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Crossing State Lines with Durable Powers

Linda S. Whitton

Valparaiso University School of Law, linda.whitton@valpo.edu

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The durable powers journey began some forty years ago when the National Conference of Commissioners on Uniform State Laws (NCCUSL) proposed the Model Special Power of Attorney for Small Property Interests Act in 1964. Designed to be an inexpensive alternative to guardianship for persons with relatively small estates, this special power of attorney permitted qualified individuals to delegate authority for the care of person and property in advance of incapacity, but it required judicial approval.

Not long after the introduction of the Model Special Power of Attorney, NCCUSL added a durable powers section to the 1969 Uniform Probate Code (UPC). Unlike the Model Special Power of Attorney, the durable powers provision of the UPC did not condition delegation of surrogate decision-making authority upon judicial approval or size of estate. Based on widespread state receptivity to durable powers as an alternative to guardianship, NCCUSL then approved the freestanding Uniform Durable Power of Attorney Act in 1979 (the Uniform Act).

As amended in 1987, the Uniform Act contains only five short sections that define the creation and effect of a durable power of attorney, the relationship of an attorney-in-fact to a later court-appointed fiduciary, the binding effect of agent action taken without actual knowledge of the principal's death, and the sufficiency of an

agent's affidavit as proof of the power's validity. Eventually, all 50 states and the District of Columbia enacted durable power of attorney legislation, 48 of which adopted the Uniform Act or substantially similar provisions.

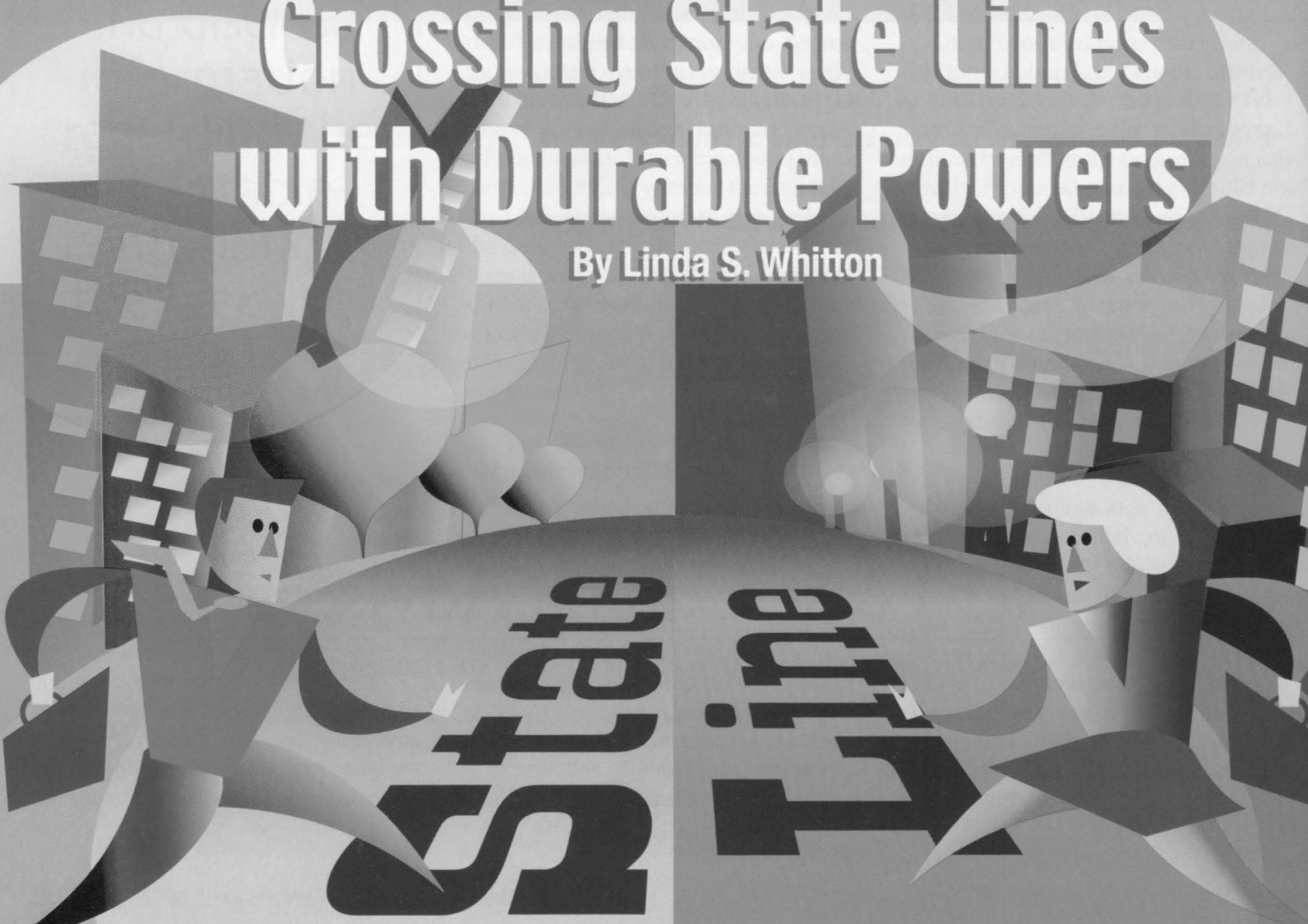
Erosion of Uniformity

Despite initial national uniformity in durable powers legislation, a study last year by the NCCUSL Joint Editorial Board for Uniform Trusts and Estates Acts (JEB) revealed that consistency among states is rapidly eroding. Only 13 states remain "pure" Uniform Act states. Eighteen jurisdictions have retained the Uniform Act's core sections but have added a few provisions to address specific topics, and 20 states (39% of all jurisdictions) have adopted numerous detailed provisions either instead of, or in addition to, the Uniform Act provisions. With the increasing mobility of clients and their geographically diverse property holdings, material differences in state durable power of attorney laws

Linda S. Whitton is a Professor of Law at Valparaiso University School of Law, the reporter for the Drafting Committee to Revise the Uniform Durable Power of Attorney Act, and the supervisory council member for the Probate Division E Group Committees—Elder Law and Disability Planning. This article was produced with grant support from the Erwin A. Jones Faculty Development Endowment.

Crossing State Lines with Durable Powers

By Linda S. Whitton



could pose significant hazards for clients and their attorneys.

Of particular note, the JEB study revealed growing state divergence in the following areas:

- Fiduciary standards of care and remedies for abuse,
- Authority of a later-appointed fiduciary or guardian,
- Activation of springing powers,
- Authority to make gifts,
- Multiple agents, and
- Impact of divorce on spouse-agent's authority.

The following is a brief summary of the differences discovered in each of the foregoing areas.

Fiduciary Standards of Care and Remedies for Abuse

Nineteen states expressly address fiduciary standards of care for agents, but the substance of the statutes varies considerably—from minimal treatment that merely identifies the attorney-in-fact as a fiduciary to those requiring the same level of care as a trustee and specifying a list of duties (for example, maintenance of records, maintenance of estate plan, notices, and accountings). With respect to remedies for breach of the agent's duties, the statutory provisions range from silence to penalties, such as treble damages and attorney fees, and even disinheritance.

Authority of a Later-Appointed Fiduciary or Guardian

The relative authority of an attorney-in-fact versus that of a later court-appointed fiduciary or guardian varies significantly across state lines. Twenty-three states follow the Uniform Act approach that provides that once there is a court-appointed guardian or fiduciary, the attorney-in-fact is accountable to both the fiduciary and the principal. Seventeen jurisdictions provide that the attorney-in-fact is accountable only to the fiduciary, and five terminate the attorney-in-fact's authority upon court appointment of a fiduciary. Four take the opposite approach, providing that the

attorney-in-fact's authority actually supersedes that of a later-appointed fiduciary. Regarding a fiduciary's authority to revoke a durable power of attorney, 34 jurisdictions follow the Uniform Act approach that the fiduciary has the same power the principal would have had to revoke the agent's authority, and six permit revocation only upon a judicial determination of sufficient cause.

Activation of Springing Powers

Nearly all states provide for springing powers. In fact, only four states have no express provision in their statutes for springing powers: Louisiana, Maryland, New Hampshire, and Oregon. What differs among the states is how the trigger is to be specified and whether an affidavit or written declaration must be provided to confirm that the power has "sprung." Some require a physician's affidavit of the principal's incapacity; others permit any designee of the principal, including the agent, to make the

determination. Still other states provide a default process for determination of incapacity if the principal has not specified a designee for that purpose in the power of attorney.

Authority to Make Gifts

One of the most controversial powers that may be conveyed by a durable power of attorney is the authority to make gifts. The Uniform Act does not specifically address the authority of an agent to make gifts, nor do the majority of state statutes. Only 20 jurisdictions include express reference to gift making authority, and all but two of these jurisdictions provide for statutory default limitations on the authority. Although state approaches to gift making authority vary considerably,

in general, states are divided into two divergent groups—one that requires the durable power of attorney to include specific authorization of gift-making authority and the other that implies the authority to make gifts if the agent is given broad authority without specific limitations.

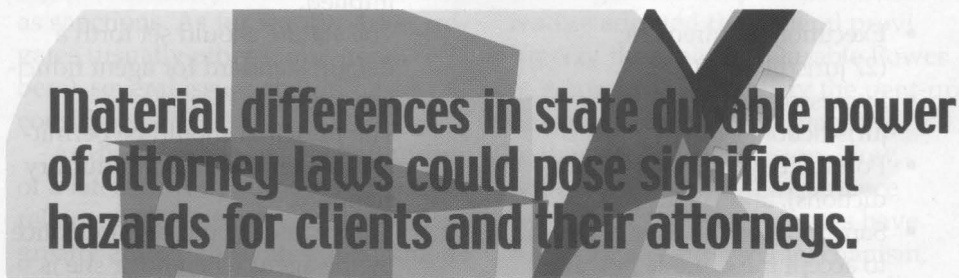
Multiple Agents

One frequently used technique to assure that a durable power of attorney will remain an effective hedge against guardianship is the designation of multiple or successor agents. A principal, once incapacitated, can obviously no longer appoint new or substitute agents. Although appointment of multiple agents may be common, the default rules governing the authority of multiple agents are anything but common. Sixteen jurisdictions specifically address the authority of multiple agents. Two prohibit co-agents; one requires that multiple agents act jointly; nine provide that the instrument can specify joint or

several authority for multiple agents but that in the absence of specification the multiple agents must act jointly; three state that multiple agents may act independently in the absence of specification to the contrary; and one does not provide a default rule but states that the instrument can specify joint or several authority.

Impact of Divorce on a Spouse-Agent's Authority

Among the 12 states that specifically address the impact of divorce on the authority of a spouse-agent (Alabama, California, Colorado, Illinois, Indiana, Minnesota, Missouri, Pennsylvania, Texas, Vermont, Washington, and Wisconsin), all 12 provide for revocation of the spouse-agent's authority



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upon a decree of divorce. Four, however, actually provide for revocation upon the filing of the petition (Alabama, Minnesota, Missouri, and Pennsylvania), and five also revoke authority upon legal separation (Alabama, Colorado, Illinois, Minnesota, and Washington).

Filling in the Gaps

In addition to areas of statutory divergence, the JEB study also identified a

national survey sent to all state bar elder law and probate sections as well as the leadership of the Real Property, Probate and Trust Law Section, the American College of Trust and Estate Counsel, and the National Academy of Elder Law Attorneys. In a group of 371 respondents representing all but seven jurisdictions, there was over 70% consensus on the following topics not currently addressed by the Uniform Act:

- The statute should require a con-

Upon recommendation of the JEB, NCCUSL has appointed a drafting committee to begin a revision process for the Uniform Durable Power of Attorney Act. Although revision of the Act may hold promise for restoring some of the former uniformity among state durable power of attorney statutes, current challenges remain for the lawyer whose client will cross state lines with durable powers.

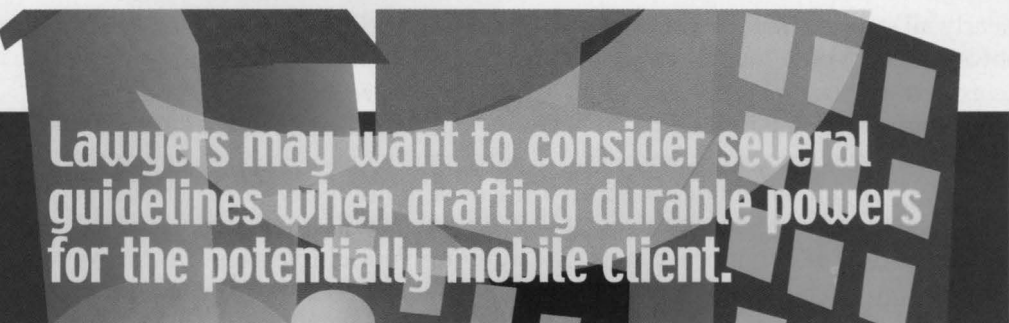
Planning for the Mobile Client

Obviously the best approach for mobile clients is to draft a separate power of attorney document for each state in which the principal anticipates at least temporary residence or the location of property. But the unpredictability of sudden incapacity and the consequences that follow, such as relocation to receive long-term care, may make planning with multiple documents impractical. Given the unanticipated variables that accompany incapacitation and the reluctance of clients to plan for such eventualities, lawyers may want to consider several guidelines when drafting durable powers for the potentially mobile client.

Draft with Specificity—Do Not Rely on Default Provisions

Although specifications with respect to agent authority drafted in one state will not be effective to enlarge upon mandatory statutory restrictions in another, such specificity will overcome differences in default provisions that exist only to supplant what is not covered by express language. While it is unlikely that another state's default provisions could legally expand on the authority granted by the principal in her original state, it is likely that default provisions could constrain such authority. A typical portability provision provides: "A power of attorney will be valid in this State if validly executed under the laws of another state, but shall not be deemed valid to authorize any actions that are in contravention of the laws of this State."

Consider, for example, that in State A multiple agents may act severally unless otherwise specified, and that in



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number of topics left unaddressed by the Uniform Act that states have approached by statute in similar ways. These include:

- Execution requirements (27 jurisdictions),
- Successor agents (16 jurisdictions),
- Portability provisions (12 jurisdictions), and
- Sanctions for third-party refusal to accept the durable power of attorney (eight jurisdictions).

Although only eight jurisdictions have enacted sanctions to deal with third-party refusal to accept an agent's authority, this was identified during the study as an emerging "hot topic." Other hot topics include identifying who should have standing to request judicial review and accounting of the agent's performance and what restrictions should apply to agent authority to change a life insurance, IRA, or qualified plan beneficiary, to create, amend, or revoke a revocable trust, and to claim an elective share or disclaim inheritance.

Finding Consensus

Perhaps most enlightening in the JEB's study process were the results of a

firming affidavit to activate springing powers.

- Gift-making authority should be expressly stated rather than implied.
- The statute should set forth a default standard for agent fiduciary duties.
- The principal should be permitted to alter the default fiduciary standard.
- The statute should require notice by the agent when he or she is no longer willing or able to act.
- The statute should include a remedies or sanctions provision for third-party refusal to honor a durable power of attorney.
- Third-party reliance should be protected by a statutory presumption that the durable power of attorney is valid.
- Divorce, annulment, or the filing of a petition for divorce should revoke a spouse-agent's authority.
- The statute should include a portability provision.
- The statute should include a remedies and sanctions provision for abuse by the agent.
- The statute should include safeguards against abuse by the agent.

State B they must act jointly unless otherwise specified. A principal who relies on the default provisions in State A may have her intent undermined if the document must be used in State B. What if, on the other hand, the power of attorney is drafted in State B with reliance on the default provisions requiring joint action by multiple agents, and now one of the agents seeks to exercise independent authority in State A? Arguably the law in State A should not be permitted to alter the principal's intent as inferred from the default provisions in State B—that multiple agents must act jointly. It is unlikely, however, that third parties in State A would have the sophistication to question the right of one of the multiple agents to act independently when no restrictions appear on the face of the document and independent authority of multiple agents is the state's default practice. Such disparities in state default positions could play a significant role in family power plays for control over an incapacitated principal.

Avoiding the inadvertent limitations of another state's default provisions could also be essential in carrying out the principal's intentions for estate planning or qualification for public benefits. For these purposes, it is especially critical that the power to make gifts, and to deal with the principal's trusts, pension plans, and insurance policies, be expressly articulated.

State Clear Triggers for Springing Powers

The use of springing powers, although disfavored by some lawyers, is widespread. Twenty-three percent of the respondents to the JEB survey indicated that there was a client preference for springing powers, 61% reported a preference for immediate powers, and 16% saw no trend. Eighty-nine percent of the attorneys questioned believed that states should authorize springing powers by statute, but 74% also indicated that the statute should require a confirming affidavit to activate the power.

Given the current differences that exist in state default provisions for the activation of springing powers, lawyers should recommend that the power of attorney contain clear triggers. Attention must be paid both to *who* will make the determination of incapacitation and upon *what* basis. Such specificity not only will overcome nonmandatory default provisions in another state but also will help to provide assurance to third parties who are sometimes skeptical about accepting an agent's authority under a springing power.

Anticipate Challenges to Agent Authority

Challenges to agent authority typically come from two sources—third parties who must transact with the agent, and other want-to-be surrogates for the incapacitated principal. Drafting with greater specificity concerning potentially controversial powers is perhaps the only means to enhance acceptance by third parties short of statutory consequences such as sanctions. As for want-to-be surrogates (usually other family members), several issues should be considered.

As discussed above, the authority of a later court-appointed fiduciary relative to the attorney-in-fact varies greatly among the states. A common end-run tactic by feuding family members is to relocate the incapacitated relative and then seek guardianship in the new jurisdiction. In anticipation of challenges to an agent's authority once the principal is incapacitated, the drafting attorney should make certain that the scope of granted authority is both broad and explicit enough to cover all of the principal's needs. Likewise, the plan for multiple or successor agents must be sufficient to preclude the necessity of a guardian appointment. The principal should also consider making a guardian nomination within the power of attorney to bolster evidence of the principal's choice of surrogate should there be a later challenge.

If challenge to the agent's authority is likely, the lawyer may also want

to consider replacing default provisions regarding fiduciary duties with express instructions concerning the agent's expected standard of care. When the typical default provision might require a "trustee" type level of due care, the principal may want to reduce the standard to "good faith" to discourage suits by disgruntled family members. Although this reduced standard may not be controlling in a jurisdiction that mandates a higher level, it may still serve as evidence of the principal's intentions for his choice of agent. Of course, dissuading potential challenges by want-to-be surrogates has to be balanced against the potential loss of protection to the principal by virtue of the reduced fiduciary standard.

Durable Powers and State Law Uniformity

When NCCUSL first introduced the concept of durable powers, a growing need for an inexpensive alternative to guardianship existed. States readily adopted the general provisions of the Uniform Durable Power of Attorney Act to satisfy the pent-up demand for incapacity planning without court supervision. Now, with over 30 years of experience using durable powers, states have begun to fine-tune the mechanism, resulting in growing statutory divergence. Differences among states may pose increasing challenges to lawyers with mobile clients. Short of a return to statutory uniformity, perhaps the best advice at present for the drafting lawyer is the old adage: "Look both ways" before crossing state lines with durable powers. ■

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