



## **The New Connecticut Power of Attorney Act**

**March 1, 2016**

**9:00 a.m. - 11:30 a.m.**

**CBA Law Center**

**New Britain, CT**

**CT Bar Institute, Inc.**

CLE Credit 2.0 Hours

## Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

*--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994*

## Faculty Biographies

**Michael M. Darby** has served as the judge for the Greater Manchester Probate Court since 2011. He has practiced law on Main St. in Manchester CT since 1982, and is currently a partner at Darby & Darby, LLC with his wife, Atty. Nancy Darby, where they focus primarily on estate planning and estate administration. Judge Darby served as the Town Attorney for the Town of Manchester from 1991 to 2007. He graduated from the University of Hartford in 1979 and from Duke University School of Law in 1982.

**Sandra Sherlock-White** is an attorney practicing in Newington. She received her law degree from Western New England School of Law and has practiced in Connecticut and Massachusetts. Ms. Sherlock-White is former Chair of the Elder Law Section of the Connecticut Bar Association, a member of the Executive Committee of the Elder Law Section of the Connecticut Bar Association, a member of the Estates and Probate Section of the Connecticut Bar Association, and a member of the National Academy of Elder Law Attorneys. She also served for five years as Legislative Liaison for the Elder Law Section of the Connecticut Bar Association, and continues to serve on its Legislative Committee and engage in legislative advocacy for the Elder Law Section. She is an adjunct Professor of Law at the University of Connecticut Law School where she teaches Elder Law. She has also served as an adjunct professor of Law in the LL.M. Program in Estate Planning and Elder Law at Western New England College School of Law. Her areas of practice include estate planning, planning for incapacity, probate, legal issues involving Medicaid and real estate. Ms. Sherlock-White has been a frequent local and national speaker on elder law programs for attorneys, social workers, healthcare providers, senior groups and various organizations including the Alzheimer's Association, the National Academy of Elder Law Attorneys, the Connecticut Bar Association, and the Connecticut Probate Assembly. She served as a member of the task force for the Connecticut Bar Association for conservatorship reforms and probate court reforms. She is a member of the Professional Advisory Board of the Hartford Foundation for Public Giving, a Corporator for Connecticut Community Care, Inc., and the Coalition for Elder Justice in Connecticut. She has been nominated as a Top Attorney in Connecticut and Super Lawyer for five years.

**Deborah J. Tedford** is an attorney and principal in the Tedford Law Firm of Mystic, Connecticut. She graduated from Yale University, *cum laude* in 1972 as a member of one of the first classes to include women, and from Boston University School of Law in 1976. She is also a qualified mediator, having completed 40 hours of formal mediation training.

Deb served as President of the Connecticut Bar Association, an organization of over 11,000 members, for the year 2002-2003, and was previously Secretary and Vice President of that organization. She is the past chairman of the Connecticut Bar Association's Estates and Probate Section and also of its Elder Law Section. She served as Co-Chair of the Connecticut Bar

Association's Task Force on the Future of the Probate Courts from its inception. She was founding editor of the Estates and Probate Newsletter and is a past president of the Southeastern Connecticut Estate and Tax Planning Council. She has served as Chair of the Connecticut Bar Association's Pro Bono Committee and is the Chair of the CBA's annual Federal Tax Institute of New England.

Deb was elected a fellow of the American College of Trust and Estate Counsel (ACTEC), a national organization of trust and estate attorneys, in 1992; was elected as a fellow of the Connecticut Bar Foundation in 1995; and of the Fellows of the American Bar Foundation in 2012. She recently served three years as Chair of the Elder Law Committee of ACTEC and is a Regent of the College. She is a member of ACTEC's Fiduciary Litigation Committee and has served on a number of other administrative committees for the college. She has been named one of the Top Twenty-Five Women Super Lawyers in Connecticut as well as one of state's top trusts and estates lawyers by the same organization.

As part of her years of service to the Bar and her profession, Deb co-chaired and was the principal author of the Connecticut Bar Association's Report of the Task Force on the Future of the Connecticut Probate System, published in May 2003. She has worked tirelessly with a number of colleagues on a Connecticut version of the Uniform Trust Code, without success to date, but with many interesting stories to tell. Deb has been asked to testify before Connecticut's Finance Committee on the effects of the estate tax laws in Connecticut, and has testified in favor of special needs trusts for the disabled.

Deb is a frequent speaker at the state and national levels on topics related to the field of trust law, including special needs trusts, estate and gift taxation, social security and undue influence in probate matters.

**CONNECTICUT BAR ASSOCIATION  
SEMINAR MARCH 1, 2016  
NEW CONNECTICUT UNIFORM POWER  
OF ATTORNEY ACT**

Attorney Sandra Sherlock White  
Law Offices of Sandra Sherlock White, LLC  
365 Willard Avenue Suite 2E  
Newington, CT 06111

# Overview of the new POAA

- Public Act 15-240
- Effective July 1, 2016
- Modeled on the Uniform Act approved by the Uniform Law Commission in 2006
- UPOAA with comments available at [www.uniformlaws.org](http://www.uniformlaws.org)
- Enacted in 19 states: Alabama, Arkansas, Colorado, Connecticut, Hawaii, Idaho, Iowa, Maine, Maryland, Montana, Nebraska, Nevada, New Mexico, Ohio, Pennsylvania, USVI, Virginia, West Virginia, Wisconsin

# Overview of the new POAA

Organization-Four subparts:

1.General Provisions

2.Authority

3.Statutory Forms

4.Miscellaneous

# Overview of the new POAA

3 categories of Provisions:

1. Default
2. Mandatory
3. Explanatory

# Overview of the new POAA

“Incapacity” means inability of an individual, even with appropriate assistance, to perform the functions inherent in managing his or her affairs because the individual:

- 1.Has a mental, emotional or physical condition that results in being unable to receive and evaluate information or make or communicate decisions; or
- 2.Is Missing, Detained (e.g. incarcerated) or Outside the U.S. and unable to return. [Section 2 (5)]

Nomenclature:

“Agent” whether denominated an agent, attorney in fact or otherwise

# New POAA is primarily a Default Statute

Words which indicate when Statutory Provision is a Default Law and therefore can be overridden:

- “unless the POA otherwise provides”
- “except as otherwise provided in the POA”

# Specific Default Provisions

- POA is presumed durable; [Section 4]
- POA is effective immediately;[Section 9(a)]
- POA unaffected by lapse of time;[Section 10(c)]

# Specific Default Provisions

- Successors have same scope of authority as original agent, may not act until all predecessors are unavailable. [Section 11(b)(2)]
- **Default is that Co-agents act JOINTLY** [Section 11(a)]
- Co-agents may NOT exercise authority independently UNLESS the power is explicitly several
- Uniform Act provides that the Default is several, not joint, authority [UPOAA Sec. 111(a)]

# Specific Default Provisions

- Agents are entitled to reimbursement of expenses and **reasonable compensation**. [Section 12]
- Spouse–agent’s authority **terminates** upon filing of action for legal separation, dissolution or annulment. [Section 10(b)(5)]
- Agent **accepts appointment** by exercising authority or performing duties or by any other conduct indicating acceptance.[Section 13]
- Agent **resigns** by giving notice. [Section 18}

# MANDATORY Agent DUTIES

- Act **generally** in accordance with the principal's reasonable expectations;
- If such expectations are unknown, make reasonable efforts to ascertain the Principal's expectations
- Act otherwise in the Principal's best interest
- AND Cooperate with Principal's health care proxy to carry out the Principal's reasonable expectations to the extent actually known by the agent and otherwise, act in the Principal's best interest.

# MANDATORY Agent DUTIES

- Act within the Scope of Authority
- Act in Loyalty and Good Faith
- Avoid Conflicts
- Act with Care, Competence, and Diligence
- Keep Records

# MANDATORY Agent DUTIES

Attempt to preserve P's estate plan if known and preservation is in P's best interest based on all relevant factors, including:

- 1.Value and nature of P's property;
- 2.P's foreseeable obligations and need for maintenance;
- 3.Minimization of taxes, including income, estate, inheritance, GST and gift taxes; and
- 4.Eligibility for a benefit, a program or assistance under a federal or state statute or regulation.

[Section 14(6)]

# MANDATORY Agent DUTIES

- Agent that acts in good faith is NOT liable to any beneficiary of P's estate plan for failure to preserve plan
- Agent that acts with care, competence and diligence for P's best interest is not liable solely because the agent also benefits or has a conflicting interest in relation to the property or affairs of P
- If P selected Agent for his special skill or expertise, the special skills or expertise MUST be considered in determining whether the agent acted with care competence and diligence under the circumstances.
- An Agent shall not be considered to have special skills or expertise solely because he is an Attorney.

# MANDATORY Agent DUTIES

- Absent a breach of duty to P, Agent is not liable if the value of P's property declines
- *Unless the POA otherwise provides*, an agent is not required to disclose receipts, disbursements or transactions performed by agent **unless**:
  - ✓ ordered by a court;
  - ✓ Requested by P, or by P's Guardian, Conservator or fiduciary acting for P;
  - ✓ Requested by a Representative of Protective Services; or
  - ✓ Requested by Personal Representative or Successor in Interest of P's Estate upon the death of P.
  - ✓ Agent must comply within 30 days

# Creation of POA

- Signed by Principal or by another individual directed by the Principal to sign P's name in P's conscious presence
- Dated
- Witnessed by 2 witnesses
- If acknowledged by notary or commissioner of superior court, POA presumed to be genuine but acknowledgement not required [Section 5]

# POA Effective

- POA executed before 10-1-15 (expect correction to 7-1-16) is valid if complied with the law as it existed at the time of its execution
- If Springing POA becomes effective upon P's incapacity and POA does not authorize person to determine incapacity or person authorized is unable or unwilling to make determination, POA becomes effective based on:
  1. Written determination or record by 2 independent physicians that P is incapacitated pursuant to Sec. 2(5)(a); or
  2. Judge's determination that P is missing, detained (including incarceration) or outside and unable to return to the U.S.

# HIPAA

- Person authorized by P in POA to determine that P is incapacitated may act as P's personal representative pursuant to HIPAA to obtain access to P's health care information and communicate with P's health care providers [Section 9(d)]

# Jurisdiction and Choice of Law

- Meaning and Effect of POA determined by law of jurisdiction indicated in POA, or
- If no indication in POA by law of jurisdiction in which POA was executed (Section 7)

# Acceptance by 3<sup>rd</sup> parties

- Sanctions for unreasonable refusals apply only to acknowledged POA's
- 3<sup>rd</sup> party shall either accept an acknowledged POA or may request within 7 business days:
  1. Agent's certification under penalty of perjury of any factual matter regarding the principal, agent or POA;
  2. English translation of POA if in another language;
  3. Opinion of counsel as to any matter of law regarding the POA if written request provides reason for the request.

# Acceptance by 3<sup>rd</sup> parties

- If 3<sup>rd</sup> party requests additional documentation, 3<sup>rd</sup> party must accept POA within 5 business days after receipt thereof; and
- 3<sup>rd</sup> party may not require an additional or different form of POA for authority granted in the POA presented

# Non-Acceptance of POA Safe Harbors [Section 20]

3<sup>rd</sup> party is NOT required to accept acknowledged POA if:

- 1.P is not eligible or qualified to enter the transaction with 3<sup>rd</sup> party;
- 2.Engaging in transaction with Agent or P would be inconsistent with state or federal law;
- 3.3<sup>rd</sup> party has actual knowledge of the termination of the POA;
- 4.Request for certification, translation or counsel's opinion refused;
- 5.3<sup>rd</sup> party in good faith (means honesty in fact) believes that POA is not valid or that the agent does not have authority to perform the act requested, whether or not a certification, translation, or counsel's opinion has been requested or provided;
- 6.3<sup>rd</sup> party makes or has actual knowledge that another person has made a report to Bureau of Aging, Community and Social Work Services Division of DSS stating a good faith belief that P may be subject to physical or financial abuse, neglect, exploitation or abandonment by Agent or person acting for or with Agent

# 3<sup>rd</sup> Party Protection

- Broad protection for good faith acceptance of any acknowledged POA-actual knowledge standard:

For purposes of section 19 and 20 a 3<sup>rd</sup> party “who conducts activities through an employee is without actual knowledge of a fact relating to:(1) a power of attorney,(2) a principal, or (3) an agent if the employee conducting the activity involving such power of attorney, principal or agent is without actual knowledge of the fact.”

- Safe Harbors [Section 20]
- Limitation of 3<sup>rd</sup> party’s liability for legitimate refusals of **all acknowledged** powers of attorney within the Safe Harbors- NOT limited to refusals of statutory form (majority of enacting jurisdictions adopted this standard)

# Protections of Principal...and many others!

BROAD Standing provision-persons who may petition a court per CGS 45a-175 to construe POA or review Agent's conduct, and grant appropriate relief:

- 1.Principal or Agent;
- 2.Guardian, conservator or other fiduciary acting for Principal;
- 3.Person authorized to make health care decisions for Principal;
- 4.Principal's spouse, parent or descendant;
- 5.Individual who qualifies as presumptive heir;
- 6.Beneficiary of property, benefit or contractual right on P's death or Beneficiary of a trust created by or for P that has a financial interest in P's estate;
- 7.Representative of Protective Services for the Elderly within DSS;
- 8.P's caregiver or another person that demonstrates sufficient interest in P's welfare;
- 9.3<sup>rd</sup> party asked to accept POA. [Section 16]

# Broad Standing Provision

- If P objects, petition under Section 16 **shall** be dismissed, unless the court finds that P is incapacitated
- Can P draft out of this provision?
- If draft out of this provision, what is the effect?

# Protection of Principal

## Agent Liability:

- If Agent violates the act, Agent must reimburse Principal for costs and fees advanced and restore value of Principal's property diminished by violation. [Section 17]
- No liability for decline in value of P's property absent breach of fiduciary duty.
- An Agent with actual knowledge of a breach or an imminent breach by another Agent must notify P.
- If P is incapacitated Agent must take any action reasonably appropriate to safeguard P's best interest. [Section 11]

# Protection of Agent

- Option of exoneration provision lowering standard for Agent's conduct from ordinary negligence to good faith [Section 15]
- If POA relieves Agent for liability for breach of fiduciary duty, it is binding on P and P's successors except if breach committed dishonestly, with improper motive or with reckless indifference to POA's purpose or P's best interest, or was a result of abuse of a confidential or fiduciary relationship with P
- An Agent that does not participate in or conceal another Agent's breach of fiduciary duty (including predecessor) is not liable for other Agent's actions unless POA provides otherwise

# Agent Authority

## General Grant of Authority:

- Grants authority to perform “all acts that the Principal could perform”---includes authority with respect to:
  - real property; tangible personal property; stocks and bonds; commodities and options; banks and other financial institutions; operation of an entity or business; insurance and annuities; estates, trusts, and other beneficial interest; claims and litigation; personal and family maintenance; benefits from governmental programs or civil or military service; retirement plans; and taxes.
- Details on the scope of powers granted as to each subject are contained in Sections 27-39.

# “HOT” Powers

## **Specific Express Grant required to:**

- Create, amend, revoke or terminate an inter vivos trust;
- Make a Gift;
- Create or change beneficiary designation;
- Create or change rights of survivorship;
- Delegate authority granted under POA;
- Waive P’s beneficiary rights of a joint or survivor annuity, including a survivor benefit under a retirement plan;
- Exercise fiduciary powers that P has authority to delegate;
- Disclaim property, including a power of appointment.

[Section 24]

# Default Limitations on Agent's Authority

- **Unless otherwise provided**, limit on Agent's authority to create in the Agent, or in an individual to whom Agent owes a legal obligation of support, an interest in P's property whether by gift, right of survivorship, beneficiary designation, disclaimer or otherwise, **if Agent is not an ancestor, spouse or descendant of P.**
- Example: non-relative agent with gift making authority could not gift to the agent or agent's dependent without express authority in POA.

# Default Limitations on Agent's Authority

**Unless otherwise provided**, Gifting authority is limited to:

1. Annual exclusion Gifts, or if P's spouse agrees to consent to a split gift in an amount not to exceed twice the annual exclusion limit; and
2. Consent to the splitting of a gift made by P's spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.

# Authority Incorporation by Reference

- 2 methods for incorporating by reference:
  1. Refer to the Act's descriptive term for a subject, or
  2. Refer to the Act's section number.
- P may **modify** any authority incorporated by reference
- **Problem:** Act uses the existing CT list of powers in the statutory short form, which do **not** correspond to the powers described in the new UPOAA.

# Appointment of Conservator

- Prior to 7-1-16 Powers of Attorney are ***terminated*** upon the Appointment of a Conservator of the Estate (Voluntary or Involuntary, and Limited or Plenary) CGS 45a-562 & 1-56j
- Effective 7-1-16 Court may, ***continue, limit, suspend, or terminate*** the POA
- If **continued**, Agent is accountable to the COE and P;
- If **suspended**, POA **shall be reinstated** upon termination of COE as a result of P regaining capacity;
- Court has the authority to continue certain provision of the POA, but not others [Section 8]

# Nomination of Conservator

- P may designate a Conservator of Estate or Conservator of Person in POA
- Court shall make appointment of COE and/or COP designated by P unless court finds that the person named is unwilling or unable to serve or there is substantial evidence to disqualify such person [Section 8(a)]

# Portability

- Recognizes the validity of pre-existing POA's executed under the prior law in CT; [Section 6]
- Recognizes POA's validly created under the law of another jurisdiction and military POA's; [Id.]
- Interprets the meaning and effect of a POA created under other law as determined by the law of the jurisdiction indicated in the POA or in the absence of indication of jurisdiction, by the law of the jurisdiction in which the POA was created (Rationale: differing default rules in different jurisdictions.) [Section 7]

# Termination of POA

- P's death;
- P's incapacity if POA **not** durable;
- P revokes POA;
- P revokes Agent's authority or Agent dies, becomes incapacitated, or resigns AND POA does not provide for another agent to act;
- POA provides that it terminates;
- Court terminates POA. [Section 10]

# Termination of Agent's Authority

- P revokes the authority;
- Court terminates Agent's authority pursuant to 8(B);
- Agent dies or resigns;
- Divorce, annulment or legal separation action between P and Agent is filed;
- POA terminates; or
- Agent becomes incapacitated.

Unless POA provides otherwise Agent is deemed incapable as defined in Section 2(5)(a) by:

- I. A judge in a court proceeding;
- II. 2 independent physicians;
- III. A successor agent if a physician's written opinion cannot be obtained due to Agent's refusal to be examined or Agent's failure to execute authorization to release medical information; OR

A judge finds Agent is missing, detained (including incarceration) or outside and unable to return to the U.S.

Section 10

# Agent Resignation

- Unless POA provides for a different method, Agent may resign by giving notice to P
- If P is incapacitated, Agent to give notice to COE, COP and Guardian, if any, and Co-Agent or Successor Agent
- If no COE, COP, Guardian, Co-Agent or Successor Agent, Agent to give notice to P's spouse and children, if any, or person reasonably believed by Agent to have sufficient interest in P's welfare OR representative of Division of Protective Services for the Elderly within DSS. [Section 18]

# Relation to Other Law

- Supplemented by principles of law & equity, including the common law of agency, except where the Act displaces such principles
- Remedies are not exclusive

# Digital Assets Authority

- Act does NOT include any authority over the Principal's digital assets
- Digital assets authority must be included in POA if desired.

# Optional Statutory Forms

## Statutory Form Power of Attorney: [Section 41]

- Contains plain English, educational information and cautionary notices for Principal and Agent;
- Segregates “HOT” powers;
- Many new provisions, such as for designation of successor agents;
- Short Form POA’s executed **BEFORE** effective date will remain valid

## Agent’s Certification: [Section 42]

- Optional
- Facilitates verification by the Agent of factual matters concerning the POA

# Corrections needed

- Change references to “October 1, 2015” contained in Sections 6, 45 and 51
- Change discrepancies between the categories of powers in the Statutory Short Form and categories of powers described in the new UPOAA (for example, new short form refers to “Insurance transactions” while the Act refers to “Insurance and Annuities”, etc.)

A Guided Tour of the  
Connecticut Uniform Power of Attorney Act

**CBA Young Lawyers Section**

Tuesday, March 1, 2016

9:00 to 11:30 am

|                    |                        |
|--------------------|------------------------|
| Hon. Michael Darby | Deborah J. Tedford     |
| Greater Manchester | Tedford Law Firm, P.C. |
| Probate Court      |                        |



# Overview of the CT UPOAA

Connecticut's version is P.A. 15-240, **effective 7/1/16**; but note the internal references in some sections to 10/1/15 (see, e.g., Section 6) which are confusing, to say the least

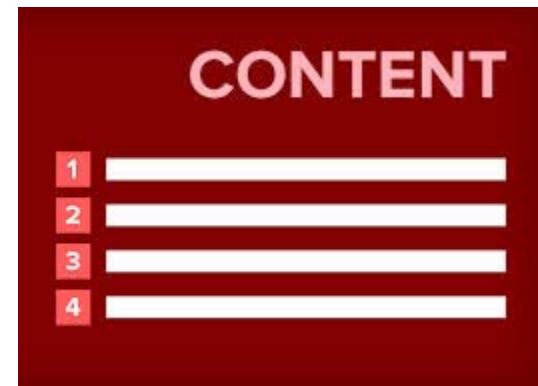
The original uniform act with comments is available at [www.uniformlaws.org](http://www.uniformlaws.org). Act approved by the ULC in 2006

19 Enactments to date: Alabama, Arkansas, Colorado, Connecticut, Hawaii, Idaho, Iowa, Maine, Maryland, Montana, Nebraska, Nevada, New Mexico, Ohio, Pennsylvania, USVI, Virginia, West Virginia, Wisconsin

# Overview of the CT UPOAA (cont'd)

Organization: Four subparts

1. General Provisions
2. Authority
3. Statutory Forms
4. Miscellaneous



Three categories of provisions: default, mandatory and explanatory



## UPOAA is Primarily a Default Statute

- Look for these words which indicate a statutory provision can be overridden and is default law
  - “unless the POA otherwise provides”
  - “except as otherwise provided in the POA”

## Specific Default Provisions

- POA is presumed durable; Section 4



- POA is effective immediately: Section 9(a)



- POA unaffected by lapse of time; Section 10(c)





# Default Provisions: Agents

- Successors have same scope of authority as original agent, may not act until all predecessors are unavailable. Section 11(b)(2)
- Co-agents may NOT exercise authority independently unless the power is several. (default is for *joint* authority). Section 11(a). The uniform act default is several, not joint, authority—UPOAA Sec. 111(a). Unfortunately, the legislature modified the bill we proposed to retain the existing statutory default of joint authority.
- Agents are entitled to reimbursement of expenses and reasonable compensation. Section 12. Spouse-agent's authority terminates upon filing of action for legal separation, dissolution or annulment. Section 10(b)(5)

## Default Provisions: Agents (cont'd)

- Agent accepts appointment by exercising authority or performing duties or by any other conduct indicating acceptance *Section 13*, and resigns by giving notice. *Section 18*



# Mandatory Agent duties-Section 14

- Loyalty and good faith
- Avoid conflicts
- Act with care, competence and diligence
- Keep records
- Cooperate with P's health care agent



# Mandatory Agent duties, Section 14 (cont'd)

- Attempt to preserve P's estate plan if known and preservation is in P's best interest
- Act according to P's reasonable expectations if known, otherwise in P's best interest; also must make all reasonable efforts to ascertain the Principal's expectations
- Act within scope of authority



## Mandatory Provisions, Section 5

Creation of POA: P's signature required

*Notarization is not mandatory*, but presumption of genuineness attaches only to notarized signatures; sanctions for unreasonable refusals apply only to acknowledged POAs



# Mandatory Provisions, Sec. 20

## Acceptance (hooray!)

- Third persons (i.e., financial institutions)
  - Must decide whether to accept *acknowledged* POA or must request additional documentation (agent certification, opinion of counsel, or translation) within 7 business days. Section 20.
  - If additional documentation is requested, must accept POA within 5 business days after receipt unless refusal is based on a statutory safe harbor. Section 20(a)(2).



No  
Monkeying  
Around!



# Explanatory Provisions

- Definitions of particular note (Section 2):
  - Good faith—honesty in fact Section 2(4)
  - Incapacity—the definition stresses the operative consequences of the individual’s impairment—the inability to manage property and business affairs—rather than the impairment itself. There are two subcategories of incapacity: (1) P has an impairment in the ability to receive information and communicate decisions even with technological assistance, and (2) P is missing, detained (*e.g.*, incarcerated), or outside the U.S. and unable to return. Section 2(5)

## Explanatory Provisions (cont'd)

- **Exclusions:** Applies to all POAs except powers coupled with an interest, healthcare powers, proxies or delegations to exercise voting or entity management rights, and powers created on a governmental form for a governmental purpose. Rationale: either the authority for the power emanates from other law or the agent is not intended to act as the P's fiduciary. § 3





# Explanatory Provisions (cont'd)

- Portability
  - Recognizes the validity of pre-existing powers executed under the prior law of the enacting jurisdiction, powers validly created under the law of another jurisdiction, and military powers of attorney. § 6
  - Establishes a means for interpreting the meaning and effect of a POA created under other law (determined by the law of the jurisdiction indicated in the POA or in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the POA was created). Rationale: differing default rules in different jurisdictions. § 7



## Explanatory Provisions (Sec. 21, 23)

- Relation to Other Law
  - Supplemented by principles of law & equity, including the common law of agency, except where the Act displaces such principles
- Remedies are not exclusive

**EXCLUSiVE VS NON-EXCLUSiVE**



## Explanatory Provisions (cont'd)

- Provisions for the Protection of Principal
- Broad standing provision (anyone who demonstrates sufficient interest in Principal's welfare can seek judicial review of the POA or the agent's conduct) § 16
- *Note: There is a corresponding modification to C.G.S. § 45a-175 in § 47(d), to give the same individuals standing in accounting actions.*
  - Third persons can refuse a valid POA if abuse is suspected. § 20(b)(1)
  - If conservator appointed, the court may continue, limit, suspend or terminate the agent's authority. § 8(b) If capacity is later restored, the court may restore the agent's authority, if it was suspended, etc. § 53



## Explanatory Provisions (cont'd)

- Provisions for the Protection of Principal (cont'd)
  - Agent duties—mandatory duty to act in accordance with Principal's expectations if known, otherwise in P's best interest; default duties to cooperate with P's health care agent and to preserve P's estate plan; agent must make all reasonable efforts to ascertain P's expectations. § 14
  - Agent liability: If agent violates act, agent must reimburse Principal for costs and fees advanced and restore value of P's property diminished by violation. § 17

# Explanatory Provisions (cont'd)

- To Protect Agent, Context-specific liability standards

Good faith standard re: preservation of estate plan. Sec. 14(c)

No liability solely because agent also benefits from an action provided that agent acted with care, competence, and diligence for P's best interest. Sec. 14(d).

No liability for decline in value of Principal's property absent breach of fiduciary duty. Sec. 14(f).





## Explanatory Provisions (cont'd)

- Protection of Agent (cont'd)
- No liability for the actions of persons engaged on behalf of P provided A exercises care, competence and diligence in selecting and monitoring persons) § 14

**EXONERATION**



## Explanatory Provisions (cont'd)

- Protection of Agent (cont'd)
  - Guidelines for the commencement and termination of agency relationship. Sections 13, 18
  - Option of exoneration provision lowering standard for agent's conduct from ordinary negligence to good faith § 15



# Explanatory Provisions (cont'd)

- Protection of Third Persons
  - Broad protection for good faith acceptance of any purportedly acknowledged POA (actual knowledge standard; § 19)
  - Clear safe harbors for legitimate refusals (including refusal of a valid POA where abuse is suspected § 20)
  - In § 20, CT selected Alternative A (which the majority of enacting jurisdictions have used), which limits a third party's liability for legitimate refusals of *all* acknowledged powers of attorney within the clear safe harbors (so the § 20 protections are not limited to legitimate refusals of the *statutory* form of POA).

# Authority—Specific and General


- *Segregation of “Hot” Powers; Specific Express Grant Required to:*
  - Create, amend, revoke, or terminate an inter vivos trust 24(a)(1)
  - Make a gift § 24(a)(2)
  - Create or change rights of survivorship § 24(a)(3)
  - Create or change a beneficiary designation § 24(a)(4))
  - Delegate authority granted under the POA § 24(a)(5)



# Authority—Specific and General (cont'd)


- *Segregation of “Hot” Powers*; Specific Express Grant Required to:
  - Waive the P’s right to be a beneficiary of a joint and survivor annuity § 24(a)(6)
  - Exercise fiduciary powers that the P has authority to delegate § 24(a)(7)
  - Disclaim or refuse an interest in property § 24(a)(8)





## Authority—Specific and General (cont'd)

- Section 24(b) contains a default limit on A's authority if A is not an ancestor, spouse or descendant of P.
- Such agents may not use the POA to create in the agent, or someone whom the agent supports, an interest in the P's property, *unless specifically authorized in the POA*. § 24(b). (Good bye, Nefarious Niece!)
- For example, a non-relative agent with gift making authority could not gift to the agent or the agent's dependent without the P's express authority in the POA. 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.



# Authority—Specific and General (cont'd)

- All Other Authority can be delegated by a **General Grant**
  - Grant of authority to perform “all acts that the Principal could perform”—includes authority with respect to: real property; tangible personal property; stocks and bonds; commodities and options; banks and other 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; and taxes. Section 24(c). Details on the scope of powers granted as to each subject are in § § 27-39.

# General Grant

In the flesh.....





# Authority: Incorporation by Reference

- Incorporation by reference. § 25(b) provides 2 methods for incorporating by reference. POA can refer to the Act's *descriptive term* for a subject or to the *section number*. Either incorporates the entire statutory section as if it were set out in full in the power of attorney.
- P may **modify** any authority incorporated by reference. § 25(c)
- § § 27 to 40 describe updated subject areas that can be incorporated by reference (a much needed update!)
- § 26 describes the general authority that automatically accompanies any incorporated power, such as to contract, engage in ADR, hire attorneys, etc.

# Digital Assets Authority

- Act does NOT include any authority over the principal's digital assets. Digital assets authority must be included in a POA if desired.



# Optional Statutory Forms

## **New, *Optional* Statutory Form Power of Attorney § 41**

- Contains plain English, educational information and cautionary notices for P and A
- Segregates “hot” powers
- Flexible enough to permit any delegation contemplated by the Act
- Short Form POAs executed BEFORE act adopted will remain valid
- The bill was amended to include the existing CT list of powers in the Short Form. So, the new Statutory Short Form only includes the new UPOAA powers *in parentheses after the old powers*. For example, the new statutory short form refers to “Insurance transactions (insurance and annuities)” while the Act refers to and delineates the authority over “Insurance and Annuities”. So, it’s not entirely clear what authority the agent has over insurance and annuities—is it the new authority, the old authority, or both? See, e.g., Section 41 (short form) and Section 33 (delineating insurance and annuities authority).

**Agent’s Certification § 42** --Optional; facilitates verification by the agent of factual matters concerning the POA



# What form should we be using?

- Existing forms are fine
- We can't use the new forms until 7/1/16, and before the statute is fixed to align the captions and the powers
- We need to discuss "hot" powers and digital assets authority with our clients, and draft according to their intent.