

# SB2229

Measure Title: RELATING TO THE UNIFORM POWER OF ATTORNEY ACT.

Report Title: Uniform Power of Attorney Act; Authority

Description: 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, Hawaii Revised Statutes.

Companion: [HB2054](#)

Package: Kupuna Caucus

Current Referral: CPN, JDL

Introducer(s): CHUN OAKLAND, IHARA, Baker, Espero, Galuteria, Nishihara, Shimabukuro

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**Committee on Commerce and Consumer Protection**

**SB 2229, RELATING TO THE UNIFORM POWER OF ATTORNEY ACT**

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

**Wednesday, January 29, 2014; Conference Room 229**

**9:00 a.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.

SB2229 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.



*The Judiciary, State of Hawaii*

**Testimony to the Senate Committee on Commerce and Consumer Protection**

The Hon. Rosalyn H. Baker, Chair  
The Hon. Brian T. Taniguchi, Vice Chair

Wednesday, January 29, 2014  
9:00 a.m.  
State Capitol, Conference Room 229

by

**WRITTEN TESTIMONY ONLY**

Lori Ann M. Okita  
Chief Court Administrator, First Circuit

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**Bill No. and Title:** Senate Bill No. 2229, 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, Hawaii Revised Statutes.

**Judiciary's Position:**

The Judiciary takes no position on the merits of Senate Bill No. 2229. 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 4.
2. The exemption suggested by the Judiciary is similar to the bill's exemption of health care decisions (page 4, line 18).



Senate Bill No. 2229, Relating to the Uniform Power of Attorney Act  
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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.

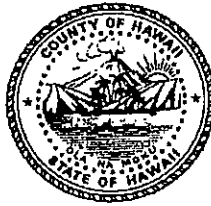
The Judiciary also notes that subsection -12 provides certain listed persons “may petition a court to construe a power of attorney or review the agent’s conduct, and grant appropriate relief” without specifying a particular court and/or case type in which to submit the petition.

The Judiciary has further concerns regarding subsection -16 and subsection -41. Subsection -16 regarding liability for refusal to accept acknowledged power of attorney may prevent the Land Court from questioning documents that have been signed by an attorney-in-fact if the receiving clerk fails to note it upon receipt, even when the Power of Attorney was not recorded as required by Section 501-174, Hawaii Revised Statutes. Additionally, subsection -41 may be interpreted by some persons as authorizing an attorney-in-fact to become a successor trustee in a trust.

Thank you for the opportunity to provide written comments on this matter.

MITCHELL D. ROTH  
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TESTIMONY IN SUPPORT OF SENATE BILL 2229

AN ACT RELATING TO THE UNIFORM POWER OF  
ATTORNEY ACT

Hearing before COMMITTEE ON COMMERCE AND  
CONSUMER PROTECTION

Wednesday, January 29, 2014, 9:00 AM  
State Capitol, Conference Room 229

Sen. Rosalyn H. Baker, Chair  
Sen. Brian T. Taniguchi, Vice Chair

TO: Senators Baker, Taniguchi and Members of the Committee:

The Hawaii County Prosecutor's Office has an Elder Abuse Team which participates in monthly inter-disciplinary team meetings with elder stakeholders including case managers, Legal Aid and Public Health Nursing. At these meetings stakeholders have on occasion discussed the financial problems of incapacitated elders and their caregivers caused by financial institutions' refusal to honor valid powers of attorney. SB 2229 seeks to remedy this, by mandating safeguards for Principals (very often incapacitated elders), their Agents and the third parties who are asked to rely on the agent's authority.

SB 2229 is based on the model Uniform Power of Attorney Act (2006) drafted by the National Conference of Commissioners on Uniform State Laws, a non-partisan organization now in its 122<sup>nd</sup> year. The catalyst for the Act was a national review of states' power of attorney (POA) legislation which revealed a "growing divergence among states' statutory treatment"<sup>1</sup> of POAs. The Uniform Power of Attorney Act was drafted "to provide greater guidance for all parties affected by the power of attorney relationship: the principal, the agent and third persons who are asked to accept the agent's authority..."<sup>2</sup> As of 2013, thirteen states had adopted UPOAA.<sup>3</sup>

The arguments in favor of SB 2229 are set forth in the Uniform Law Commission's article, "Why States Should Adopt UPOAA," which argues that all states should enact UPOAA because, among other things, it "[p]rovides mandatory provisions that provide safeguards for the protection of the principal, the agent, and persons who are asked to rely on the agent's authority."<sup>4</sup>

<sup>1</sup> Prefatory Note to the Uniform Power of Attorney Act, Drafted by the NCCUSL and By It Approved and Recommended For Enactment In All States, at its Annual Conference Meeting, July 7-14, 2006.

<sup>2</sup> Phoenix L. Rev, 343, 2008.

<sup>3</sup> Uniform Law Commission website, [www.uniformlaws.org/Act](http://www.uniformlaws.org/Act) (Power of Attorney)

<sup>4</sup> Ibid., "Why States Should Adopt UPOAA"

The current hodge-podge of financial institutions' policies relating to the acceptance and honoring of valid POAs, both here in Hawaii and nation-wide, are designed to insulate the financial institutions themselves from liability. These policies vary from institution to institution and even from branch to branch (some Hawaii banks even leave the decision of whether to honor a POA to the discretion of local branch managers). Some Hawaii financial institutions decline to honor a valid POA if it is "stale," (executed over five years prior to the date it is presented by the agent) or if it is not on a bank-prepared form.

This piecemeal approach does not offer consistent legally mandated protections for financial institutions and it affords no protection whatsoever to principals, many of whom are responsible elders. An elder who, in good faith, has executed a POA appointing a trusted friend or family member to handle their financial affairs when they are unable to do so, justifiably believes that they have handled unforeseen contingencies in a responsible manner. Little do they know that their bank may refuse to honor their POA, leaving their appointed agent with no ability to access their accounts or pay their financial obligations.

This is more than an inconvenience, it can be a disaster. Elders often have their social security checks deposited directly to their bank accounts. When their agent is prohibited from accessing these funds, the accounts soon accumulate more cash than the Medicaid allowable limit of \$2000. Once that happens, Medicaid can terminate the elder's benefits. Without Medicaid, a family of an elder in a skilled nursing facility can easily expect to owe \$30,000 within a month. Other financial obligations the family cannot cover from their own income begin to accrue. Mortgage payments slip, medical bills mount. Meanwhile the elder's assets are safe - untouched and untouchable.

The Office of the Prosecuting Attorney of the County of Hawaii supports passage of Senate Bill No. 2229. Thank you for the opportunity to testify on this matter.

Respectfully,



Mitchell D. Roth  
Prosecuting Attorney  
County of Hawaii

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

**ON S.B. NO. 2229**

**RELATING TO THE UNIFORM POWER OF ATTORNEY ACT**

**BEFORE THE SENATE COMMITTEE ON  
COMMERCE AND CONSUMER PROTECTION**

**DATE:** Wednesday, January 29, 2014, at 9:00 a.m.  
Conference Room 229, State Capitol

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

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To Chair Baker, Vice Chair Taniguchi, 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. 2299, 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.



TESTIMONY of CPUL on S.B. NO. 2229  
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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.



# 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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