

SB2229

SD1

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

ON S.B. NO. 2229, S.D. 1

RELATING TO THE UNIFORM POWER OF ATTORNEY ACT

**BEFORE THE SENATE COMMITTEE ON
JUDICIARY AND LABOR**

DATE: Tuesday, February 18, 2014, at 10:00 a.m.
Conference Room 016, State Capitol

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

To Chair Hee, Vice Chair Shimabukuro, 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 S. B. No. 2229, S.D. 1, 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) 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.
- (2) 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.
- (3) 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 S.B. No. 2229, S.D. 1.



Uniform Law Commission

The National Conference of Commissioners on Uniform State Laws

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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



TO: Senate Committee on Judiciary and Labor

DATE: Tuesday, February 18, 2014, 10:00 a.m.
Conference Room 016

RE: **SB 2229, SD1 – RELATING TO THE UNIFORM POWER OF ATTORNEY ACT**

Chair Hee, Vice-Chair Shimabukuro 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 SB 2229, SD1, 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.