preserve the durable power of attorney as a low-cost, flexible, and private form of surrogate decision making while deterring use of the power of attorney as a tool for financial abuse of incapacitated individuals. It contains provisions that encourage acceptance of powers of attorney by third persons, safeguard incapacitated principals, and provide clearer guidelines for agents.

The UPOAA provides broad protection for good faith acceptance or refusal of an acknowledged power of attorney, consequences for unreasonable refusal of an acknowledged power of attorney and recognition of the portability of powers of attorney validly created under other law. The Act seeks to address the problem of arbitrary refusals of powers of attorney by entities such as banks, brokerage houses, and insurance companies. With respect to liability for refusal of a power of attorney, the Act provides adopting states with two choices: Section 120, Alternative A, sets out liability parameters for refusal of

any acknowledged power of attorney not excluded by the statutory safe harbors. Section 120, Alternative B, applies only to refusals of acknowledged statutory form powers of attorney. As an additional protective measure for the principal, both alternative Sections 120 allow refusal of an otherwise valid power of attorney if the person believes 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" and makes or knows that another person has made a report to Adult Protective Services (or the equivalent governmental agency).

Protections for the principal under the UPOAA are multi-faceted and include: mandatory as well as default fiduciary duties for the agent; liability for agent misconduct; broad standing provisions for judicial review of the agent's conduct; and the requirement of express language to grant certain authority that could dissipate the principal's property or alter the principal's estate plan. Mandatory duties include acting in good faith, within the scope of the authority granted and according to the principal's reasonable expectations (or, if unknown, the principal's best interest). Default duties that can be varied in the power of attorney include the duty to preserve the principal's estate plan (subject to certain qualifications) and the duty to cooperate with the person who has the principal's health-care decision making authority.

The UPOAA recognizes that many agents are family members who have inherent conflicts of interest, but that these conflicts may not, in and of themselves, prevent an agent from acting competently for the principal's benefit. While it is well-accepted that an agent under a power of attorney is a fiduciary, most state statutes do not specify what that means. The UPOAA addresses this dilemma in a default provision which recognizes that 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 or has conflicting interests. Furthermore, the Act permits the principal to include in the power of attorney an exoneration clause for the benefit of the agent. Another provision that operates to the benefit of both the principal and the agent is one requiring notice of an agent's resignation. If the agent cannot effectively notify the principal because the principal is incapacitated, the provision gives a hierarchy of persons to whom the agent may give notice, including a governmental agency having authority to protect the welfare of the principal.

In the final analysis, there may be no perfect solution to meet the surrogate decision making needs of our aging society, but the UPOAA balances the competing interests at stake with legislative reforms that enhance the usefulness of durable powers while at the same time protecting the principal, the agent, and those who deal with the agent.

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111 N. Wabash Avenue Suite 1010 Chicago, Illinois 60602

HB2054

Submitted on: 2/18/2014

Testimony for JUD on Feb 20, 2014 13:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Kristina Bartell	Individual	Support	No

Comments:

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February 18, 2014

The Honorable Chairman Ige and Vice-Chair Woman Kidani:

My name is Sara Sato and I am Board Certified Behavior Analyst (BCBA). I have a Masters Degree in Special Education, Severe Disabilities/Autism Specialization from the University of Hawaii at Manoa and have been working with individuals with disabilities for 15 years. I have worked in Hawaii and San Francisco as an Educational Assistant, Skills Trainer, Behavior Therapist, Special Education Teacher, and Behavior Analyst. I am writing this testimony to voice my wholehearted support for HB 2054 SD1.

I clearly remember the first child I ever met with Autism. He was a preschooler named "Ben", with flowing, black hair and had the longest eyelashes I have ever seen. Ben cried often, engaged in aggression towards others, was self-injurious and completely non-vocal. When I first started working with him, I struggled to figure him out. I never knew what he wanted and constantly felt helpless: I wanted to help and I just didn't know how! However, when it was time for recess he sought me out and sat next to me on top of the play structure. When it was time to nap, he would bring his face right up to mine, and rub his eye brows against mine. Ben's mannerisms and interactions with me were so fascinating, I was intrigued and wanted to learn as much as I could about Autism.

As a Skills Trainer working for a DOE contracted company, I participated in trainings about Autism, Challenging Behavior, and Data Collection. I had the opportunity to work with numerous children with Autism and other disabilities under the direction of Behavioral Supervisors and teachers. In this setting, I saw how intensive, structured programs using the principles of Applied Behavior Analysis (ABA) truly benefitted the children. The students gained academic skills, their challenging behavior decreased, and they became more independent. At the same time I witnessed other children's programs that were less structured and intensive, and saw how these children were stagnant in their growth.

In 2009 I was fortunate enough to begin working for Behavior Analysis No Ka Oi, an ABA company lead by Christine Walton, Ph.D, BCBA-D. Dr. Walton has significant training in the field of ABA from some of the leaders in the field. She spent countless hours training me, attending every session I had with our clients at first, carefully ensuring that we were providing the best services we could. I immediately saw significant improvements in all of the children we serviced. We worked with children that would spit at others, bite, head lock, engage in self-injury, scream, and flop to the ground. Children who were non-vocal, those who would only engage in echolalia, or ones who would imitate TV shows all day long. Through the systematic procedures that we implemented, parent and teacher training, and consistent, daily work with our clients, they all made incredible progress. I felt so gratified to do this work and took tremendous pride in helping these individuals and their families.

After this experience I moved to San Francisco and was determined to gain more opportunities in ABA. I also had my mind set on becoming a Board Certified Behavior Analyst (BCBA). This involved taking 5 post-graduate courses that were extremely rigorous, accumulating 1500 hours of supervision hours from a BCBA, and taking a comprehensive exam with a less than 40% pass rate. I was fortunate enough to find employment with an incredible company in San Francisco and gained countless experiences as a Program Supervisor and Behavior Analyst, working in homes and schools in the Bay Area. It was there that I also accumulated many of my supervision hours and passed the BCBA exam.

In San Francisco I was amazed at the structure of the DOH and DOE systems. When a child was diagnosed with Autism, they were allowed to have intensive ABA services from time of diagnosis until at least Kindergarten, focusing on early intervention. I saw how having these intensive services from the moment they were diagnosed until becoming school age had a tremendous impact on their lives. It was amazing to work with children who were non-vocal to being able to fully communicate their wants and needs and eventually be rescinded from special education. To meet with parents who were in tears when we would start services and then have tears of gratitude when hearing their children talk for the first time.

Being back in Hawaii, I am blessed once again to be working for Behavior Analysis No Ka Oi, in the role of a Behavioral Specialist. I supervise Behavior Tutors to work with children with Autism, design their programs, and provide parent training. This position is difficult, time consuming, and stressful. But each day I come to work, I hear a child speak a new word or a parent tells me their child is listening to them more. I witness a child call their mother, "Mama" for the first time or work on social interactions with teenagers. Each day I am helping individuals reach their highest potential. I am so proud of what I do and I want nothing more than to continue to help as many individuals with Autism as I possibly can.

Thank you for your time in reading this,

Sara Sato, M.Ed., BCBA

HB2054

Submitted on: 2/18/2014

Testimony for JUD on Feb 20, 2014 13:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Adam Bartell	Individual	Support	No

Comments:

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