ACTEC Law Journal

Volume 43 | Number 2 Article 3

12-1-2018

Powers of Attorney under the Uniform Power of Attorney Act Including Reference to Virginia Law

F. Philip Manns Jr.

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/acteclj

Part of the Estates and Trusts Commons, Taxation-Federal Estate and Gift Commons, and the Tax Law Commons

Recommended Citation
Manns, F. Philip Jr. (2018) "Powers of Attorney under the Uniform Power of Attorney Act Including Reference to Virginia Law," *ACTEC Law Journal*: Vol. 43: No. 2, Article 3.
Available at: https://scholarlycommons.law.hofstra.edu/acteclj/vol43/iss2/3

This Article is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in ACTEC Law Journal by an authorized editor of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

ARTICLES

Powers of Attorney under the Uniform Power of Attorney Act Including Reference to Virginia Law

*F. Philip Manns, Jr.**

Abstract

The Uniform Power of Attorney Act (UPOAA), approved in 2006, slightly amended in 2008 and more significantly amended in 2016, has been adopted by 27 U.S. jurisdictions. The UPOAA promotes uniformity in language delineating an agent's powers and mandates that third parties accept notarized powers of attorney. Under the UPOAA, an instrument simply granting an agent authority to do "all acts that a principal could do," vests that agent with broad powers: the precise delineation of those powers is produced by about a dozen pages of UPOAA text automatically incorporated by reference into such "all acts" instruments. However, the UPOAA expressly excludes from such "all acts" agents nine powers, six of which relate to acts that could dissipate the principal's property, two of which relate to delegation of authority, and the ninth of which relates to the "content of electronic communications." Those nine, so-called "hot" powers, are granted to an agent only when the instrument "expressly grants" them.

Five problematic areas exist within the UPOAA: (1) internal conflict within the UPOAA after its 2016 amendments regarding agent access to the content of the principal's electronic communications; (2) a failure automatically to grant incidental powers to any hot powers expressly granted; (3) a missing modifier in the section concerning an agent's authority to make gifts; (4) a missing good faith requirement in the agent certification rule; and (5) overlap among the ostensibly distinct hot powers.

Virginia's adoption of the UPOAA included about two-dozen changes to the uniform text, nine of which are particularly important: (1) the cold gifting power; (2) the gutting of the primary consumer protection of the UPOAA; (3) the reversal of the forged signature rule; (4) the negation of provisions conditioning effectiveness upon delivery of the instrument to

* Professor of Law, Liberty University School of Law. Thanks to students in my Wills, Trusts & Estates classes at Liberty University School of Law and at California Western School of Law who endured my discursions into agency law.

the agent; (5) the expanded agent disclosure rule; (6) the agent's creation and amendment of trusts; (7) the rule of presumed non-ademption; (8) the legally irrelevant failure to adopt the UPOAA Statutory Form Power of Attorney*; and (9) the curious change to the definition of "incapacity." Some of those changes are inexplicable; others are misguided.*

Regarding agency law doctrines not particularly addressed by the UPOAA, but obviously affected by it, the UPOAA reverses the century-old Virginia rule of strict construction for powers of attorney, and that will expose irreconcilable conflicts between (1) two Virginia Supreme Court cases stating opposite rules regarding the evidentiary presumption placed upon self-dealing agents, and (2) two Virginia Supreme Court cases reaching opposite conclusions on nearly identical facts for agents who made gifts to themselves of the principal's property. Thus, courts soon will confront the consequences of the UPOAA and its effect upon various aspects of agency law.

Table of Contents

Introduction 153
I. Summary of the UPOAA 158
A. Overview of the UPOAA Menu Approach to Agent Power 158
1. The Thirteen-Subject Cold Power Special 158
2. The Hot Powers 160
3. The Incidental Powers Side Dish 161
4. Summary of the Expansive Default Agent Powers Under the UPOAA Menu Approach 161
5. The Hire-the-Chef Option 163
II. Problematic Areas of the UPOAA 163
A. Conflict with RUFADAA 163
B. UPOAA Gifting Amount Issue 169
1. Gifting Power: Cold, Hot, and Boiling Hot 169
2. The Missing Modifier and the Lurking Single Limit Under the UPOAA Gifting Power 173
C. UPOAA Fails to Grant Incidental Powers to Hot Powers 174
D. Good Faith Missing from UPOAA Agent Certification Rule 176
E. Overlap Within the Hot Powers of the UPOAA 177
F. Successor Agents Under the UPOAA 180
G. Agent Compensation Under the UPOAA 180
H. UPOAA Not Applicable to Principals Who Are Not Individuals 181

III. Some Significant Non-Uniform Aspects of the VaUPOAA 181
A. Boiling-Hot Gifting Powers 182
1. Gifting Power: Cold, Hot, and Boiling Hot 182
2. Drafting the Boiling-Hot Gifting Power 183
B. Gutting the Primary Consumer Protections of the UPOAA 184
1. Permitting Boilerplate to Eliminate Statutory Liability of Persons Asked to Accept Powers of Attorney 185
2. Flip-Flopping Who Pays for Opinions of Counsel and Who Chooses Counsel 187
C. Forgery Rule Diminishes Relative Attractiveness of Powers of Attorney 189
1. Powers of Attorney Compared to Guardianships . 193
2. Powers of Attorney Compared to Trusts 193
D. Negating Effectiveness Conditioned on Delivery 194
E. Agent Disclosure Rule 195
F. Agent's Creating and Amending of Trusts 197
G. Rule of Presumed Nonademption 198
H. Inconsequential Removal of the Statutory Form Power of Attorney 199
I. Change to the Definition of Incapacity 201
IV. The UPOAA's Effect on Agency Law Doctrines ... 202
A. UPOAA Strengthens the Rule of Strict Construction for Hot Powers 203
B. As the UPOAA Abrogates Strict Construction for Cold Powers, Questions of Power Yield to Questions of Duty 207
1. Does *Parfitt* Change the Burden of Proof to a Burden of Production? 211
2. Comparing Burdens of Proof (Persuasion) and Production (Going Forward) 216
C. Cold Power Cases like *Ott* After the VaUPOAA 218
D. Gift Cases like *Mountjoy* After the UPOAA 221
Conclusion 228

Introduction

While the legal doctrine of agency is ancient, the durable agent is not. Until about sixty years ago, an agent's authority automatically terminated upon the incapacity of the agent's principal, making agency arrangements ineffective mechanisms to manage the property of incapacitated principals. Because the default mechanism for managing

the property of incapacitated principals—guardianship proceedings—was expensive, lawyers sought to create so-called "durable" powers of attorney that would survive the principal's incapacity and thereby serve as an inexpensive, non-judicial alternative to guardianship proceedings. Virginia led the way by enacting in 1954 the prototypical statute for durable powers of attorney.[1]

By 1979 a Uniform Durable Power of Attorney Act had been approved,[2] and it subsequently was enacted in nearly all states. However, states continued to enact non-uniform provisions to deal with matters upon which the 1979 act was silent.[3] The Uniform Power of Attorney Act (UPOAA), adopted in 2006, very slightly amended in 2008,[4] but more significantly amended in 2016,[5] replaces the 1979 act, and applies to all agents named in "writings or other records" by all principals who

---

1 Act of Apr. 5, 1954, ch. 486, 1954 Va. Acts 581-82 ("Whenever any power of attorney . . . shall contain . . . words showing the intent of the principal that such power or authority shall not terminate upon his disability, then all power and authority . . . shall continue . . . notwithstanding any subsequent disability."); *see* Karen E. Boxx, *The Evolution of the Power of Attorney*, 37-15 U. Miami Heckerling Inst. on Est. Plan. ¶ 1501.1 (2010).

2 Unif. Durable Power of Attorney Act (1979) (Unif. Law Comm'n, amended 1987).

3 Unif. Power of Attorney Act prefatory n., at 1 (2006) (Unif. Law Comm'n, amended 2016). ("Despite initial uniformity, the review found that a majority of states had enacted non-uniform provisions to deal with specific matters upon which the Original Act is silent. The topics about which there was increasing divergence included: 1) the authority of multiple agents; 2) the authority of a later-appointed fiduciary or guardian; 3) the impact of dissolution or annulment of the principal's marriage to the agent; 4) activation of contingent powers; 5) the authority to make gifts; and 6) standards for agent conduct and liability. Other topics about which states had legislated, although not necessarily in a divergent manner, included: successor agents, execution requirements, portability, sanctions for dishonor of a power of attorney, and restrictions on authority that has the potential to dissipate a principal's property or alter a principal's estate plan.").

4 *Id.* § 211(a), (b)(1)-(2), (b)(8). In section 211(a), the defined term "estates, trusts, and other beneficial interests" was changed to "estate, trust, or other beneficial interest." In subsections 211(b)(1), (b)(2), and (b)(8), the term "the fund" was replaced with "an estate, trust, or other beneficial interest." *See* Amend. to Unif. Power of Attorney Act (Unif. Law Comm'n 2008), http://www.uniformlaws.org/shared/docs/power%20of%20attorney/upoaa_amendment_may08.pdf.

5 Unif. Power of Attorney Act § 201(a)(8). In 2016, the following was added as a hot power, "exercise authority over the content of electronic communications, as defined in 18 U.S.C. Section 2510(12) [as amended] sent or received by the principal," as section 201(a)(8); and then-existing subjection (a)(8), the power to disclaim, was re-numbered as subsection (a)(9). Such was intended to conform with section 9 of the Revised Uniform Fiduciary Access to Digital Assets Act. *Id.* § 201 cmt. Hist. n. As well, the statutory form power of attorney in section 301 was amended to include a check box for the hot power "Access the content of electronic communications."

are individuals.[6] But while the UPOAA addresses more agency law than the original act, the UPOAA does not occupy the field, and expressly continues all common law principles not displaced by specific provisions of the act.[7] Widespread use of durable powers of attorney occurs in every jurisdiction in the United States, not only for incapacity planning, but also for convenience when a principal retains capacity.[8] Consequently, desires persist both for durable powers and for predictable legal rules governing them. To date, the UPOAA has been enacted in twenty-seven U.S. jurisdictions.[9]

In the first section of this article, I summarize the UPOAA and its menu approach to agent powers. In the second section, I analyze five problematic areas of the UPOAA. Included are discussions of (1) the creation, by a 2016 amendment, of an ostensible new hot power for "exercis[ing] authority over the content of electronic communications,"[10] although such power has been, and continues to be, included in the incidental powers list; (2) a failure automatically to grant incidental powers to any hot powers[11] expressly granted; (3) a missing modifier in the section concerning an agent's authority to make gifts; (4) a missing good

---

[6] *Id.* § 102(7) (defining "power of attorney" to mean "a writing or other record that grants authority to an agent to act in the place of the principal"), § 102(9) (defining "principal" to mean "an individual who grants authority to an agent in a power of attorney"). The UPOAA excepts from its scope four types of powers of attorney: powers coupled with an interest; health care powers; voting rights proxies; and powers under government forms. § 103.

[7] *Id.* § 121 cmt., *construed in* James Cox, III, *Virginia's Adoption of the Uniform Power of Attorney Act*, 2011 Emerging Issues 5881 (LexisNexis), Sept. 6, 2011, at 1.

[8] Unif. Power of Attorney Act art. 1, general cmt. (Unif. Law Comm'n 2016).

[9] The UPOAA Table of Jurisdictions in the *Uniform Laws Annotated* lists twenty-two enacting jurisdictions: Alabama, Arkansas, Colorado, Connecticut, Hawaii, Idaho, Iowa, Maine, Maryland, Montana, Nebraska, Nevada, New Mexico, Ohio, Pennsylvania, South Carolina, Utah, Virgin Islands, Virginia, Washington, West Virginia, and Wisconsin. Unif. Power of Attorney Act, 8B U.L.A. 14 (Supp. 2017). The website of the Uniform Law Commission adds North Carolina, New Hampshire, and Texas but omits the Virgin Islands. *Acts: Power of Attorney*, Unif. Law Comm'n, http://www.uniformlaws.org/Act.aspx?title=Power%20of%20Attorney (last visited Dec. 10, 2017). Florida should be included as well. *See* Fla. Stat. § 709.2101 (2017); Rebecca C. Bell, *Florida's Adoption of the Uniform Power of Attorney Act: Is It Sufficient to Protect Florida's Vulnerable Adults?*, 24 St. Thomas L. Rev. 32, 34 (2012). So should Georgia, 2017 Ga. Laws 435.

[10] Unif. Power of Attorney Act § 201(a)(8).

[11] The term "hot power" refers to powers requiring express, specific grant in the power of attorney instrument. *See infra* note 19 and accompanying text. Accordingly, I will use "hot power" in that sense and use the term "cold power" to describe those powers not requiring express grant, but instead being subject to grant by either (1) a statement of "power to do all acts that a principal could do," or (2) reference to one or more "descriptive terms" for each of 13 UPOAA sections. I also will use the term "boiling-hot power" to refer to certain powers to make gifts. *See infra* note 91 and accompanying text.

faith requirement in the agent certification rule; and (5) overlap among the ostensibly distinct hot powers.

In the third section, I examine Virginia's adoption of the UPOAA[12] and discuss[13] nine particularly important non-uniform aspects of the VaUPOAA. Included are discussions of (1) the cold gifting power; (2) the gutting of the primary consumer protection of the UPOAA; (3) the reversal of the forged signature rule; (4) the negation of provisions conditioning effectiveness upon delivery of the instrument to the agent; (5) the expanded agent disclosure rule; (6) the agent's creation and amendment of trusts; (7) the rule of presumed non-ademption; (8) the legally irrelevant failure to adopt the UPOAA *Statutory Form Power of Attorney*; and (9) the curious change to the definition of "incapacity."

In the fourth section, I analyze the UPOAA's consequences to two important aspects of the common law of agency. First, the UPOAA will cause the operative language of powers of attorney to become more uniform, and that uniform language will cloak agents with broad authority in all subjects except those nine subjects identified as hot powers. Ex-

---

[12] In 2010, Virginia firmly enacted its version of the Uniform Power of Attorney Act. Act of Apr. 11, 2010, ch. 455, 2010 Va. Acts 816-33; Act of Apr. 11, 2010, ch. 632, 2010 Va. Acts 1128-44. It is not clear why two identical bills were passed by the General Assembly and signed by the Governor. Chapters 455 and 632 are identical in operative part, except that chapter 632 contains a comma after "Sunday" in section 26-71.20(D), *see* 2010 Va. Acts at 1134, but chapter 455 does not, *see* 2010 Va. Acts at 822. The Code of Virginia presently includes the comma, *see* VA. CODE ANN. § 64.2-1618(D) (2017), but at one time did not, *see* VA. CODE ANN. § 26-91(D) (Repl. Vol. 2011). In 2009, Virginia had enacted a less firm version, which never became effective, because that version provided that "the provisions of this [2009] Act shall not become effective unless reenacted by the 2010 Session of the General Assembly." Act of Apr. 8, 2009, ch. 830, § 3, 2009 Va. Acts 2653 (not codified in the Code of Virginia). The 2010 session of the General Assembly did not reenact the 2009 Act. Rather, the 2010 session of the General Assembly passed chapters 455 and 632, and those chapters, with the Governor's assent, became firmly effective as the Virginia Uniform Power of Attorney Act (VaUPOAA) on July 1, 2010. In 2012, Virginia re-codified its laws pertaining to wills, trusts, and fiduciaries, creating a new title numbered 64.2, and included its codification of the UPOAA in sections 64.2-1600 to 64.2-1642. 2012 Va. Acts ch. 614.

[13] Andrew Hook and Lisa Johnson wrote a detailed analysis of the 2009 Virginia Act in the *University of Richmond Law Review*. They recommended "that the General Assembly re-enact the [2009 Virginia version of the] UPOAA in the 2010 Session with the amendments suggested in this article." Andrew H. Hook & Lisa V. Johnson, *The Virginia Uniform Power of Attorney Act*, 44 U. RICH. L. REV. 107, 108 (2009). The General Assembly accepted virtually all the changes suggested by Hook and Johnson, and made a few other changes to the 2009 Act as well. Mr. Hook and Ms. Johnson also briefly synopsized the VaUPOAA in Professor J. Rodney Johnson's 2010 annual review of Wills, Trusts, and Estates. J. Rodney Johnson, *Wills, Trusts, and Estates*, 45 U. RICH. L. REV. 403, 403-04 (2010) ("The present writer is indebted to Mr. Hook and Ms. Johnson, the authors of the 2009 article, for contributing the following text to explain these 2010 changes in the context of their original 2009 article.").

press grant of broad agent power within the so-called cold-powers will diminish the relevance of the rule of strict construction for powers of attorney, under which courts strictly construe express powers and thinly imply other powers.[14] As the rule of strict construction retreats, fiduciary duty will advance as the mechanism for reviewing agent conduct. A particularly relevant aspect of the fiduciary duty of agents is the shifting of an evidentiary burden to the agent when she engages in transactions with her principal in which the agent receives considerable personal benefit. Second, the UPOAA uniquely addresses the agent's power to make gifts, which will make particularly important the definition of "gift" within the instrument or the UPOAA's default provisions.

To consider the UPOAA's consequences to those two important aspects of the common law of agency, the law of the Commonwealth of Virginia will be examined. In Virginia, prior to an aberrational 2009 decision of the Virginia Supreme Court,[15] Virginia law consistently had placed upon a self-dealing agent the burden to prove the absence of undue influence by clear and convincing evidence; yet that 2009 decision, which failed to discuss the competing line of cases, may have changed the self-dealing agent's evidentiary burden to one merely of production. In addition, recent Virginia Supreme Court decisions also muddle the common law of agency regarding gifts made by agents to themselves of the principal's property. In one case in 2008, the Virginia Supreme Court concluded that because the agent both transferred and received *some* consideration in a property exchange with her principal, she had not made a gift, which the power of attorney instrument flatly prohibited, but instead had engaged in a permitted exchange.[16] Soon thereafter, in a nearly identical case in 2010, the Virginia Supreme Court held that the agent had not transferred *any* consideration in a property exchange with her principal; therefore, the agent had made a gift, which the instrument had not authorized.[17] In neither case did the court analyze the situations as self-dealing transactions to which an evidentiary presumption should attach. Instead, the simple issue of "gift or not" carried the day, yet the two cases drew opposite conclusions on near identical facts. In a more recent case in which an agent altered the post-death rights in the principal's trust in her favor, the Virginia Supreme Court

---

14 *See* JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 449 (8th ed. 2009) (citing Jones v. Brandt, 645 S.E.2d 312 (Va. 2007)).

15 *See* Parfitt v. Parfitt, 672 S.E.2d 827 (Va. 2009). *See infra* Section IV.B.1.

16 *See* Ott v. L & J Holdings, LLC, 654 S.E.2d 902 (Va. 2008). *See infra* Section IV.C.

17 Smith v. Mountjoy, 694 S.E.2d 598 (Va. 2010). *See infra* Section IV.D.

did not even mention evidentiary presumptions when it summarily concluded that the agent acted in the principal's "best interests."[18]

The UPOAA will increase the prevalence of situations involving the evidentiary presumption applying to self-dealing agents and of situations involving the definition of "gift" for transfers between agent and principal. The Virginia cases demonstrate that the desire for predictable rules for agent authority has not been achieved.

I. Summary of the UPOAA

A. Overview of the UPOAA Menu Approach to Agent Power

The UPOAA creates a menu of agent powers for selection by the principal as she prepares her power of attorney. The menu includes (1) a thirteen-subject cold power special; (2) nine hot powers,[19] available only à la carte; (3) a side dish of incidental powers accompanying all the cold powers, but only one of the hot powers;[20] and (4) a hire-the-chef option for custom combinations of powers.[21]

1. *The Thirteen-Subject Cold Power Special*

Under the UPOAA, if a power of attorney simply grants an agent authority to do "all acts that a principal could do," the agent has authority to act for the principal in thirteen named subjects,[22] the so-called cold powers: (1) real property; (2) tangible personal property; (3) stocks and bonds; (4) commodities and options; (5) banks and other financial institutions; (6) operation of entity or business; (7) insurance and annuities; (8) estates, trusts, and other beneficial interests; (9) claims and litigation; (10) personal and family maintenance; (11) benefits from

[18] Reineck v. Lemen, 792 S.E.2d 269, 273 (Va. 2016). *See infra* notes 313-22 and accompanying text.

[19] Section 201 of the UPOAA lists eight types of powers that require express, specific grant in the power of attorney. Unif. Power of Attorney Act § 201(a)(1)-(8) (Unif. Law Comm'n 2016). "Referred to informally as the 'hot powers' by the Drafting Committee, these powers were selected for special treatment because of their potential for dissipating the principal's property and altering the principal's estate plan." Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance Between Autonomy and Protection*, 1 Phoenix L. Rev. 343, 348 (2008). Professor Whitton served as Reporter for the Uniform Power of Attorney Act. *Id.* at 344.

[20] *See* Unif. Power of Attorney Act § 203(1)-(10) (listing ten incidental powers, including authority to "do any lawful act with respect to the subject and all property related to the subject").

[21] A custom combination inheres in any scheme of default rules. *See id.* § 203(10).

[22] *Id.* § 201(c) ("[I]f a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in Sections 204 through 216.").

governmental programs or civil or military service; (12) retirement plans; and (13) taxes.[23] Each cold power has its own definitional section within the UPOAA, and each such section exhaustively lists subject-specific powers for the particular cold power.[24]

Virginia adopted the UPOAA's cold power provisions with three exceptions. First, the power to disclaim is a cold power in Virginia, because it is included with the cold power relating to "estates, trusts, and other beneficial interests."[25] Second, Virginia included a limited power to make gifts within the cold powers. Under the VaUPOAA, but not the UPOAA, "if a power of attorney grants to an agent authority to do all acts that a principal could do,"[26] the agent has authority to continue the "principal's personal history of making or joining in the making of lifetime gifts."[27] That VaUPOAA provision restates a rule previously codi-

---

[23] *Id.* §§ 204-216.

[24] For instance, the power regarding "stocks and bonds" provides "[u]nless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to stocks and bonds authorizes the agent to: 1. Buy, sell, and exchange stocks and bonds; 2. Establish, continue, modify, or terminate an account with respect to stocks and bonds; 3. Pledge stocks and bonds as security to borrow, pay, renew, or extend the time of payment of a debt of the principal; 4. Receive certificates and other evidences of ownership with respect to stocks and bonds; and 5. Exercise voting rights with respect to stocks and bonds in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote." *Id.* § 206.

[25] VA. CODE ANN. § 64.2-1632(B)(8) (2017). The UPOAA uses bracketed language within both the statutory text and the Legislative Notes to identify choices for an enacting legislature. *See* UNIF. POWER OF ATTORNEY ACT § 106 legislative n. (UNIF. LAW COMM'N 2016). Of course, an enacting legislature completely is free to alter a uniform act in any manner, yet bracketed language signals choices expressly contemplated by a Uniform Act's drafters. UPOAA section 201, the hot powers section, includes in bracketed language the power to "disclaim property, including a power of appointment." *See* UNIF. POWER OF ATTORNEY ACT § 201(a)(8). The Legislative Note to Section 201 reminds legislatures that section 5(b) of the Uniform Disclaimer of Property Interests Act generally permits a fiduciary to disclaim any interest in property. In 2003, Virginia enacted the Uniform Disclaimer of Property Interests Act and included section 5(b). *See* VA. CODE ANN. § 64.2-2603(B). Virginia conformed the VaUPOAA with section 64.2-2603(B) by treating the power to disclaim as a cold power. *Compare* VA. CODE ANN. § 64.2-1632(B)(8) (including power to disclaim in cold power relating to "estates, trusts, and other beneficial interests"), *with* VA. CODE ANN. 64.2-1622(A) ("disclaim property" not included in the hot powers list).

[26] VA. CODE ANN. § 64.2-1622(C).

[27] VA. CODE ANN. § 64.2-1622(H) (2017) ("[T]he agent shall have the authority to make gifts in any amount of any of the principal's property to any individuals or to organizations described in §§ 170(c) and 2522(a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both, in accordance with the principal's personal history of making or joining in the making of lifetime gifts."). That subsection also provides, "This subsection shall not in any way impair the right or power of any principal, by express words in the power of attorney, to authorize, or limit the authority of, an agent to make gifts of the principal's property."

fied in section 11-9.5 of the Code of Virginia.[28] Third, Virginia expressly includes in its "all-acts" agent provisions a cross-reference[29] to the section of the Revised Uniform Fiduciary Access to Digital Assets Act that applies to "an agent with specific authority over digital assets or general authority to act on behalf of a principal."[30] That cold power over electronic communications permits the agent to receive only "a *catalogue* of electronic communications sent or received by the principal and digital assets, other than the *content* of electronic communications."[31] Consistent with the 2016 amendments to the UPOAA, in 2017 Virginia added "authority over the content of an electronic communication of the principal"[32] to the list of hot powers.

2. *The Hot Powers*

The UPOAA contains a list of nine powers that the agent "may do . . . on behalf of the principal or with the principal's property only if the power of attorney *expressly grants* the agent the authority."[33] Commonly called hot powers, they include powers to (1) create, amend, revoke, or terminate an inter vivos trust; (2) make a gift; (3) create or change rights of survivorship; (4) create or change a beneficiary designation; (5) delegate authority granted under the power of attorney; (6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; (7) exercise fiduciary powers that the principal has authority to delegate; (8) exercise authority over the content of electronic communications sent or received by the principal; and (9) disclaim property, including a power of appointment.[34]

Hot powers 8 and 9 are bracketed in the UPOAA. Bracketed language in uniform acts presents enacting legislatures with alternatives for particular matters.[35] With respect to hot power 9, agent power to disclaim property that would transfer to the principal absent a disclaimer,

---

28 VA. CODE ANN. § 11-9.5 (Cum. Supp. 2009) (that provision sometimes is referred to as the anti-*Casey* rule); Hook & Johnson, *supra* note 13, at 125.

29 VA. CODE ANN. § 64.2-1622(C) (including a cross reference to VA. CODE ANN. § 64.2-124 (2017)).

30 REVISED UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 10(2) (UNIF. LAW COMM'N 2015) [hereinafter RUFADAA].

31 *Id.*

32 VA. CODE ANN. § 64.2-1622(A)(8).

33 UNIF. POWER OF ATTORNEY ACT § 201(a) (UNIF. LAW COMM'N 2016) (emphasis added).

34 *Id*. § 201(a)(1)-(9).

35 *See, e.g.*, *id.* § 201 legislative n. Obviously enacting legislatures can and often do alter uniform acts when enacting legislation. Yet, bracketed language invites alternatives and its consequent non-uniformity.

the legislative note describes a choice between having that power as a hot one or as a cold one under either or both of UPOAA section 211(b)(8) and section 5(b) of the Uniform Disclaimer of Property Interests Act.[36] With respect to hot power 8, authority over the content of electronic communications, the apparent choice under the UPOAA is between including it as a hot power and not including it at all. Virginia, in its enactments following the 2016 amendments to the UPOAA, included by cross-reference to its enactment of the Revised Uniform Fiduciary Access to Digital Assets Act, a cold power for "all-acts" agents to access to a "catalogue of electronic communications sent or received by the principal." The addition of authority over the content of electronic communications as a hot power was added in 2016 to conform with the Revised Uniform Fiduciary Access to Digital Assets Act.[37] On this matter, the RUFADAA and the UPOAA do not dovetail seamlessly, a matter taken up in section II.A, *infra*.

3. *The Incidental Powers Side Dish*

The UPOAA provides a side dish of incidental powers to accompany every cold power "unless this incidental authority is modified in the power of attorney."[38] Ten incidental powers are listed including, most broadly, authority to "[d]o any lawful act with respect to the subject and all property related to the subject."[39] Oddly, the incidental powers do not accompany any granted hot powers (except the power to make gifts).[40] Obviously the instrument can, and probably should, change that.[41]

4. *Summary of the Expansive Default Agent Powers Under the UPOAA Menu Approach*

A one-sentence instrument stating simply, "Paul Principal grants Amy Agent authority to do all acts that Paul Principal could do," vests the agent with the thirteen cold powers and with the incidental powers for each cold power. That one sentence generates, through incorporation by reference of the subject-specific powers and the incidental pow-

---

36 *Id.*

37 *Id.* § 201 hist. n.

38 *Id.* § 203 cmt.; VA. CODE ANN. § 64.2-1624 (2017) (adopting UPOAA § 203 verbatim). Note that the VaUPOAA did not incorporate the UPOAA comments into the Code of Virginia, but section 64.2-1640 does provide that "consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it."

39 VA. CODE ANN. § 64.2-1624 (incidental powers list).

40 *See infra* Section II.C.

41 *Id.*

ers list, an instrument of about fourteen pages,[42] and is a profound change from pre-existing Virginia law. Under pre-VaUPOAA law, and its so-called strict construction doctrine, a one sentence instrument stating simply, "principal grants agent authority to do all acts the principal could do," may have granted no authority to the agent, because no authority *expressly* is stated.[43]

If one adds "including the power to make gifts" to the one-sentence instrument, the agent then possesses both a particularized gifting power and the incidental powers with respect to the power to make gifts. Add one or more of the following eight phrases (1) "create, amend, revoke, or terminate an inter vivos trust;" (2) "create or change rights of survivorship;" (3) "create or change a beneficiary designation;" (4) "delegate authority granted under the power of attorney;" (5) "waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;" (6) "exercise fiduciary powers that the principal has authority to delegate," (7) "exercise authority over the content of electronic communications," or (8) disclaim property, and the agent broadly has such powers; however, the incidental powers list would *not* apply to any hot powers granted to the agent.[44]

Indeed, this menu, or initial-the-box, approach is implemented by the *Statutory Form Power of Attorney* contained within the UPOAA.[45] Under the statutory form, the principal (1) can initial a single box to grant all cold powers, (2) can take an à la carte approach to the cold powers by initialing them individually, and (3) must take an à la carte approach to the hot powers by initialing them individually.[46]

---

[42] The Maryland version of the UPOAA includes nearly the entire statutory text relating to agent powers in its oddly named *Maryland Statutory Form Limited Power of Attorney* form, and the document runs to 14 pages when formatted on letter-sized paper. The title is odd because the "*limited* power of attorney" form can be used to grant more power than the general statutory form, the *Maryland Statutory Form Personal Financial Power of Attorney Form*," which grants only cold powers. *Compare* MD. CODE ANN., EST. & TRUSTS § 17-202 (LexisNexis 2017) (Personal Financial Power form), *with* MD. CODE ANN., EST. & TRUSTS § 17-203 (Limited Power form).

[43] "This general rule of construction [the rule of strict construction for powers of attorney] essentially provides that expansive language . . . should be interpreted as intending only to confer those incidental powers necessary to accomplish objects as to which *express* authority has been given to the attorney-in-fact." Jones v. Brandt, 645 S.E.2d 312, 315 (Va. 2007) (citing Hotchkiss v. Middlekauf, 32 S.E. 36, 37-8 (Va. 1899)) (emphasis added). *See infra* Section IV.A.

[44] *See infra* Section II.C.

[45] UNIF. POWER OF ATTORNEY ACT § 301 (UNIF. LAW COMM'N 2016). The VaUPOAA failed to adopt the Statutory Form Power of Attorney, but that is without any legal consequence. *See infra* Section III.H.

[46] UNIF. POWER OF ATTORNEY ACT § 301.

5. *The Hire-the-Chef Option*

All systems of default rules inherently permit alteration of those rules by the drafter. But, in addition to allowing the re-writing of default rules, the UPOAA expressly permits incorporation by reference of entire individual cold power sections by mere use of the descriptive term for that power.[47] For instance, use of the descriptive term for a particular cold power, like "Real Property," without more grants both the specific powers within the subject-specific section and the powers in the incidental list.[48] Thus, under a hire-the-chef option, a drafter can choose among cold powers and include them by mere descriptive term, choose among hot powers and include them by mention of the statutory clauses, alter any of the referenced hot or cold powers by express language, and include matters not part of the UPOAA.

II. Problematic Areas of the UPOAA

A. Conflict with the RUFADAA

The Revised Uniform Fiduciary Access to Digital Assets Act (2016) (RUFADAA) creates a hierarchy of agent access to digital assets dependent upon the text of the power of attorney.[49] The RUFADAA mimics the hot/cold power approach of the UPOAA, creating a content/catalogue distinction for electronic communications akin to a letter/envelope distinction for postal mail.

Under its hot power analog, the RUFADAA requires that a "power of attorney expressly grant[ ] an agent authority over the content of electronic communications" before an agent may access such content.[50] The RUFADAA's cold-power analog arises when a power of attorney grants either (i) "general authority to act on behalf of a principal" or (ii) "specific authority over digital assets."[51] When either of those two categories of powers is granted, the agent may obtain only "a *catalogue* of electronic communications sent or received by the principal."[52] That "catalogue of electronic communications" is limited to "information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic

47 *Id.* § 202(b) ("A reference in a power of attorney to general authority with respect to the descriptive term for a subject in Sections 204 through 217 or a citation to a section of Sections 204 through 217 incorporates the entire section as if it were set out in full in the power of attorney.").

48 *Id.* §§ 202-204; Va. Code Ann. § 64.2-1622-24 (2017).

49 Revised Unif. Fiduciary Access to Digital Assets Act §§ 9, 10 (Unif. Law Comm'n 2016) [hereinafter RUFADAA].

50 *Id.* § 9.

51 *Id.* § 10.

52 *Id.*

address of the person."[53] Consequently, RUFADAA's hot power—arising from express grant of authority over the content of electronic communications—grants content, or letter-like, access, while RUFADAA's cold power—arising from express grant of either specific authority over digital assets or general authority to act—grants catalogue, or envelope-like, access.

But having created the content/catalogue distinction, the RUFADAA does not further address the distinguishing of its hot, "express authority over the content of electronic communications" from its cold, "specific authority over digital assets." And, the RUFADAA's definition of "digital asset" only muddles the matter.

Under the RUFADAA, "'digital asset' means an electronic record in which an individual has a right or interest."[54] And, "'record' means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."[55] Combining those, "digital asset" necessarily includes all information stored in any electronic medium that is retrievable in any perceivable form, which makes "digital asset" a very broad category that seemingly includes everything that anyone would want to recover from the Internet.

It is therefore not clear, given the breadth of the definition of "digital assets" in the RUFADAA and the breadth of "authority" in its normal use, why an instrument granting an agent "specific authority over digital assets" would *not* include access to the content of those digital assets. Nor does the RUFADAA address how to decide when language, other than those precise phrases, constitutes the greater "express authority over the content of electronic communications" or the lesser "specific authority over digital assets."

Interpreting powers of attorney is the province of the UPOAA. Regrettably, the two acts do not integrate easily on the content/catalogue distinction for electronic communications. Moreover, when addressing electronic communications, a 2016 amendment to the UPOAA introduced a potential ambiguity not plainly resolvable under the UPOAA's overlap rule. First, let's consider the UPOAA without the 2016 amendment.

Recall that the UPOAA takes a subject-matter-based approach to agent powers, and when any subject-matter power is granted, a set of incidental powers arises with respect to that subject.[56] Included within those incidental powers, in section 203(9), is authority to "*access com-*

53 *Id.* § 2(4).
54 *Id.* § 2(10).
55 *Id.* § 2(22).
56 Unif. Power of Attorney Act § 203 (Unif. Law Comm'n 2016).

munications intended for, and communicate on behalf of the principal, whether by mail, *electronic transmission*, telephone, or other means."[57] The UPOAA comment states that section 203(9) "includes authorization . . . to access communications intended for the principal, and to communicate on behalf of the principal using all modern means of communication."[58]

Does a UPOAA power to access communications by electronic transmission constitute a RUFADAA "express grant of authority over the content of electronic communications?"[59] The verb "access" is not defined in the UPOAA, but it is used in one other section, also dealing with information. In both of those UPOAA sections (sections 109(d) and 203(9)), "access" must be construed to grant authority over the entire content of the thing accessed.

UPOAA section 109(d) provides that when a power of attorney authorizes a person to determine the principal's capacity, that capacity reviewer may "obtain access to the principal's health-care information."[60] Such access in section 109(d) must be understood to permit the capacity reviewer to read the content of the health-care information. If access under section 109(d) did not permit the capacity reviewer to obtain the content of the health-care information, then that section would fail of its essential purpose of enabling the capacity reviewer to determine capacity. Thus, a grant of access to health-care information in section 109(d) must be construed as an "express grant of authority over the content" of that information.

Similarly, section 203(9)'s grant of authority to "access communications . . . by mail, electronic transmission, telephone, or other means" must be construed as an "express grant of authority over the content" of those communications. For instance, the power to access communications by mail cannot commonly be understood to grant access only to envelopes;[61] it empowers the agent to read that mail. And, the language of section 203(9) cannot be interpreted to create different content access rules for mail and electronic transmissions; by plain reading, they are two of the four means of communications to which the agent has access.

---

57 *Id.* § 203(9) (emphasis added).

58 *Id.* § 203 cmt.

59 RUFADAA § 9 (Unif. Law Comm'n 2016).

60 Unif. Power of Attorney Act § 109(d).

61 For instance, the United States Domestic Mail Manual provides as follows: "Unless otherwise directed, an addressee's mail may be delivered to . . . any person authorized to represent the addressee. A person or several persons may designate another to receive their mail." U.S. Postal Serv., Mailing Standards of the United States Postal Service, Domestic Mail Manual § 508, ¶ 1.5.1 (July 11, 2016) available at https://pe.usps.com/text/dmm300/508.htm?q=agent++mail+send&t=H&s=R&p=1&c=DMM (last visited Nov. 23, 2017). *See* 81 Fed. Reg. 66,822 (Sept. 29, 2016).

Neither UPOAA section 203(9) nor its comments create a letter/envelope distinction for any of the four means of communications addressed within it.

Consequently, "access" in the UPOAA means authority over the entire thing accessed: the health-care information in section 109(d) and the communications in section 203(9). Consequently, when the text of the section 203(9) appears on the *face* of a power of attorney, that language constitutes a RUFADAA "express grant of authority over the content of electronic communications," so that both the pre-2016 UPOAA and the RUFADAA permit the agent to access the content of electronic communications.

Doubtless such powers of attorney exist. For instance, the *Maryland Statutory Form Limited Power of Attorney* form includes nearly the entire UPOAA statutory text relating to agent powers within the statutory form.[62] In addition, some attorneys similarly may have set out the entire statutory text relating to agent power when drafting powers of attorney. For such instruments, agent access to the content of electronic communications is clear.

However, suppose a power of attorney is interpreted under the UPOAA but the text of the section 203(9) does not appear on the document's face. Section 203 states that it applies "[e]xcept as otherwise provided in the power of attorney." Does a default rule of interpretation in the UPOAA constitute RUFADAA "express authority over the content of electronic communications?"[63]

At first blush, the answer is No. A requirement for an express statement seemingly requires that the statement appear on the face of the power of attorney. However, that conclusion would cause an agent's access to content to turn on whether the drafter chose a shorter version (not stating statutory default rules, but simply relying on them) or a longer version (stating statutory default rules). As well, such a distinction under the UPOAA is particularly misguided because the UPOAA prefers shorter instruments that do not repeat default rules, as demonstrated by (i) section 202's rule of incorporation of authority by reference to a subject-specific descriptive term and (ii) the statutory form power of attorney in section 301.[64]

---

62 MD. CODE ANN., EST. & TRUSTS § 17-203 (LexisNexis 2017). Consequently, the content of UPOAA section 203 is set out in full.

63 RUFADAA § 9 ("[A] power of attorney [that] expressly grants an agent authority over the content of electronic communications sent or received by the principal").

64 "The Act offers the drafting attorney enhanced flexibility whether drafting an individually tailored power of attorney or using the statutory form. . . . Sections 204 through 217 of the Act set forth detailed descriptions of authority relating to subjects such as 'real property,' 'retirement plans,' and 'taxes,' which a principal, pursuant to Section 202, may incorporate in full into the power of attorney either by a reference to the

In fact, making any aspect of agent authority turn on whether the default rule was set out in the text of a power of attorney is the sort of quibbling that the UPOAA intended to stop.[65] Nonetheless, it is unclear whether a power of attorney that does not state the rule of section 203(9) on its face, but simply relies on section 203(9) as a default rule, constitutes RUFADAA "express authority over the content of electronic communications."[66]

Thus, when an agent acts under a power of attorney relying on the default rule of section 203(9), we have a potential conflict between the UPOAA and the RUFADAA. The UPOAA's default rules grant access to content; the RUFADAA does not grant access to content, but only to a catalogue, if at all.[67] However, the acts are not mutually exclusive. Each appears to grant agent powers independent of the other. Thus, an agent with authority under the UPOAA can enforce it under section 120, regardless of whether she would have authority under the RUFADAA.

The 2016 amendments to the UPOAA make these points murkier. Under section 201(a)(8), as amended, an agent may "exercise authority over the content of electronic communications"[68] only if "the power of attorney expressly grants the agent [that] authority."[69] However, 203(9) was not amended, so the UPOAA now simultaneously contains a rule granting access to communications by electronic transmission and a requirement for express grant of authority over the content of electronic communications. Because there was no change to section 203(9), and particularly the word "access" therein, a potential conflict exists between those sections, and that conflict is not plainly resolvable under the UPOAA's overlap rule. The UPOAA overlap rule applies only when "subjects over which authority is granted in a power of attorney are similar or overlap."[70]

---

short descriptive term for the subject used in the Act or to the section number. . . . The definitions in Article 2 also provide meaning for authority with respect to subjects enumerated on the optional statutory form in Article 3. Section 203 applies to all incorporated authority and grants of general authority, providing further detail on how the authority is to be construed." UNIF. POWER OF ATTORNEY ACT prefatory n. (UNIF. LAW COMM'N 2016).

[65] *See infra* Section III.B.1.

[66] RUFADAA § 9 ("[A] power of attorney [that] expressly grants an agent authority over the content of electronic communications sent or received by the principal").

[67] *Id.* § 10 ("[A]n agent with specific authority over digital assets or general authority to act on behalf of a principal" shall receive a "catalogue of electronic communications.").

[68] UNIF. POWER OF ATTORNEY ACT § 201(a)(8).

[69] *Id.* § 201(a) (emphasis added).

[70] *Id.* § 201(e).

Does the UPOAA overlap rule narrow section 203(9) with respect to the content of electronic communications? No, it should not. The overlap rule is not triggered because access to electronic communications is not a *subject* over which authority is granted. The fourteen subjects over which authority can be granted under the UPOAA are the subject-specific, descriptive terms contained in sections 204 through 217,[71] which are the thirteen cold powers plus gifts.

Under the UPOAA, powers are granted by reference to such subjects' descriptive terms (or by reference to "all acts," which is deemed to refer to thirteen of the fourteen subjects). When any subject is granted, the incidental powers of section 203 arise with respect to it. Consequently, if a power of attorney grants power over Real Property, the agent has the power, under section 203(9), to access communications by electronic transmission with respect to Real Property. Although at first blush, section 201(a)(8) appears to conflict with that, it does not. Section 201(a)(8), when triggered by express grant of authority over the "content of electronic communications," empowers the agent to access *all* of the principal's electronic communications (the greater 201(a)(8) power), not merely those electronic communications relating to the subjects over which power was given (the lesser 203(9) incidental power).

Properly read, no conflict exists between the new hot power of section 201(a)(8) and the existing incidental power under section 203(9). Section 201(a)(8) is a new, greater power over electronic communications that is not tethered to, and limited by, the subject power to which it is incidental, as is section 203(9). The UPOAA's overlap rule confirms this reading. The overlap rule is triggered by similarity or overlap among two subjects, but section 203(9) is not a subject; it is an incidental power. Arguably, if we gave "subject" a broader meaning, *e.g.*, anything that we can describe with a noun, then we could regard section 201(a)(8) to circumscribe section 203(9).[72] However, such is inconsistent with the subject-matter approach of the UPOAA and its use of the word "subject."

Thus, the UPOAA as amended in 2016 creates two kinds of access to the content of electronic communications: subject-specific content access and complete content access without regard to subject. At no point does the UPOAA instantiate the letter/envelope distinction that the

---

[71] *Id.* § 202.

[72] That argument proceeds as follows: The UPOAA's overlap rule states that when the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls, with exceptions, one of which is the hot-powers section. Therefore, although section 203(9) grants broad access authority, the 2016 enactment of section 201(a)(8) circumscribes it, because the rule of greatest breath yields to the specific limits of the hot-powers rules, one of which now requires express grant of authority over the content of electronic communications. *Compare* UNIF. POWER. OF ATTORNEY ACT § 201(a)(8), *with* UNIF. POWER OF ATTORNEY ACT § 203(9).

RUFADAA makes. However, the 2016-amended UPOAA continues the potential conflict between the UPOAA and the RUFADAA when an agent acts under a power of attorney relying on the default rule of section 203(9). While the UPOAA grants access to content, the RUFADAA grants catalogue access, at best. However, the UPOAA and RUFADAA are not mutually exclusive. Each appears to grant agent powers independent of the other. Thus, an agent with authority over the content of electronic communications under the UPOAA could enforce it under section 120, regardless of whether she would have authority under the RUFADAA.

B. UPOAA Gifting Amount Issue

1. *Gifting Power: Cold, Hot, and Boiling-Hot*

The UPOAA places three types of restraints on gift giving by agents: (1) permitted gift recipients, (2) permitted gift circumstances, and (3) permitted gift amounts.

Permitted Gift Recipients. Under the UPOAA, unless the instrument otherwise provides, an agent who is not an ancestor, spouse, or descendant of the principal may not make a transfer to the agent (or to the agent's dependent) by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.[73] Note the obvious point: the statutory text expressly allows the instrument to expand the default rule and include the agent (and the agent's dependents) within the class of permitted gift recipients.

However, a drafter may want to do more than simply permit an agent to make gifts to herself, as the UPOAA also places general duties on agents, separate from the gifting rules, that potentially limit an agent's ability to make gifts to herself.[74] Those general agent duties are of two types: minimum mandatory duties, not alterable by the instrument, and default duties. Here are the mandatory agent duties: (1) act in accordance with the principal's reasonable expectations, if known, and otherwise in the principal's best interest; (2) act in good faith; and (3) act only within the scope of authority granted.[75] Here are the default agent duties: (1) act loyally; (2) act not to create conflicts of interest that impair impartiality; (3) act with ordinary care, competence, and diligence; (4) keep records of all transactions; (5) cooperate with the principal's health care agent; and (6) attempt to preserve the principal's estate

[73] Unif. Power of Attorney Act § 201(b); Va. Code Ann. § 64.2-1622(B) (2017).

[74] *See* Unif. Power of Attorney Act § 114 (Unif. Law Comm'n 2016); Va. Code Ann. § 64.2-1612.

[75] Unif. Power of Attorney Act § 114(a)(2)-(3); Va. Code Ann. § 64.2-1612(A).

plan.[76] Consequently, a drafter may want expressly to waive the default duties, particularly those relating to loyalty and conflict of interest when the instrument otherwise permits the agent to make significant gifts to herself.

Permitted Gift Circumstances. Under the UPOAA, an agent may not make a gift to anyone until the agent has determined that the gift is consistent with the principal's objectives actually known by the agent, or if the principal's objectives are unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors,

> including (1) the value and nature of the principal's property; (2) the principal's foreseeable obligations and need for maintenance; (3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; (4) eligibility for a benefit, a program, or assistance under a statute or regulation; and (5) the principal's personal history of making or joining in making gifts.[77]

Unlike the rule regarding permitted gift recipients, the UPOAA provisions on permitted gift circumstances do not expressly authorize alteration of those circumstances because the phrase "except as otherwise provided" is absent. In addition, one of the three mandatory, not-waivable, general agent duties is the duty to "act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest."[78] Consequently, in order to alter the permitted gift circumstances, the instrument should describe the principal's expectations about gifts rather than simply attempting to waive the agent's not-waivable duty to honor the principal's expectations.[79]

The UPOAA comments are particularly helpful on the point.

> [While] [t]he Act does not require, nor does common practice dictate, that the principal state expectations or objectives in the power of attorney[,] . . . when a principal's subjective expectations are potentially inconsistent with an objective best interest standard, good practice suggests memorializing those expecta-

---

76 UNIF. POWER OF ATTORNEY ACT § 114(b)(6)(A); VA. CODE ANN. § 64.2-1612(B).

77 UNIF. POWER OF ATTORNEY ACT § 201(c); VA. CODE ANN. § 64.2-1638(C).

78 UNIF. POWER OF ATTORNEY ACT § 114(a)(1); VA. CODE ANN. § 64.2-1612(A)(1). Two other agent duties are not allowed to be altered: (1) act in good faith, and (2) act only within the scope of authority granted in the power of attorney. UNIF. POWER OF ATTORNEY ACT § 114(a)(2)-(3); VA. CODE ANN. § 64.2-1612(A)(2)-(3) (2017).

79 *See* UNIF. POWER OF ATTORNEY ACT § 217 cmt. (UNIF. LAW COMM'N 2016).

tions in a written and admissible form as a precaution against later challenges to the agent's conduct.[80]

Permitted Gift Amounts. Under the UPOAA, an agent may not make gifts unless the instrument expressly grants the authority to "make a gift."[81] In addition, if the instrument simply grants the "authority to make a gift,"[82] without further elaboration, the agent can make gifts, but in a quite limited amount; *i.e.*, "in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code Section 2503(b)."[83] For 2017, section 2503(b) of the Internal Revenue Code provides that "the first $14,000 of gifts to any person . . . are not included in the total amount of taxable gifts under § 2503 made during that year."[84] The per donee limit doubles under the UPOAA "if the principal's spouse agrees to consent to a split gift pursuant to Internal Revenue Code Section 2513."[85]

By contrast, the VaUPOAA permits an agent, who has been granted simply the "authority to do all acts that a principal can do,"[86] to continue the "principal's personal history of making or joining in the making of lifetime gifts."[87] And, under both the UPOAA and the VaUPOAA, if a principal desires to grant a gifting power in excess of the $14,000 (or $28,000) per donee limit, the authority to exceed those amounts must be stated in express terms.[88]

Consequently, when analyzing gifting powers, we could call the power to make gifts consistent with the "principal's personal history of making or joining in the making of lifetime gifts" a cold power,[89] granted to an "all-acts" agent in Virginia but not under the UPOAA. We could call the power to make gifts of up to the $14,000 (or $28,000)

---

[80] *Id.* § 114 cmt.

[81] *Id.* § 201(a)(2).

[82] *Id.* § 201(d); VA. CODE ANN. § 64.2-1622(D).

[83] UNIF. POWER OF ATTORNEY ACT § 217(b)(1); VA. CODE ANN. § 64.2-1638(B)(1).

[84] Rev. Proc. 2016-55, 2016-45 I.R.B. 707 § 3.27 (Oct. 26, 2016) (providing inflation-adjusted amounts for calendar year 2017 pursuant to 26 U.S.C. § 2503(b)(2)).

[85] UNIF. POWER OF ATTORNEY ACT § 217(b)(1) (UNIF. LAW COMM'N 2016); VA. CODE ANN. § 64.2-1638(B)(1) (2017). Split gift treatment under section 2513 means that the spouse who did not make a gift is treated as having made a gift, and the spouse who did make the gift is treated as not having made the gift—the kind of "deeming" exercise tax lawyers love. 26 U.S.C. § 2513 (2012).

[86] VA. CODE ANN. § 64.2-1622(C).

[87] *Id.* § 64.2-1622(H). That provision also provides, "This subsection shall not in any way impair the right or power of any principal, by express words in the power of attorney, to authorize, or limit the authority of, an agent to make gifts of the principal's property."

[88] UNIF. POWER OF ATTORNEY ACT § 217(b); VA. CODE ANN. § 64.2-1638(B).

[89] Under the UPOAA, there is no cold gifting power. *See* UNIF. POWER OF ATTORNEY ACT §§ 201(a)(2), 217.

limit a hot power, granted by mention of the subject of "general authority with respect to gifts."[90] We could call the power to make gifts in excess of the hot-power limit a "boiling-hot" power—a hot power (and the only hot power) that requires more than mere statement of the descriptive term for that hot-power to grant broad authority regarding that subject. Therefore, under the VaUPOAA, the power to make gifts is simultaneously a cold power, a hot power, and a boiling-hot power.[91]

Regarding the hot-power limit, under both the UPOAA and the VaUPOAA, when an agent possesses only "general authority with respect to gifts"[92] (and does not possess express, specific authority regarding amounts of gifts), (1) the $14,000 limit applies per donee and (2) the per donee limit increases to $28,000 if the principal's spouse consents to split-gift treatment. However, a significant question of interpretation exists regarding the numerical limit. Does the hot-power limit renew annually or is it a single limit on the aggregate sum of all gifts to each donee, whenever made, under the power of attorney?

The precise language at issue in both the UPOAA and the VaUPOAA is identical and is as follows:

> [L]anguage in a power of attorney granting general authority with respect to gifts authorizes the agent only to: (1) make outright to, or for the benefit of, a person, a gift of any of the principal's property . . . in an amount per donee not to exceed *the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code Section 2503(b)*, 26 U.S.C. Section 2503(b), [as amended,] without regard to whether the federal gift tax exclusion applies to the gift, or if the principal's spouse agrees to consent to a split gift pursuant to Internal Revenue Code Section 2513, 26 U.S.C. 2513, [as amended,] in an amount per donee not to exceed twice the annual federal gift tax exclusion limit . . . .[93]

The question reduces to this: Does the phrase "the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code 26 U.S.C. Section 2503(b)"[94] mean (1) *$14,000* or (2) *$14,000 per year*?

---

90 UNIF. POWER OF ATTORNEY ACT § 217; VA. CODE ANN. § 64.2-1638.

91 Under the UPOAA, the power to make gifts is both a hot and boiling-hot power. All other powers under the UPOAA and VaUPOAA are either cold powers or hot powers.

92 UNIF. POWER OF ATTORNEY ACT § 217(b) (UNIF. LAW COMM'N 2016); VA. CODE ANN. § 64.2-1638(B) (2017).

93 UNIF. POWER OF ATTORNEY ACT § 217(b)(1); VA. CODE ANN. § 64.2-1638(B)(1) (emphasis added).

94 UNIF. POWER OF ATTORNEY ACT § 217(b)(1); VA. CODE ANN. § 64.2-1638(B)(1).

2. *The Missing Modifier and the Lurking Single Limit Under the UPOAA Gifting Power*

If the phrase, "the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code 26 U.S.C. Section 2503(b)," means *$14,000*, then we read the UPOAA as follows: "language in a power of attorney granting general authority with respect to gifts authorizes the agent only to make . . . a gift of any of the principal's property . . . in an amount per donee not to exceed $14,000."

Under that construction, the agent may make gifts per donee totaling $14,000 in the aggregate for all gifts made under the power of attorney. Under that interpretation, if the annual federal gift tax exclusion increases, say to $15,000, the agent may make gifts per donee totaling $15,000, so if gifts of $14,000 had been made in the past, the increase in the annual exclusion would permit an additional $1,000 of gifts to be made under the power of attorney.

If the phrase means *$14,000 per year*, then we read the UPOAA as follows: "language in a power of attorney granting general authority with respect to gifts authorizes the agent only to make . . . a gift of any of the principal's property . . . in an amount per donee not to exceed $14,000 per year."

Doubtless the intention was to create a limit of $14,000 per year, because the relevant UPOAA comment refers to the provisions as implementing "the principal's expectation that *annual* family gifts be continued."[95]

The language would be free from doubt if it read "in an amount per donee *per year* not to exceed "the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code 26 U.S.C. Section 2503(b)." Yet, because of the language used in the UPOAA, some doubt exists about whether "annual" modifies the action of giving or modifies only the title of a number found in the Internal Revenue Code. The number found in the Internal Revenue Code is *$14,000*, and not *$14,000 per year*.[96]

To make the issue free from doubt, a drafter may want to add "per year" before or after "per donee."

---

[95] UNIF. POWER OF ATTORNEY ACT § 201 cmt. (emphasis added).

[96] For 2017, section 2503(b) provides that "the first $14,000 of gifts to any person . . . are not included in the total amount of taxable gifts under § 2503 made during that year." Rev. Proc. 2016-55, 2016-45 I.R.B. 707, § 3.37(1) (Oct. 26, 2016).

C. UPOAA Fails to Grant Incidental Powers to Hot Powers

Recall that the UPOAA takes a menu- or subject-based approach to agent powers.[97] Each of fourteen separate UPOAA sections states, as its title, a "descriptive term," like "Estates, Trusts, and Other Beneficial Interests,"[98] and comprehensively lists agent powers that arise when "language in a power of attorney grant[s] general authority with respect to" that section's descriptive term.[99] A subject-specific power can be granted to an agent either (1) by reference to one or more descriptive terms[100] or (2) by grant of authority to "do all acts that a principal could do," which statement alone grants power under thirteen of the fourteen descriptive terms.[101] We have called those thirteen powers "cold powers," and called an instrument that simply grants "authority to do all acts that a principal could do" an "all-acts" instrument.

In the UPOAA, each cold power has its own section; each such section delineates subject-specific powers; and those delineations are extensive.[102] Added to those subject-specific powers are incidental powers: UPOAA section 203 states that "by executing a power of attorney that incorporates by reference a subject described in Sections 204 through 217 or that grants to an agent authority to do all acts that a principal could do . . . , a principal authorizes the agent, with respect to that subject, to" perform 10 types of incidental powers including, most broadly, authority to "[d]o any lawful act with respect to the subject and all property related to the subject."[103]

---

97 *See* discussion *supra* Section I.A.

98 *See, e.g.,* UNIF. POWER OF ATTORNEY ACT § 211 (UNIF. LAW COMM'N 2016).

99 *Id.* § 202(b).

100 *Id.* ("A reference in a power of attorney to general authority with respect to the descriptive term for a subject in Sections 204 through 217 or a citation to a section of Sections 204 through 217 incorporates the entire section as if it were set out in full in the power of attorney.").

101 *Id.* § 201(c). The power to make gifts is excluded from an "all-acts" power of attorney; it must be separately stated.

102 For instance, the power regarding "stocks and bonds" provides, "[u]nless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to stocks and bonds authorizes the agent to: 1. Buy, sell, and exchange stocks and bonds; 2. Establish, continue, modify, or terminate an account with respect to stocks and bonds; 3. Pledge stocks and bonds as security to borrow, pay, renew, or extend the time of payment of a debt of the principal; 4. Receive certificates and other evidences of ownership with respect to stocks and bonds; and 5. Exercise voting rights with respect to stocks and bonds in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote." *Id.* § 206; *see also* VA. CODE ANN. § 64.27-1627 (2017).

103 UNIF. POWER OF ATTORNEY ACT § 203 (UNIF. LAW COMM'N 2016); *see also* VA. CODE ANN. § 64.2-1624 (incidental powers list).

Section 203's mention of "Sections 204 through 217" refers to the thirteen cold-powers sections (sections 204 to 216) plus the hot-power section on gifts (section 217). Consequently, and oddly, the incidental powers section does not refer to UPOAA section 201(a), which is the only section that describes the scope of authority for all hot powers other than the power to make a gift.[104]

Consequently, we can observe that any given cold power has three parts: (1) a descriptive term for its subject name; (2) subject-specific powers within each subject-specific section; and (3) incidental powers; but for hot powers, except gifts, only the power's descriptive term for its subject name exists. For hot powers other than the power to make a gift, neither a list of subject-specific powers nor a list of incidental powers exists.

The failure to incorporate the incidental powers into the hot powers potentially is problematic. The UPOAA comment to section 203 demonstrates the problem. That comment states, "The actions authorized in Section 203 are of the type often necessary for the exercise or implementation of authority over the subjects described in Sections 204 through 217."[105] Indeed they are, and that raises the question of the need to grant the incidental powers for the exercise or implementation of authority over the hot-power subjects granted in Section 201(a).

The problem arising from the non-incorporation of the incidental powers into the hot powers is even greater in Virginia, where the "rule of strict construction for powers of attorney" likely survives for hot powers.[106] As noted, under the UPOAA and VaUPOAA, for hot powers (except gifts), only the power's subject name exists: neither subject-specific powers nor incidental powers exist. Under Virginia's rule of strict construction for powers of attorney, the authority given is not extended beyond the terms in which it is expressed.

> This general rule of construction essentially provides that expansive language . . . should be interpreted as intending only to confer those incidental powers necessary to accomplish objects as to which *express* authority has been given to the attorney-in-fact.[107]

Consequently, under the default regimes of the UPOAA and the VaUPOAA, for a hot power (other than gifts), the only operative lan-

---

104 The hot powers are listed in UPOAA section 201(a)(1) to (9), and section 201 is not referenced in section 203. *See* Unif. Power of Attorney Act §§ 201(a)(1)-(9); 203.

105 *Id.* § 203 cmt.

106 *See infra* Section IV.A.

107 Jones v. Brandt, 645 S.E.2d 312, 315 (Va. 2007) (citing Hotchkiss v. Middlekauf, 32 S.E. 36, 37-38 (Va. 1899)) (emphasis added).

guage that will exist for a hot power is a statement like "my agent may create or change rights of survivorship."[108] In Virginia, that grant would be interpreted as "intending only to confer those *incidental powers necessary* to accomplish" the object of creating and changing rights of survivorship. Rather than face arguments about whether a particular incidental power is necessary, a drafter may want to obviate the problem by incorporating the incidental powers into any hot powers granted.

D. Good Faith Missing from UPOAA Agent Certification Rule

In exchange for mandated acceptance of an agent's authority under an acknowledged power of attorney,[109] the UPOAA does not require third parties dealing with such agents to investigate the agent or the agent's actions.[110] Instead, section 119 places the risk of an invalid acknowledged power of attorney upon the principal, and does so by authorizing two kinds of third-party reliance: (1) permitted reliance on the document,[111] and (2) permitted reliance on certification by the agent.[112]

Permitted Reliance on the Document. Under UPOAA section 119(c), "[a] person that in *good faith* accepts an acknowledged power of attorney *without actual knowledge*" to the contrary may rely in good faith on the validity of the power of attorney, the validity of the agent's authority, and the propriety of the agent's exercise of authority.[113] This reliance arises from the mere presentation of a document that constitutes an acknowledged power of attorney.[114] Moreover, a third party

---

108 For instance, under the Statutory Form Power of Attorney of the UPOAA, the hot powers exist only by descriptive term for the subject name. UNIF. POWER OF ATTORNEY ACT § 301.

109 UPOAA section 120 grants only six limited reasons to refuse to accept an acknowledged power of attorney. *Id.* § 120(b)(1)-(6). The VaUPOAA adds a very broad seventh reason. VA. CODE ANN. § 64.2-1618(B)(1) (2017) (adding "or the principal has otherwise relieved the person from an obligation to engage in the transaction with an agent representing the principal under a power of attorney" to the UPOAA text of "[t]he person is not otherwise required to engage in the transaction with the principal in the same circumstances"). *See infra* Section III.B.

110 UNIF. POWER OF ATTORNEY ACT prefatory n., at 2.

111 *Id.* § 119(c) (document reliance).

112 *Id.* § 119(d) (reliance on agent certification).

113 *Id.* § 119(c).

114 UPOAA sections 119 and 120 apply only to an "acknowledged power of attorney," while all other UPOAA sections apply to a "power of attorney." *Id.* §§ 119-20. Under the UPOAA, the status of "acknowledged power of attorney" is gained when a power of attorney has been "purportedly verified before a notary public or other individual authorized to take acknowledgements." *Id.* § 119(a). The VaUPOAA deletes "purportedly" from the definition. VA. CODE ANN. § 64.2-1617(A). That difference has no real consequence when considering UPOAA section 120 and its Virginia analog, section 64.2-1618, but has significant consequence when considering UPOAA section 119 and its Virginia analog, section 64.2-1617. *See infra* Section III.C.

seeking additional, optional protection may request an agent's certification,[115] but is not required to do so.

Permitted Reliance on the Certification by the Agent. Under UPOAA section 119(d), "[a] person that is asked to accept an acknowledged power of attorney may request, and rely upon, without further investigation: an agent's certification under penalty of perjury of any factual matter concerning the principal, agent, or power of attorney."[116]

Comparison of subsections (c) and (d) of UPOAA section 119 reveals that reliance on agent certification is neither conditioned on the agent's (1) acting in good faith nor (2) acting without actual knowledge to the contrary. Consequently, a third party apparently can have actual knowledge to the contrary, yet still rely upon an agent certification under penalty of perjury as to "any factual matter concerning the principal, agent, or power of attorney." Note that the rule of reliance on agent certification is not alterable by the power of attorney; consequently, the only protection for principals desiring to avoid the rule is to ensure that the principal never verifies her powers of attorney "before a notary public or other individual authorized to take acknowledgements."[117]

The UPOAA rule regarding reliance on agent certification is inconsistent with the Uniform Trust Code's rule regarding reliance on trustee certification: "A person who acts in reliance upon a certification of trust *without knowledge* that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification."[118] It is not clear why the UPOAA broadened its rule of reliance on agent certification to include situations where someone has actual knowledge to the contrary of the facts so certified.

E. Overlap Within the Hot Powers of the UPOAA

Within the nine UPOAA hot powers,[119] we can classify six of them as donative hot powers, *i.e.*, powers to transfer the principal's property without consideration. Although susceptible to abuse, principals routinely grant such powers when principals want agents to engage in estate planning for the principal. The six donative hot powers include the pow-

---

115 UNIF. POWER OF ATTORNEY ACT § 119 cmt. (UNIF. LAW COMM'N 2016).

116 *Id.* § 119(d)(1). The UPOAA provides an optional form for an agent to use in the optional certification process. *Id.* § 302. Interestingly, although the UPOAA statutory text limits a third party's reliance on agent certification to acknowledged powers of attorney, the statutory form is not limited to acknowledged powers of attorney. The UPOAA is silent regarding the effect of agent certification under not-acknowledged powers of attorney.

117 *Id.* § 119(a).

118 UNIF. TRUST CODE § 1013(f) (UNIF. LAW COMM'N 2005) (emphasis added).

119 UNIF. POWER OF ATTORNEY ACT § 201(a)(1)-(9).

ers to (1) create, amend, revoke, or terminate an inter vivos trust; (2) make a gift; (3) create or change rights of survivorship; (4) create or change beneficiary designations; (5) waive the principal's right as beneficiary under an annuity, and (6) disclaim property rights of the principal.[120]

Upon reading these six donative hot powers an interesting question arises: Are the hot powers entirely independent or do they overlap? Note that while the UPOAA states a general rule regarding overlap (under which the broadest authority controls), that general rule expressly excludes the hot powers.[121] Both the exclusion of hot powers from the rule of overlap and the scheme of hot powers itself strongly suggest against overlap.

Observe, if hot powers exist by separate descriptive terms, and hot powers are granted only by express statement of those descriptive terms, how can a grant of one descriptive term expressly grant another? In other words, if hot power *C* must be expressly granted by a statement of the descriptive term *C*, how can a grant of descriptive term *D* meet the mark? If *C* is distinct from *D* and each must be separately stated, how can one overlap the other? Overlap, if it exists, would mean that the hot power of descriptive term *C* is authorized by grant of power *C* or of power *D*, and that is inconsistent with a requirement of an express authorization of *C*.

Consequently, overlap appears inconsistent with a scheme of express statement of discrete descriptive terms. Support for the non-overlap thesis also exists in other parts of the UPOAA. For instance, when the UPOAA negates the power of an agent, not related to the principal, to create "in the agent . . . an interest in the principal's property,"[122] the UPOAA separately negates the powers of (1) gift, (2) right of survivorship, (3) beneficiary designation, and (4) disclaimer.[123] Accordingly, when the UPOAA seeks to negate hot powers expressly granted by separate descriptive terms, each individually granted hot power is negated by that power's separate descriptive term.

Nonetheless, a small bit of hot-power overlap necessarily occurs within the text of the UPOAA; not surprisingly, the overlap occurs for the descriptive term "make a gift,"[124] the only hot power with a subject-

[120] *Id.* § 201(a). Note that the power to disclaim is a hot power under the UPOAA, but not under the VaUPOAA.

[121] *Id.* § 201(e). "Subject to subsections (a), (b), and (d), if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls." Subsection (a) of section 201 lists the hot powers. *Id.* § 201(a)(1)-(9).

[122] *Id.* § 201(b).

[123] *Id.*

[124] *Id.* § 201(a)(2).

specific section, rather than merely a label. The subject-specific section for gifts makes clear that language granting general authority with respect to gifts *does* authorize the agent to make "a gift to a trust." Presumably, the agent also could create the trust that will receive the gift.[125] Therefore, the power to "make a gift" expressly includes the power to "create a trust" to receive that gift, yet each is an exclusively distinct hot power with a separate descriptive term.

This noted overlap of "make a gift" and "create a trust" is the extent of the clear textual overlap for hot powers under the UPOAA. Nonetheless, other overlap questions arise when contemplating the hot power provisions. I will raise three.

First, does the power to make a gift include the power to create a right of survivorship? It appears not, because the two are separate hot powers, and each must be separately granted by reference to a distinct descriptive term. But that result seems strange. If an agent is authorized to make a present gift of the principal's property, why can't the agent do the lesser act (from the perspective of present economic consequence to the principal) of creating a survivorship right?

The gifts section states that an agent granted gifting powers may make gifts "outright to" or "for the benefit of" a permitted gift recipient.[126] "For the benefit of" is defined to include transfers (1) to trust, (2) to Uniform Transfers to Minors Act accounts, (3) to Section 529 Tuition Savings Accounts or Prepaid Tuition Plans, and in Virginia, (4) to Uniform Custodial Act trusts.[127] Now, the interpretative issue becomes thus: Does "for the benefit of," as defined within section 217, include a transfer created by a survivorship right? Such transfers are not included in the "for the benefit of" list. Consequently, it is not clear that a gift could be made by a survivorship right when the agent is not also separately authorized to create survivorship rights.

Second, does the hot power to create a trust include the power to create survivorship rights within that trust? Here there is no textual overlap, because there are no subject-specific sections either for trust powers or for survivorship powers. (Recall that, unlike cold powers, there are no subject-specific-powers lists for any hot powers, except gifts.) Consequently, one would expect that there is no overlap, because (i) each hot power is distinct and (ii) hot powers must be expressly granted. Yet, survivorship rights are ubiquitous in trusts. Suppose a power of attorney expressly granted a power to create an inter vivos trust, but did not expressly grant a power to create a right of survivorship. Would the agent have power to create a trust with survivorship

[125] *Id.* § 217(a) ("a gift 'for the benefit of' a person includes a gift to a trust").
[126] *Id.* § 217.
[127] *Compare id.* § 217(a), *with* VA. CODE ANN. 64.2-1638(A) (2017).

rights embedded within the trust? Perhaps, we might label the survivorship rights inside the trust by some other name, like equitable remainders, and escape the textual conflict within the UPOAA.

Third, the powers (1) to "[c]reate or change rights of survivorship"[128] and (2) to "[w]aive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan"[129] are separate hot powers. Yet, the overlap is clear. "A survivor benefit under a retirement plan" is a "right of survivorship." Thus, an agent granted the hot power to change a "right of survivorship" should also possess the hot power to waive a "survivor benefit under a retirement plan." However, that is inconsistent with a theory of distinct hot powers.

To obviate the hot power overlap issues, a drafter may want to grant all the hot powers.

F. Successor Agents Under the UPOAA

While the UPOAA permits the principal to name successor agents in the instrument[130] and even permits the principal to grant to the agent the hot power of naming successor agents,[131] neither occurs by default. Therefore, if a principal simply names an agent, no succession process exists.[132] Thus, a drafter may want to name successor agents, expressly allow an agent to name a successor agent, or both. The optional *Statutory Form Power of Attorney* contains sections for designating a successor agent and a second successor agent.[133] A drafter may want to grant less authority to a successor agent than to an original agent.[134]

G. Agent Compensation Under the UPOAA

Under the UPOAA, the agent by default is entitled to both "reimbursement of expenses reasonably incurred," and to "compensation that is reasonable under the circumstances."[135] A principal may want to eliminate, limit, or define agent compensation and reimbursement.[136]

---

[128] VA. CODE ANN. § 64.2-1622(A)(3).

[129] *Id.* § 64.2-1622(A)(6).

[130] UNIF. POWER OF ATTORNEY ACT §§ 111(b), 201(e) (UNIF. LAW COMM'N 2016).

[131] The power to "[d]elegate authority granted under the power of attorney" is a hot power. *Id.* § 201(a)(5).

[132] By contrast, when a trust instrument fails to name a successor trustee, the qualified beneficiaries by unanimous agreement can name a successor, and so can a court. UNIF. TRUST CODE § 704(c) (UNIF. LAW COMM'N 2005); VA. CODE ANN. § 64.2-757(C).

[133] UNIF. POWER OF ATTORNEY ACT § 301.

[134] Hook & Johnson, *supra* note 13, at 120.

[135] *Id.* at 121.

[136] UNIF. POWER OF ATTORNEY ACT § 112 (UNIF. LAW COMM'N 2016); *see* Hook & Johnson, *supra* note 13, at 121.

The UPOAA comments provide guidance quite helpful to those decisions.

> While it is unlikely that a principal would choose to alter the default rule as to expenses, a principal's circumstances may warrant including limitations in the power of attorney as to the categories of expenses the agent may incur; likewise, the principal may choose to specify the terms of compensation rather than leave that determination to a reasonableness standard.[137]

H. UPOAA Not Applicable to Principals Who Are Not Individuals

Although the UPOAA is a comprehensive, yet non-exclusive, statement of the law of agency, it excludes from coverage the entire class of agents named by principals who are not individuals. The UPOAA defines "principal" to mean "an *individual* who grants authority to an agent in a power of attorney."[138] Therefore, entities and other persons who are not individuals, like unincorporated associations, are excluded from the definition of principal and therefore from coverage under the UPOAA.

A drafter could draft a power of attorney instrument between a non-individual principal, like an entity, and an agent which either expressly states or expressly adopts by reference the first and second party rules of the UPOAA—those rules governing the relationship between the principal and agent.

However, the third-party rules of the UPOAA—those rules governing the relationship between third parties on the one hand and the principal and agent on the other—cannot be adopted merely by agreement between the principal and the agent. Thus, such matters as judicial relief, effect of reliance upon an acknowledged power of attorney, uniformity of construction, and remedies for third party refusal to accept an acknowledged power of attorney would not apply to agreements between non-individual principals and their agents.

III. Some Significant Non-Uniform Aspects of the VaUPOAA

The VaUPOAA appears initially to have been drafted by a subcommittee of the Wills, Trusts and Estate Section of the Virginia Bar Association.[139] That subcommittee revised the UPOAA where the subcommittee, in consultation with organizations, including the Virginia Bankers Association and the AARP, "felt Virginia law was superior."[140]

---

137 Unif. Power of Attorney Act § 112 cmt.

138 *Id.* § 102(9); Va. Code Ann. § 64.2-1600 (2017) (emphasis added).

139 Johnson, *supra* note 13, at 403-04.

140 Hook & Johnson, *supra* note 13, at 111.

The subcommittee's draft was introduced into the Virginia House of Delegates in the 2008 session, but was not enacted that year. However, in 2009, the draft was re-introduced in the Virginia Senate, amended by the House of Delegates, and enacted as the 2009 VaUPOAA, yet the 2009 Act never became effective.[141] Instead, the 2009 Act was re-introduced in 2010, further amended, enacted, and finally became effective as the VaUPOAA on July 1, 2010.[142]

Here is a description of some of the prominent differences between the UPOAA and VaUPOAA.

A. Boiling-Hot Gifting Powers

1. *Gifting Power: Cold, Hot and Boiling-Hot*

When analyzing gifting powers, we have called the "power to make gifts consistent with principal's personal history of making or joining in the making of lifetime gifts"[143] a cold power,[144] and noted that such cold power is granted to an "all-acts" agent[145] in Virginia but not under the UPOAA; called the power to make gifts up to the $14,000 (or $28,000) limit a hot power, and noted that such hot power is granted under both the UPOAA and VaUPOAA by mention of the subject of "general authority with respect to gifts;"[146] and called the power to make gifts in excess of the hot-power limit a "boiling-hot" power, and noted that under both the UPOAA and VaUPOAA such is the only hot power that requires more than mere statement of the subject to grant broad authority regarding that subject.[147]

To grant a gifting power in excess of the $14,000 (or $28,000) limit, both the UPOAA and the VaUPOAA require that the power must be stated in express terms.[148] Because estate planning often involves transfers exceeding $14,000 or even $28,000 per donee per year,[149] an agent

141 *Id*. at 111-12.

142 *See supra* note 13.

143 VA. CODE ANN. § 64.2-1622(H). Under the UPOAA there is no cold gift power. UNIF. POWER OF ATTORNEY ACT §§ 201(a)(2), 217(b) (UNIF. LAW COMM'N 2016).

144 *See supra* Section II.B.1.

145 An "all-acts" agent is one to whom the principal has granted "authority to do all acts that a principal could do." VA. CODE ANN. § 64.2-1622(C) (2017). Such an agent has all the cold powers, and in Virginia, has the power to make gifts consistent with the principal's history of making gifts. *Id.* § 64.2-1622(H).

146 UNIF. POWER OF ATTORNEY ACT § 217(b); VA. CODE ANN. § 64.2-1638(B).

147 *See supra* Section II.B.1.

148 UNIF. POWER OF ATTORNEY ACT § 217(b); VA. CODE ANN. § 64.2-1638(B).

149 Because of an issue of interpretation in both the UPOAA and the VaUPOAA, the hot power limit may be $14,000 (or $28,000) per donee per instrument (and not per year). *See* UNIF. POWER OF ATTORNEY ACT § 217(b)(1) (UNIF. LAW COMM'N 2016); VA. CODE ANN. § 64.2-1638(B)(1).

expected to engage in more than elementary estate planning for a principal will need a boiling-hot power.

2. *Drafting the Boiling-Hot Gifting Power*

To permit an agent to effect maximum estate planning for the principal, a drafter might authorize the agent to make gifts "in any amount" to "anyone"[150] or more likely, to "descendants of the principal and spouses of such descendants."

Yet, while that cures the state-law, boiling-hot power issue, it simultaneously causes a federal transfer tax problem, resulting from the not obvious application of section 2041 of the Internal Revenue Code. Section 2041 causes significant estate tax problems for the *agent* if the agent is *not* denied the power to make gifts to herself. To a reader not well versed in the minutiae of section 2041, that rule generates curious results.

For instance, the agent named in a power of attorney often is a natural object of the principal's bounty, *e.g.*, a child, and the agent often will be advised by estate planning counsel to implement an estate planning strategy of making gifts to her siblings. Well-drafted instruments often prevent the agent from making a gift to herself, even though she is a member of the class of persons to whom gifts will be made—she is a child of the principal, just like her siblings. Why does the instrument prevent her from treating herself identically with her siblings? Because section 2041 of the Internal Revenue Code, as a matter of law, treats all agents as acting with maximum greed. Upon death, every agent is treated as owning all property that she was empowered to transfer to herself at her death, even though she refrained from actually grabbing it all.[151] Thus, if the agent dies while the principal is alive, section 2041 problems loom. Proof of the agent's altruism, nay even her prudence, would not matter.

Deciding how to finesse the matter of agent power to make gifts to the agent involve strategies for which tax lawyers justifiably are famous. This article does not include detailed advice for addressing the agent's

[150] Obviously, permitting gifts to anyone maximizes estate planning flexibility, yet the obvious potential for abuse would tend to suggest a smaller group of permitted gift recipients.

[151] 26 U.S.C. § 2041 (2012). Under section 2041, a decedent's federal gross estate includes all property over which at her death she possessed a "general power of appointment," which means a power exercisable in favor of decedent, her creditors, her estate, or the creditors of her estate. Certain exceptions exist: (1) a power limited by an ascertainable standard relating to decedent's health, education, maintenance or support, (2) a power held jointly with the creator of the power, and (3) to a limited extent, a power held jointly with a person having an interest substantially adverse to the decedent. *Id.*

section 2041 problem, for that issue is not unique to the UPOAA, has existed for a long time, and is treated in other sources.[152]

The salient points about gifting powers under the VaUPOAA are that (1) an "all-acts" agent has a cold gifting power to continue the principal's personal history of making gifts,[153] (2) the hot power to make gifts is constrained in a way that other hot powers are not, (3) the default hot-power limit may be per donee per instrument rather than per year,[154] (4) drafters of many instruments will want to include the boiling-hot power to make gifts in excess of the $14,000 (or $28,000) limit, but (5) in doing so, agent power to make gifts to herself must be constrained, or else real problems occur if the agent predeceases the principal.[155]

B. Gutting the Primary Consumer Protections of the UPOAA

Persons asked to accept powers of attorney manifestly create unreasonable difficulty, and the UPOAA meant to change that.[156] UPOAA sections 119 and 120 define a subset of powers of attorney—acknowledged powers of attorney—and fashion a scheme in which such instruments readily are accepted and unreasonable refusals to accept them readily are sanctioned.[157] Section 120 creates an exhaustive list of six acceptable reasons to refuse to accept an acknowledged power of

---

152 A common technique is to appoint special gift agents. 2 VA. LAW FOUND., COMM. ON CONTINUING LEGAL EDUC., ESTATE PLANNING IN VIRGINIA app. 8-4 (3d ed. 2007 & Supp. 2009) (document entitled *Durable Special Power of Attorney Granting Authority to Make Gifts*). *See* Bridget J. Crawford, *Tax Avatars*, 2008 UTAH L. REV. 793; Peter B. Tiernan, *Agent's Powers in a Durable Power of Attorney Can Result in Unexpected Tax*, 32 EST. PLAN. 34 (Dec. 2005).

153 Query, upon the death of a Virginia "all-acts" agent, while the principal is alive, will the agent's federal gross estate include property subject to the agent's power to continue the principal's "personal history" of making gifts to the agent? If so, would that include the sum total of all gifts ever made to the agent by the principal because that amount is the principal's history? Or would some consideration be given to the rate at which gifts historically had been given? *See generally* VA. CODE ANN. § 64.2-1622 (2017).

154 *See supra* Section II.B.2.

155 As always in tax, problems are sometimes opportunities in disguise. The agent may want to trigger inclusion in her estate to use the agent's estate tax credit. *See* Jonathan G. Blattmachr & Jeffrey N. Pennell, *Adventures in Generation-Skipping, or How We Learned to Love the Delaware Tax Trap*, 24 REAL PROP. PROB. & TR. J. 75 (1989).

156 The Overview of the UPOAA states that "[s]ections 119 and 120 are included in the Act to address the frequently reported problem of persons refusing to accept a power of attorney." UNIF. POWER OF ATTORNEY ACT prefatory n., at 4 (UNIF. LAW COMM'N 2016).

157 *Id.* § 119 cmt.

attorney;[158] a person who refuses acceptance without a statutorily acceptable reason faces liability; and that liability extends to the reasonable attorneys' fees and costs incurred in the action to mandate acceptance.

Under the UPOAA, a person asked to accept an acknowledged power of attorney has only six reasons to refuse acceptance:[159]

(1) the person is not otherwise required to engage in a transaction with the *principal* in the same circumstances;

(2) engaging in a transaction with the principal or agent in the same circumstances would be inconsistent with federal law;

(3) the person has actual knowledge of the termination of the agent's authority or of the power of attorney;

(4) the person's request for a certification, a translation, or an opinion of counsel is refused;

(5) the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested; or

(6) the person makes, or has actual knowledge that another person has made, a report to the local adult protective services office stating a good faith belief 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.

1. *Permitting Boilerplate to Eliminate Statutory Liability of Persons Asked to Accept Powers of Attorney*

While the VaUPOAA includes all six UPOAA-permissible reasons to refuse to accept an acknowledged power of attorney, it adds another: "the principal has otherwise relieved the person from an obligation to engage in the transaction with an *agent* representing the principal under a power of attorney."[160] Observe the change in language between the first UPOAA reason and the added Virginia reason. Under the UPOAA, the person may refuse acceptance if the person is not required

---

158 UPOAA sections 119 and 120 apply only to an "acknowledged power of attorney," while all other UPOAA sections apply to a "power of attorney." *See Id.* §§ 119-20. Under the UPOAA, the status of "acknowledged power of attorney" is gained when a power of attorney has been "purportedly verified before a notary public or other individual authorized to take acknowledgements." *Id.* § 119(a). The VaUPOAA deletes "purportedly" from the definition. VA. CODE ANN. § 64.2-1617(A). That difference has no real consequence when considering UPOAA section 120 and its Virginia analog, section 64.2-1618, but has significant consequence when considering UPOAA section 119 and its Virginia analog, section 64.2-1617. *See infra* Section III.C.

159 UNIF. POWER OF ATTORNEY ACT § 120(b).

160 VA. CODE ANN. § 64.2-1618(B)(1) (2017) (emphasis added).

to engage in a transaction with the *principal*; under the VaUPOAA the person may refuse acceptance if the person is not required to engage in a transaction with the *agent*. The first UPOAA reason makes the obvious point that if a person is not required to engage in a transaction with an individual, then that person cannot be made to engage in a transaction with the agent of that individual. The added VaUPOAA reason, on the other hand, permits well-advised commercial entities to continue to refuse to accept acknowledged powers of attorney, without liability, simply by slipping into their form contracts the statement, "You [the consumer] relieve us [the business] from any obligation to engage in transactions with an agent representing you under a power of attorney." Consequently, while the UPOAA eviscerates anti-consumer boilerplate, the VaUPOAA instantiates it.

Because the defense made available by anti-consumer boilerplate under the VaUPOAA is a rule of law, the power of attorney cannot override the statutory rule and create liability for third parties. Accordingly, the only way under Virginia law that a principal can ensure that he has the benefit of the improper refusal provision is vigilantly to ensure that he never enters form contracts relieving the other party from the obligation to engage in transactions with his agents.

The VaUPOAA thereby stands in opposition not only to the UPOAA, but to the even more aggressive consumer protection provisions of the law of other states. Professor Whitton, the Reporter for the UPOAA, reported that of the twelve states that recognized liability for unreasonable refusals of powers of attorney at the time the UPOAA was drafted, seven allowed recovery of attorney's fees, and five allowed recovery of costs.[161] She added that, in addition to the recovery of actual damages, presumably available in any state forbidding unreasonable refusals, Alaska provides for a civil penalty of $1000, and Indiana provides for treble damages as well as prejudgment interest on actual damages.[162]

Professor Whitton also reported on a national survey conducted by the Joint Editorial Board for Uniform Trusts and Estates Acts.

> Respondents to the JEB Survey were asked whether they had ever experienced difficulty obtaining third-party acceptance of an agent's authority. Sixty-three percent selected the answer "yes, occasionally," seventeen percent chose "yes, frequently," and twenty percent selected "no." In a follow-up question, seventy-four percent of all respondents favored statutory remedies or sanctions to address unreasonable refusal of a power of

---

[161] Linda S. Whitton, *Durable Powers as an Alternative to Guardianship, Lessons We Have Learned*, 37 STETSON L. REV. 7, 46 (2007).

[162] *Id.*

> attorney. The problem of unreasonable refusals to honor valid powers of attorney was also echoed, anecdotally, at over twenty national professional meetings where the draft Uniform Power of Attorney Act was discussed.[163]

As Professor Whitton makes clear, the absence of reported cases on unreasonable refusals does not demonstrate the absence of a problem. Practitioners stated that when faced with a refusal, they typically executed the form demanded by the third party, if the principal was competent, or filed a guardianship proceeding, if the principal was not competent, rather than litigate the refusal.[164] Consequently, Professor Whitton's *Lesson # 2: A Power of Attorney Is Only as Effective as the Willingness of Third Parties to Accept It*,[165] sounds loudly under the VaUPOAA, where refusals are made easy and not subject to sanction by the simple expedient of boilerplate language in consumer contracts.

In a further blow to the consumer protection provisions of the UPOAA, the VaUPOAA provides additional means for a third party to obviate liability for refusing to accept acknowledged powers of attorney, even when that third party neglects to include the magic boilerplate. Those additional means arise because the VaUPOAA (1) removes the cost-shifting provision when a third party makes an untimely request for an opinion of counsel, and (2) permits the third party always to saddle the consumer with the delay of the third party's obtaining an opinion from the *third party*'s counsel. Those additional non-uniform means of thwarting the UPOAA's consumer protection provisions are described in turn.

2. *Flip-Flopping Who Pays for Opinions of Counsel and Who Chooses Counsel*

UPOAA section 119(d)(3) provides that a third party "asked to accept an acknowledged power of attorney may request, and rely upon, without further investigation . . . an opinion of counsel as to any matter of law concerning the [acknowledged] power of attorney if the person making the request provides in a writing or other record the reason for the request."[166] Until the agent provides that opinion, the third party

---

[163] *Id.* at 38 (citing Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis,* 10 NAT. CONFERENCE OF COMM'R ON UNIF. STATE LAW (2002), http://www.uniformlaws.org/shared/docs/power%20of%20attorney/dpasurveyreport_102902.pdf.

[164] *See* Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance between Autonomy and Protection*, 1 PHOENIX L. REV. 343, 353-54 (2008).

[165] Whitton, *supra* note 161, at 38-39.

[166] UNIF. POWER OF ATTORNEY ACT § 119(d)(3) (UNIF. LAW COMM'N 2016).

properly can refuse to accept the acknowledged power of attorney,[167] but must "accept the [acknowledged] power of attorney no later than five business days after receipt" of the opinion of counsel.[168]

UPOAA section 119(e) provides that "an opinion of counsel requested under this section must be provided at the principal's expense unless the request is made more than seven business days after the power of attorney is presented for acceptance."[169] The VaUPOAA negates that consumer protection by providing that any "opinion of counsel for the principal or the agent requested under this section shall be provided at the principal's expense,"[170] without exception.

But that's not all. Under the UPOAA, a "person that is asked to accept an acknowledged power of attorney may request" "*an* opinion of counsel," but under the VaUPOAA that person may request not only an opinion of counsel for the principal or agent, but also an "opinion of counsel *for the person*."[171] Mercifully, the VaUPOAA does not saddle the principal with the expense of the third party's opinion from the third party's own counsel; however, the third party can delay the transaction for a period of time pending receipt of that opinion. And, the VaUPOAA places no express statutory limit on the amount time that the third party can delay acceptance pending receipt of an opinion from its counsel.

Thus, opportunities abound in Virginia to thwart the forced acceptance of acknowledged powers of attorney, as such acceptance is commanded by the UPOAA. First, a well-advised "person that is asked to accept an acknowledged power of attorney" can preemptively have inserted boilerplate into the relevant contract by which the principal "relieved the person from an obligation to engage in the transaction with an agent representing the principal under a power of attorney."[172] Second, if a "person that is asked to accept an acknowledged power of attorney" failed to get the boilerplate right, that person routinely can request an "opinion of the counsel for the principal or the agent"[173] before acceptance, and never have to pay for the opinion. Third, the "person that is asked to accept an acknowledged power of attorney" can

167 *See id*. § 120(b)(4).

168 *Id*. § 120(a)(2).

169 *Id*. § 119(e).

170 VA. CODE ANN. § 64.2-1617(D) (2017).

171 *Id.* § 64.2-1617(C)(3).

172 *Id.* § 64.2-1618(B)(1).

173 *Id.* § 64.2-1617(C)(3).

request "the opinion of counsel for the person,"[174] and delay acceptance until five business days after receipt of the opinion.[175]

Doubtless, enlightened entities, intending to be fair, solicitous, or even generous, may routinely accept acknowledged powers of attorney, but the point of the UPOAA was to make unreasonable refusals not simply unenlightened, but actionable. But by its amendments to the UPOAA, Virginia ensures that acceptance continues at the whim of the person that is asked to accept an acknowledged power of attorney.

C. Forgery Rule Diminishes Relative Attractiveness of Powers of Attorney

UPOAA sections 119 and 120 combine to form a scheme in which acknowledged powers of attorney readily are accepted and unreasonable refusals to accept them readily are sanctioned.[176] As noted, section 120 drops the hammer when a third party refuses to accept an acknowledged power of attorney without statutory excuse.[177] In exchange for that mandated acceptance, the UPOAA does not require third parties dealing with agents (acting under acknowledged powers of attorney) to investigate the agent or the agent's actions.[178] Instead, section 119 places the risk of an invalid acknowledged power of attorney upon the principal, and does so by authorizing two kinds of reliance: (1) permitted reliance on the document,[179] and (2) permitted reliance on certification by the agent.[180]

Permitted Reliance on the Document. Under UPOAA section 119(c), "[a] person that in *good faith* accepts an acknowledged power of attorney *without actual knowledge*"[181] to the contrary may rely in good faith on the validity of the power of attorney, the validity of the agent's authority, and the propriety of the agent's exercise of authority.[182] The VaUPOAA contains substantially similar provisions in section 64.2-1617(B) of the Code of Virginia, but, quite significantly, adds the following: "The preceding sentence [creating document reliance] shall not ap-

---

174 *Id*.

175 *Id.* § 64.2-1618(A)(2). So much for "the desire for increased acceptance and use of DPAs [Durable Powers of Attorney]." Hook & Johnson, *supra* note 13, at 130.

176 Unif. Power of Attorney Act § 119 cmt. (Unif. Law Comm'n 2016).

177 *See supra* Section III.B.

178 Unif. Power of Attorney Act prefatory n., at 4.

179 *Id.* § 119(c) (document reliance).

180 *Id.* § 119(d) (reliance on agent certification).

181 *Id.* § 119(c) (emphasis added).

182 *Id.* § 119 cmt.

ply to an acknowledged power of attorney that contains a forged signature of the principal."[183]

Permitted Reliance on the Certification by the Agent. "Although a person is not required to investigate whether a[n] [acknowledged] power of attorney is valid or the agent's exercise of authority [is] proper,"[184] UPOAA section 119 states that a third party "asked to accept an acknowledged power of attorney may request, and rely upon, without further investigation, an agent's certification under penalty of perjury of any factual matter concerning the principal, agent, or power of attorney."[185] The VaUPOAA contains a substantially identical provision in Code of Virginia section 64.2-1617(C),[186] yet subsection (C) lacks the specific exclusion of subsection (B) for "an acknowledged power of attorney that contains a forged signature of the principal." (Recall that under both the UPOAA and the VaUPOAA, a third party apparently can rely upon an agent's certification even if the third party has actual knowledge to the contrary.[187])

Consequently, the following interpretative indeterminacy arises in construing subsection (C) of Code of Virginia section 64.2-1617: Is an "acknowledged power of attorney that contains a forged signature of the principal" nonetheless considered an "acknowledged power of attorney" for purposes of subsection (C)?

If we reason forward from subsection (B) to subsection (C), the answer is yes, because if the answer were no, then the specific exclusion of subsection (B) is unnecessary. That is, if an "acknowledged power of attorney that contains a forged signature of the principal" is not an "acknowledged power of attorney," then no specific exclusion is necessary in subsection (B), because subsection (B) applies only to an "acknowl-

---

[183] VA. CODE ANN. § 64.2-1617(B) (2017). The VaUPOAA combines subsections (a) and (b) of UPOAA section 119 into one subsection, subsection (B) of section 64.2-1617, as well as adding the sentence noted in the text.

[184] UNIF. POWER OF ATTORNEY ACT § 119 cmt. (UNIF. LAW COMM'N 2016).

[185] *Id.* § 119(d)(1). Observe that unlike document reliance, reliance on agent representations is not expressly conditioned on the agent's acting in good faith and without actual knowledge to the contrary. *See supra* Section II.D. The UPOAA provides an optional form for an agent to certify facts concerning a power of attorney. UNIF. POWER OF ATTORNEY ACT § 302. The VaUPOAA includes that form. VA. CODE ANN. § 64.2-1639. Recall that the VaUPOAA did not adopt the other form in the UPOAA, the *Statutory Form Power of Attorney*. *See infra* Section III.H.

[186] VA. CODE ANN. § 64.2-1617(C). The VaUPOAA substitutes "oath" for "penalty of perjury" in the portion of the statute addressing reliance. However, the VaUPOAA did not substitute "oath" for "penalty of perjury" in the optional statutory form for agent certification. *Id.* § 64.2-639.

[187] *See supra* Section II.D.

edged power of attorney."[188] Yet, subsection (B) includes a specific exclusion, so that must mean that a specific exclusion is required, and under that reasoning, because subsection (C) lacks a specific exclusion, subsection (C) *does* apply to an "acknowledged power of attorney that contains a forged signature of the principal,"[189] because such is an "acknowledged power of attorney."

In addition, if we reason backward from subsection (B) to subsection (A), the answer still is yes, because if "an acknowledged power of attorney that contains a forged signature of the principal" is not treated as "verified" under subsection (A), then the specific exclusion of subsection (B) is yet again unnecessary.

Recall that the UPOAA definition of "acknowledged" is "purportedly verified before a notary public or other individual authorized to take acknowledgements."[190] "Purportedly" was included prior to "verified" specifically "to protect a person that in good faith accepts an acknowledged power of attorney without knowledge that it contains a forged signature or a latent defect in the acknowledgment."[191] That suggests that under a UPOAA understanding of the terms, an "acknowledged power of attorney that contains a forged signature of the principal" is not "verified," but only "purportedly verified." And, under that reasoning, if the VaUPOAA had merely deleted "purportedly" from subsection (A), then "an acknowledged power of attorney that contains a forged signature of the principal" would not be "verified," and such would render unavailable to third parties both document reliance under subsection (B) *and* reliance on agent certification under subsection (C).[192]

However, that reading of subsection (A) would render unnecessary the specific exclusion of subsection (B). If under Virginia law, an "acknowledged power of attorney that contains a forged signature of the principal" is not "verified" within the meaning of subsection (A), then such a power of attorney is neither "acknowledged" nor an "acknowledged power of attorney," and consequently subsection (B) is not appli-

---

188 The introductory clause for subsection (B) is: "A person that in good faith accepts an *acknowledged* power of attorney." VA. CODE ANN. § 64.2-1617(B) (emphasis added).

189 Hook and Johnson appear to agree. *See* Johnson, *supra* note 13, at 405 ("Thus, it appears that under the Virginia UPOAA, a third party that accepts a power of attorney with an agent's certification would be protected from liability under section [64.2-1617(C)], despite Virginia's amendment of section [64.2-1617(B)].").

190 UNIF. POWER OF ATTORNEY ACT § 119(a) (UNIF. LAW COMM'N 2016).

191 *Id.* § 119 cmt.

192 Hook and Johnson do not address this second part of the section 64.2-1617(C) argument, apparently regarding section 64.2-1617(A) still to contain the word "purportedly." *See* Johnson, *supra* note 13, at 404 ("Virginia Code section [64.2-1617(B)] protects third parties who in good faith accept a purportedly acknowledged power of attorney.").

cable to it, for subsection (B) applies only to an "acknowledged power of attorney." However, that reading of subsection (A) renders unnecessary subsection (B)'s specific exclusion of an "acknowledged power of attorney that contains a forged signature of the principal."

Simply put, an exclusion from "acknowledged power of attorney" for an "acknowledged power of attorney that contains a forged signature of the principal" makes sense only if an "acknowledged power of attorney that contains a forged signature of the principal" is, in the first instance, an "acknowledged power of attorney" for purposes of the VaUPOAA.

Consequently, whether we reason forward from subsection (B) to subsection (C) or backward from subsection (B) to subsection (A), the specific exclusion added to subsection (B) makes sense only if, in Virginia, an "acknowledged power of attorney that contains a forged signature of the principal" nonetheless *is* treated as "verified" under subsection (A) and *does* constitute an "acknowledged power of attorney" under subsection (C).

And if that is the proper interpretation of subsection (C), then a third party in Virginia asked to accept an "acknowledged power of attorney" may request, and rely upon, without further investigation, an agent's certification that the principal's signature is genuine, even if that acknowledged power of attorney contains a forged signature of the principal.

And if so, the VaUPOAA's demolishing of the consumer protections of the UPOAA is all-encompassing.

Recall that the VaUPOAA, unlike the UPOAA, (1) permits boilerplate language in contracts and (2) permits requests for opinions of counsel (even of the third party's own counsel) to negate all sanctions for a third party's refusing to accept an acknowledged power of attorney.[193] But, perhaps in a stroke of feigned equality, Code of Virginia section 64.2-1617(B) seems to eliminate the third party's forgery protection, which the UPOAA would grant.

However, the foregoing analysis of the forgery provisions of the VaUPOAA demonstrates that the equality is merely feigned. In Virginia, a third party seemingly can reverse section 64.2-1617(B)'s reversal of the UPOAA forgery rule simply by obtaining a certification from the agent that the principal's signature is genuine. Fully to accomplish that reversal, the third party, in addition to the agent's certification, would have to prevail, but very well may, on a legal argument of statutory construction that an "acknowledged power of attorney that contains a forged signature" nonetheless is considered "an acknowledged power of

[193] *See infra* Section III.B.

attorney" for purposes of section 64.2-1617(C) of the Code of Virginia. And that seems likely because the smaller category of "acknowledged power of attorney that contains a forged signature" must be a subset of the larger category of "acknowledged power of attorney."

In summary, UPOAA sections 119 and 120 fashion a scheme in which acknowledged powers of attorney readily are accepted and unreasonable refusals to accept them readily are sanctioned. The VaUPOAA upends both halves of the UPOAA scheme, and allows a well-advised third party to pin the consumer in the worst place: unable to seek sanctions for unreasonable refusals to accept, yet bearing the risk of a forged signature of the principal.

1. *Powers of Attorney Compared to Guardianships*

The goal of the UPOAA's interplay between sections 119 and 120 is clear: "This approach promotes acceptance of powers of attorney, which is essential to their effectiveness as an alternative to guardianship."[194] The goal of the VaUPOAA's upending that interplay is not so clear. But, of course, the upending means, beyond doubt, that in Virginia the power of attorney will remain a less effective alternative to judicially supervised guardianship proceedings.

2. *Powers of Attorney Compared to Trusts*

The power of attorney in Virginia also will be a decidedly less effective alternative to a Virginia revocable living trust, for what the VaUPOAA takes away from the UPOAA—third party protection—the Virginia Uniform Trust Code (VaUTC) grants to Virginia trusts. Thus, from the standpoint of third-party acceptance, VaUPOAA powers of attorney will be much less attractive than revocable living trusts.

Regarding third parties dealing with trustees, section 64.2-803 of the Code of Virginia (identical to section 1012 of the Uniform Trust Code) contains sweeping third-party protections.[195] That section protects both (1) persons who deal with the trustee for value and (2) persons who assist a trustee with a transaction. Provided the transaction was entered into in good faith and without knowledge to the contrary, third persons in either category are protected in the transaction even if the trustee was exceeding or improperly exercising the trustee's powers.[196] In addition, those protections extend to persons dealing with a

---

194 *See supra* Section III.B.

195 *Compare* UNIF. TRUST CODE § 1012 (UNIF. LAW COMM'N 2005), *with* VA. CODE ANN. § 64.2-803 (2017), which are identical.

196 UNIF. TRUST CODE § 1012 cmt.

former trustee, for the third party is protected the same as if the former trustee still held the office.[197]

Professors Donaldson and Danforth aptly summarize the third-party protection provisions of the VaUTC as follows. "[T]hese provisions are designed to encourage the flow of commerce by generally relieving third parties from any obligation to inquire into the duties and powers of trustees."[198]

Consequently, while the VaUTC reliance rule does not have an exception for documents with forged signatures, the VaUPOAA document reliance rule for acknowledged powers of attorney excepts "an acknowledged power of attorney that contains a forged signature of the principal."[199]

It is not at all clear why the VaUPOAA and the Virginia Uniform Trust Code take opposing view on the issue. Consequently, if a principal is interested in maximizing third party acceptance, and that seems virtually certain given that the only reason to execute a power of attorney is to desire third party acceptance, the principal likely will choose a revocable living trust, or will be channeled by counsel toward a revocable living trust rather than a power of attorney, provided the principal can afford the greater costs of creating and maintaining a revocable living trust.

D. Negating Effectiveness Conditioned on Delivery

The UPOAA and the VaUPOAA expressly permit powers of attorney to become "effective at a future date or upon the occurrence of a future event or contingency."[200] Consequently, the effectiveness of a power of attorney could be made contingent upon the delivery of the instrument by the principal to the agent.

However, under both the UPOAA and VaUPOAA, a third party who in good faith accepts an *acknowledged* power of attorney without actual knowledge to the contrary may act as if "the agent's authority were genuine, valid, and still in effect."[201] Consequently, under both the UPOAA and VaUPOAA, the principal and not the third party bears the

---

197 UNIF. TRUST CODE § 1012(d); VA. CODE ANN. § 64.2-803(d).

198 John E. Donaldson & Robert T. Danforth, *The Virginia Uniform Trust Code*, 40 U. RICH. L. REV. 325, 373-74 (2005).

199 VA. CODE ANN. § 64.2-1617(B).

200 UNIF. POWER OF ATTORNEY ACT § 109(a) (UNIF. LAW COMM'N 2016); VA. CODE ANN. § 64.2-1607(A).

201 UNIF. POWER OF ATTORNEY ACT § 119(c); *see also* VA. CODE ANN. § 64.2-617(B) (2017). The VaUPOAA adds a provision, "The preceding sentence [permitting reliance] shall not apply to an acknowledged power of attorney that contains a forged signature of the principal."). *See infra* Section III.C.

risk of the agent's apparent authority when an agent possesses an *acknowledged* power of attorney that had not been delivered to the agent by the principal yet the agency is conditioned upon that delivery.[202]

But, the UPOAA does not address whether the principal or the third party bears the risk of an agent's apparent authority when the agent possesses a *not-acknowledged* power of attorney and effectiveness is conditioned on a delivery that did not occur. The VaUPOAA retains a pre-existing Virginia statutory provision,[203] and addresses the matter as follows. "An agent in possession of a general, special, or limited power of attorney or other writing vesting any power or authority in him shall, where the instrument is otherwise valid, be deemed to possess the powers and authority granted by such instrument notwithstanding any failure of the principal to deliver the instrument to him, and persons dealing with such agent shall have no obligation to inquire into the manner or circumstances by which such possession was acquired."[204] Accordingly, on the specific issue of effectiveness conditioned upon delivery, the VaUPOAA extends the document reliance provisions to powers of attorney that have not been acknowledged.

The theory for that VaUPOAA rule is not clear, other than a desire to continue pre-VaUPOAA law.[205] And, the result of the Virginia delivery rule is opposite to the result of the Virginia forgery rule. The non-uniform Virginia delivery rule places on the principal a risk that the UPOAA places on (or at least does not remove from) the third party, while the non-uniform Virginia forgery rule places on the third party a risk that the UPOAA places on the principal. So, as compared to the UPOAA, under the VaUPOAA, the principal loses one (non-delivery), and wins one (forgery).

E. Agent Disclosure Rule

The VaUPOAA states a broad, non-uniform, default rule for required disclosure by agents.[206] Three aspects of Code of Virginia section

---

202 In addition, a third party desiring extra protection could request and rely upon, without further investigation, a certification by an agent under an *acknowledged* power of attorney that the delivery condition had been met. UNIF. POWER OF ATTORNEY ACT § 119(d)(1).

203 VA. CODE ANN. § 11-9.7 (Cum. Supp. 2009).

204 VA. CODE ANN. § 64.2-1604(E). That provision makes clear that the protection is for the third party only, and that "nothing herein shall preclude the court from considering such manner or circumstances as relevant factors in any proceeding brought to terminate, suspend, or limit the authority of the agent."

205 Hook & Johnson, *supra* note 13, at 116-17.

206 VA. CODE ANN. § 64.2-1612(I). Section 64.2-1612(I) was based upon former Code of Virginia sections 11-9.6 and 37.2-1018, but differs from prior law in two regards, one expansive, one restrictive. First, the scope of disclosure was expanded from two to five

64.2-1612(I) make the disclosure particularly arduous. First, the category of persons entitled to seek disclosure is broad and includes the following: (1) the principal's caregiver, spouse, parents, descendants, siblings, nieces and nephews; (2) a health care agent of the principal; (3) any beneficiary of the principal's property; (4) the local department of social services; (5) a person asked to accept the power of attorney; and (6) "any person that demonstrates sufficient interest in the principal's welfare."[207] Second, the scope of disclosure is broad. The agent must disclose all actions for the previous five years.[208] Third, the timing is rigid. The agent must comply within 30 days or "provide a writing or other record substantiating why additional time is needed," in which case the agent merely gets another 30 days.[209]

The only meaningful limitation on the default disclosure obligation is that the person making the request must have "a good faith belief that the principal suffers an incapacity or, if deceased, suffered incapacity at the time the agent acted."[210]But of course, the standard is not the existence of incapacity, but only the requester's good faith belief about incapacity.

The similar disclosure provisions of prior Virginia law existed "unless such disclosure or inspection is specifically prohibited by the terms of the instrument under which [the agent] acts."[211] The disclosure provisions of the VaUPOAA exist "[e]xcept as otherwise provided in the power of attorney,"[212] so no longer must the instrument "specifically prohibit" disclosure; rather, it need only "provide otherwise."

Consequently, while the VaUPOAA disclosure requirements may be appropriate in some cases, a drafter can limit them and may want to do so. And, although specific prohibition no longer is required to negate the default disclosure rule, drafters may want to continue to make specific reference and "specific prohibition."[213]

---

years, but second, the required specificity for a principal's opting out of the rule was diminished. *Id*. § 11-9.6 (Cum. Supp. 2009) (repealed 2010); *id*. § 37.2-1018 (Cum. Supp. 2009) (repealed 2012).

207 *Id*. § 64.2-1612(I) (cross-referencing to § 64.2-1614(A)(3) through § 64.2-1614(A)(9)).

208 *Id*. § 64.2-1612(I).

209 *Id*.

210 *Id*.

211 *Id*. §§ 11-9.6 (repealed 2010), 37.2-1018 (repealed 2012).

212 *Id*. § 64.2-1612(I) (where the phrase "[e]xcept as otherwise provided in the power of attorney" introduces and modifies the entire subsection).

213 A form Durable General Power of Attorney published in an appendix to the Virginia CLE forms "specifically prohibited" the then-existing default disclosure as follows: "Without limitation of the foregoing sentences in this paragraph, I specifically intend that my agent shall never be required to make disclosure of [his] [her] actions or permit inspection of my affairs under this instrument, pursuant to section 11-9.1, section

F. Agent's Creating and Amending of Trusts

Virginia's 2005 enactment of the Uniform Trust Code (VaUTC), while substantially adopting that uniform act, diminished the Uniform Trust Code (UTC) rule for allowing amendment of revocable trusts by agents of the trust's settlor. The UTC permits an agent to exercise the settlor's powers of revocation (R), amendment (A), or distribution (D) when expressly authorized by either (1) the trust or (2) the power of attorney.[214] The VaUTC, on the other hand, as enacted in 2005, required express authorization in the trust.[215] In sum, while the UTC allows the power of attorney *or* the trust to create the R, A, or D power in the agent, the original VaUTC allowed only the trust.

However, the 2010 acts enacting the VaUPOAA also altered that VaUTC rule, but continued to do so in a non-uniform manner, and even flip-flopped the non-uniformity. As amended, the VaUTC now permits the power of attorney to create the R, A, or D trust powers, but removes the capacity of the trust to do so.[216] In sum, while the UTC allows the power of attorney or the trust to create the R, A, or D power in the agent, the amended VaUTC allows only the power of attorney.[217]

On these points, when we overlay the UTC and VaUTC with the UPOAA, we see that the point of non-uniformity is academic, with one exception. Under the UTC, the trust alone can create the agent's power of revocation (R), amendment (A), or distribution (D). However, under the UPOAA, any agent appointed by any principal possesses power to create (C), amend (A), revoke (R) or terminate (T) a trust only if the power of attorney expressly grants those powers.[218] Observe that the R and A powers are common to both the UTC and UPOAA lists. That means that in a UTC jurisdiction that is also a UPOAA jurisdiction (1) while the UTC permits the trust alone to create agent powers with respect to R, A, and D, (2) the UPOAA demands express grant of R and

---

11-9.6, section 37.1-134.22 of the Code of Virginia of 1950, as amended, or any other statute." VIRGINIA CLE, 2 ESTATE PLANNING IN VIRGINIA app. 8-3 (3d ed. 2007 & Supp. 2009).

214 UNIF. TRUST CODE § 602(e) (UNIF. LAW COMM'N 2005) ("A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power.").

215 VA. CODE ANN. § 55-546.02(E) (Repl. Vol. 2007) (prior to 2010 amendment). The pre-2010 VaUTC also permitted an agent to exercise her principal's power on "good cause shown to a court." *Id*. *See* Donaldson & Danforth, *supra* note 198, at 371 n.258.

216 VA. CODE ANN. § 64.2-751(E) (2017).

217 The amended VaUTC states that an agent can exercise the settlor's powers of revocation, amendment, or distribution pursuant to a power of attorney "expressly authorizing such action, *except to the extent expressly prohibited by the terms of the trust*." *Id*. § 64.2-751(E) (emphasis added).

218 UNIF. POWER OF ATTORNEY ACT § 201(a)(1) (UNIF. LAW COMM'N 2016).

A powers before any agent has them. Thus, in a UPOAA jurisdiction that is also a UTC jurisdiction, a trust, standing alone, actually can grant only a D power.

The VaUTC denies the power of a trust alone to grant R, A, or D powers, so in Virginia, unlike "pure" UTC/UPOAA jurisdictions, a trust alone cannot grant a D power. This is the only point in which the non-uniform VaUTC/VaUPOAA differs from the pure UTC/UPOAA (in which a trust alone can grant a D power).

That point becomes even more academic when we realize that under both the UPOAA and the VaUPOAA, every "all-acts" agent automatically gets a D power under the power of attorney. Here is why.

Under the VaUPOAA and UPOAA an "all-acts" instrument grants all the cold powers.[219] One of the cold powers is the "estates, trusts, and other beneficial interests" power, which authorizes the agent to "demand or obtain money or another thing of value to which the principal is, may become, or claims to be, entitled by reason of an estate, trust, or other beneficial interest."[220] Thus, a D power is a cold power. Therefore, any agent under a UPOAA or VaUPOAA "all-acts" power of attorney always can exercise a settlor's powers with respect to distribution of trust property.[221]

Therefore, although in Virginia the trust alone cannot grant a D power, every "all-acts" agent in Virginia automatically gets a D power, and that D power would satisfy the VaUTC's requirement that any R, A, or D power be expressly authorized in the power of attorney. In other words, although in Virginia a trust alone cannot create a D power, Virginia powers of attorney will do so by automatic operation of the "all-acts" provisions.

G. Rule of Presumed Nonademption

When a testator makes a gift of specific property in her will, that gift fails if the testator does not own the property at her death,[222] under the so-called rule of ademption by extinction.[223] Various exceptions to

---

219 *Id*. § 201(c); *see* VA. CODE ANN. § 64.2-1622(C).

220 *See* UNIF. POWER OF ATTORNEY ACT § 211; VA. CODE ANN. § 64.2-1632(B)(2).

221 These are default rules, so the trust expressly can negate an agent's authority to exercise the settlor's powers under the trust. *See* UNIF. POWER OF ATTORNEY ACT § 211; VA. CODE ANN. § 64.2-1632(B)(2).

222 Specific devises are subject to ademption by extinction, but general devises are not. *See* May v. Sherrard's Legatees, 79 S.E. 1026, 1028 (Va. 1913). A general bequest, on the other hand, may be satisfied out of the general assets of the estate. *See* Chavis v. Myrick, 58 S.E.2d 881, 883 (Va. 1950).

223 Hood v. Haden, 82 Va. 588 (1886). If the property subject to a specific devise is not owned by the testator at her death, the gift is void. *Id.* at 599. Note, *Ademption by Extinction: The Form and Substance Test*, 39 VA. L. REV. 1085 (1953).

ademption exist. One under Code of Virginia section 64.2-415(C) provides that "a bequest or devise of specific property shall . . . be deemed to be a legacy of a pecuniary amount if such specific property shall, during the life of the testator and while he is incapacitated, be *sold by an agent* acting within the authority of a *durable* power of attorney for the testator," and further states that "the acts of an *agent* within the authority of a *durable* power of attorney are rebuttably presumed to be for an incapacitated testator."[224]

Because the VaUPOAA makes all powers of attorney durable unless the instrument provides otherwise,[225] the Virginia probate rule of presumed non-ademption will arise in all sales by all agents, except when the instrument expressly states that it is not durable, which will be unlikely. Drafters are not likely expressly to create not-durable instruments, because those instruments introduce the difficult factual issue of whether the principal lost capacity and thereby terminated the agent's authority.

Thus, a rule of presumed non-ademption of specific devises for sales by agents will become the default rule, because agents by default act under durable powers of attorney. Thus, in Virginia, ademption will not occur on an agent's sale unless the party seeking to prove ademption can rebut the presumption of the testator's incapacity.[226]

H. Inconsequential Removal of the Statutory Form Power of Attorney

Section 301 of the UPOAA provides a concise, three-page *Statutory Form Power of Attorney*.[227] Under the statutory form, the principal (1)

---

224 VA. CODE ANN. § 64.2-415(C) (2017) (emphasis added).

225 *Id*. § 64.2-1602 ("A power of attorney created under this act is durable unless it expressly provides that it is terminated by the incapacity of the principal."). Virginia led the way in the development of durable powers of attorney, when it permitted durable powers of attorney by statute in 1954. *See* Boxx, *supra* note 1, ¶ 1501. *See* Act of Apr. 5, 1954, ch. 486, 1954 Va. Acts 581-82.

226 Section 64.2-415 of the Code of Virginia, while stating a few presumptions, does not indicate whether those presumptions create burdens of production or persuasion. The section originally was enacted in 1985. *See* Hook & Johnson, *supra* note 13, at 114-15. The provision dealing with sales by durable agents was added in 1995. *See* Act of Mar. 18, 1995, ch. 381, 1995 Va. Acts 538. Evidentiary presumptions in Virginia presumptively impose only burdens of production, see *infra* Section IV.B.2, so that rule should apply to the presumptions under section 64.2-415.

227 UNIF. POWER OF ATTORNEY ACT § 301 cmt. (UNIF. LAW COMM'N 2016). The UPOAA comments state four reasons for including a statutory form. One, the familiarity and common understanding achieved with the use of one statutory form facilitates acceptance of powers of attorney. Two, in states such as Illinois and New York, where state-sanctioned statutory forms have existed for many years, the statutory form is widely used by both lawyers and lay persons. Third, a statutorily sanctioned form promotes uniform-

can initial a single box to grant all cold powers, (2) can take an à la carte approach to the cold powers by initialing them individually, and (3) must take an à la carte approach to the hot powers by initialing them individually.[228] The principal also can designate a successor agent and second successor agent, state special instructions, and nominate a guardian.[229]

Virginia,[230] like Maine[231] and Washington,[232] did not adopt the UPOAA's statutory form, but that refusal has no material consequence. Because (1) those three jurisdictions adopted the UPOAA provision that permits incorporation by reference by mere mention of the UPOAA descriptive terms for the cold and hot powers,[233] and (2) the UPOAA statutory form tracks the UPOAA descriptive terms, use of that form in those three jurisdictions must have the consequence contemplated in the UPOAA. Thus, their failure to enact the UPOAA statutory form simply means that the principal (or drafter) must find the statutory form in the UPOAA materials (available on line)[234] rather than within the state's statutory code. South Carolina failed to adopt both the UPOAA's statutory form[235] and the UPOAA's rule permitting incorporation of authority by descriptive term only.[236] Consequently, in South Carolina a statutory form power of attorney would have to be interpreted by the descriptive terms only, without benefit of incorporating the cold powers' sections. In South Carolina, the cold power sections can be incorporated only by reference to the section number,[237] and the statutory form does not recite section numbers, only descriptive

ity at a time when power of attorney forms proliferate in the public domain. Fourth, in the twenty years preceding the UPOAA, the number of states with statutory forms increased from only a few to eighteen.

228 *Id.*

229 *Id.*

230 *See* VA. CODE ANN. §§ 64.2-1638 [gifts] to 64.2-1639 [agent's certification]. The statutory form would appear between those sections.

231 *See* ME. STAT. tit. 18-A, §§ 5-947 [gifts] to 5-951 [agent's certification] (2017) (UPOAA provisions adopted by Maine).

232 *See* WASH. REV. CODE §§ 11.125.430 (2017) [agent's certification]. The statutory form does not precede that section, nor otherwise appear in chapter 11.125.

233 *See, e.g.,* VA. CODE ANN. § 64.2-1623(A) (2017); ME. REV. ANN. tit. 18-A, § 5-932(b); WASH. REV. CODE § 11.125.240(2).

234 *See* UNIF. POWER OF ATTORNEY ACT § 301 (UNIF. LAW COMM'N 2016). The full text of the UPOAA is available at http://www.uniformlaws.org/shared/docs/power%20of%20attorney/UPOAA_2011_Final%20Act_2017jan30.pdf.

235 *Compare* S.C. CODE ANN. §§ 62-8-217 [gifts] to 62-8-401 [jurisdiction] (2017), *with* UNIF. POWER OF ATTORNEY ACT § 301 (comparing the two statutes will show what was not adopted from the UPOAA).

236 S.C. CODE ANN. § 62-8-202(b) (not mentioning reference to descriptive term but only references to sections).

237 *Id.*

terms.[238] However, even in South Carolina, a one-line power of attorney, granting "an agent authority to do all acts that a principal could do" grants all the cold powers as stated in full in the cold powers sections.[239] Therefore, if a principal checked "[a]ll preceding subjects" in a statutory form, all the cold powers should be incorporated in full in South Carolina.[240]

I. Change to the Definition of Incapacity

Among the defined terms within the UPOAA is one for "incapacity," which means inability of an individual to manage property or business affairs because the individual: (A) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or (B) is: (i) missing; (ii) detained, including incarcerated in a penal system; or (iii) outside the United States and unable to return.[241] The VaUPOAA removes the clause "detained, including incarcerated in a penal system."[242]

The definition of incapacity in the UPOAA has relevance only for four triggering events: (1) to spring the power into existence when effectiveness is conditioned on the principal's incapacity;[243] (2) to terminate an agent's authority when the agent becomes incapacitated;[244] (3) to spring a successor agent's authority into existence when a prior agent becomes incapacitated;[245] and (4) to determine the proper recipients of an agent's resignation when the principal is incapacitated.[246] Thus, it is curious that Virginia would remove incarceration from the definition of incapacity under the VaUPOAA. Perhaps the drafters labored under an incorrect assumption that such would render an incarcerated person without capacity to act on her own behalf,[247] but the UPOAA does not do that.

---

238 UNIF. POWER OF ATTORNEY ACT § 301.

239 *See* S.C. CODE ANN. § 62-8-201(c) ("[I]f a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in Sections 62-8-204 through 62-8-216.").

240 UNIF. POWER OF ATTORNEY ACT § 301 (UNIF. LAW COMM'N 2016). ("If you wish to grant general authority over all of the subjects you may initial 'All Preceding Subjects' instead of initialing each subject.").

241 *Id.* § 102(5).

242 VA. CODE ANN. § 64.2-1600 (2017).

243 UNIF. POWER OF ATTORNEY ACT §§ 104, 109.

244 *Id.* § 110(b).

245 *Id.* § 111(b).

246 *Id.* § 118.

247 *See* Hook & Johnson, *supra* note 13, at 113.

IV. The UPOAA's Effect on Agency Law Doctrines

When evaluating acts undertaken by an agent, two threshold questions arise: Does the agent have power to perform an act? and If so, what standard of performance (or duty) governs the agent's conduct? The UPOAA comprehensively address the first of those questions—agent power—but does not significantly address the second—agent duty.

Regarding agent power, the UPOAA both (i) includes expansive definitions for cold powers and (ii) expressly encourages incorporation by reference of that language into powers of attorney.[248] Consequently, the primary consequence of the UPOAA will be to create powers of attorney that grant broad powers to agents. Accordingly, when courts review acts of agents performed pursuant to the cold power provisions, we are less likely to observe cases in which courts parse language of particular instruments, but will observe courts interpreting broad, statutory language incorporated into instruments. From that, we can expect three significant consequences.

First, the rule of strict construction for powers of attorney will be strengthened for hot powers, and that will require drafters to be quite (i) careful about the specificity with which hot powers are delineated, and (ii) careful to cure the UPOAA's failure to incorporate the incidental-powers list into the hot powers that a power of attorney actually grants.[249]

Second, the rule of strict construction for powers of attorney will disappear for cold powers, and as it retreats, performance duties will advance as the mechanism for reviewing agent conduct. Regarding agent performance duties, for which "fiduciary duty" often is an umbrella term, the UPOAA is terse, so resort to the common law of agency must be made. Among the most important consequences of characterizing an agent as a fiduciary are evidentiary presumptions that allocate burdens of proof in litigation between the agent and principal (including persons like executors litigating on behalf of the principal).

---

[248] Unif. Power of Attorney Act prefatory n., at 4 (Unif. Law Comm'n 2016) ("The Act offers the drafting attorney enhanced flexibility whether drafting an individually tailored power of attorney or using the statutory form. . . . Sections 204 through 217 of the Act set forth detailed descriptions of authority relating to subjects such as "real property," "retirement plans," and "taxes," which a principal, pursuant to Section 202, may incorporate in full into the power of attorney either by a reference to the short descriptive term for the subject used in the Act or to the section number. . . . The definitions in Article 2 also provide meaning for authority with respect to subjects enumerated on the optional statutory form in Article 3. Section 203 applies to all incorporated authority and grants of general authority, providing further detail on how the authority is to be construed.").

[249] *See supra* Section II.C.

Third, because the UPOAA treats the power to make gifts as both a hot and a boiling-hot power,[250] and the VaUPOAA uniquely treats the power to make gifts as simultaneously a cold, a hot, and a boiling-hot power,[251] gifting provisions will come under special scrutiny. That will make decisive the existence or not of "consideration" within transfers made by agents. Yet, when agents engage in transactions with themselves, determining whether some consideration, no consideration, or adequate consideration existed is not easily resolved. A 2010 decision of the Virginia Supreme Court, *Smith v. Mountjoy*,[252] made a baffling construction of "consideration" in such a context. The UPOAA will increase the frequency and therefore importance of such cases.

A. UPOAA Strengthens the Rule of Strict Construction for Hot Powers

Jones v. Brandt,[253] a sharply divided, 4-3 decision of the Virginia Supreme Court, made in 2007, and noted by textbook writers as a typical "strict construction" case,[254] revealed a pointed conflict in the application of the rule of strict construction for powers of attorney. However, the majority and the dissenting opinions at least agreed on how to state the rule.

> In Virginia, powers of attorney have been strictly construed for over a century. The authority granted by such an instrument is never considered to be greater than that warranted by its language, or indispensable to the effective operation of the authority granted. The authority given is not extended beyond the terms in which it is expressed. This general rule of construction essentially provides that expansive language . . . should be interpreted as intending only to confer those incidental powers necessary to accomplish objects as to which express authority has been given to the attorney-in-fact. The policy that supports this rule of construction is that the power to dispose of the principal's property is so susceptible of abuse that the power should not be implied. That abuse of the agent's power is particularly dangerous in a case involving a durable power of attorney, which by its nature remains in effect after the principal has become incapable of monitoring the

---

250 *See supra* Section II.B.1.
251 *See supra* Section II.B.1.
252 694 S.E.2d 598, 602-03 (Va. 2010).
253 645 S.E.2d 312 (Va. 2007).
254 *See* DUKEMINIER ET AL., *supra* note 14, at 449 (citing Jones v. Brandt, 274 Va. 131, 645 S.E.2d 412 (2007)).

> agent's conduct. We do not retreat from the rationale of these guidelines of construction.[255]

The opinions divided on whether a particular power of attorney authorized the agent to create a payable-on-death (POD) beneficiary designation in a certificate of deposit at a bank.[256] The instrument, by concession of the POD beneficiary, "did not expressly grant" that authority.[257] Paragraph 21 of the instrument expressly authorized the agent to "make and change beneficiary designations,"[258] but paragraph 21 referred only to "an IRA or employee benefit plan (including a plan for a self-employed individual) for [the principal's] benefit."[259] Similarly, paragraph 22 of the instrument expressly authorized the agent "to select . . . the beneficiaries of any insurance policies and any pension, profit sharing, stock ownership, or other retirement plans."[260]

Consequently, the party challenging the POD designation argued, and the three-member dissent agreed, that a principle akin to the maxim of *expressio unius est exclusio alterius* applied.[261] Justice Russell presented that argument as follows:

> Having explicitly included the power to change or select beneficiaries on the assets specifically named above, the absence of a power to change beneficiaries as to other assets was a glaring omission on the principal's part. He knew how to confer such

---

255 *Brandt,* 645 S.E.2d at 315 (citing Hotchkiss v. Middlekauf, 32 S.E. 36, 37-38 (Va. 1899); *id.* at 316 (Russell, J., dissenting) "The majority opinion correctly notes that powers of attorney are strictly construed in Virginia . . . ."

256 In its discussion, the court describes the agent's act as the "*change* of a beneficiary designation on a certificate of deposit," *id*. at 316 (emphasis added), but in its recitation of facts notes, "[t]he certificate of deposit previously had named no beneficiary other than [the principal]," *id.* at 314.

257 *Id*. at 314 (explaining that the pay-on-death beneficiary conceded "that the power of attorney did not expressly grant [agent] the authority to change the beneficiary of [principal's] certificate of deposit").

258 *Id*. at 317 (Russell, J., dissenting) (quoting paragraph 21 of the power of attorney).

259 *Id*.

260 *Id*. (quoting paragraph 22 of the power of attorney).

261 The principle of construction, *expressio unius est exclusio alterius*, provides that "'if a [written instrument] covers particular or express matters, the intention may be inferred to exclude other subjects which the general words of the [instrument] may have been sufficient to include.'" Yukon Pocahontas Coal Co. v. Ratliff, 24 S.E.2d 559, 563 (Va. Ct. App. 1943) (construing a deed) (quoting 16 AM. JUR. 537). *See* Bentley Funding Grp., L.L.C. v. SK&R Grp., L.L.C., 609 S.E.2d 49, 56 (Va. 2005) (construing a contract). *See* Clifton Williams, *Expressio Unius Est Exclusio Alterius*, 15 MARQ. L. REV. 191 (1931).

> an express power, but declined to extend it to certificates of deposit.[262]

Conversely, the four-member majority rejected the *expressio unius* argument by concluding as follows.

> Of course, all of these enumerated financial instruments or arrangements [the things mentioned in the paragraphs expressly permitting the agent to create or change beneficiary designations] are entirely distinct financial matters from a certificate of deposit. Thus, it is a reasonable assumption that [the principal] felt it necessary to expressly address his intent with regard to them, while operating under the equally reasonable assumption that his intentions were adequately addressed in other paragraphs with regard to any other instrument of any nature 'for deposit' and any 'contract' for personal property.[263]

Thus, *Brandt* held that language in a power of attorney authorizing the agent (1) "to sign, endorse, or assign any . . . instrument . . . for deposit,"[264] (2) "to make, sign acknowledge and deliver any contract,"[265] and (3) "generally to perform any other acts of any nature whatsoever . . . in any circumstances as fully and effectively as [the principal] could do as part of [the principal's] normal, everyday business affairs if acting personally"[266] did authorize "the change of a beneficiary designation on a certificate of deposit [a]s an act within 'the normal, everyday business affairs' of the owner of a certificate of deposit."[267]

The *Brandt* holding cannot survive the effectiveness of the UPOAA. In *Brandt*, the court noted that the POD beneficiary had conceded in the litigation "that the power of attorney did not expressly grant [agent] the authority to change the beneficiary of [the principal's] certificate of deposit."[268] That concession would doom the POD beneficiary's case under the UPOAA, because the precise issue is whether the power of attorney "expressly grants" the "power to create or change a beneficiary designation."[269] A concession that the instrument did not ends the case under the UPOAA.

However, suppose an identical case without the concession. *Brandt*-type cases specifically are addressed in the comments to the UPOAA.

---

262 Jones v. Brandt, 645 S.E.2d 312, 317 (Va. 2007) (Russell, J., dissenting).
263 *Id*. at 316.
264 *Id*. at 314-15 (quoting paragraph 3 of the power of attorney).
265 *Id*. (quoting paragraph 13 of the power of attorney).
266 *Id*. (quoting paragraph 25 of the power of attorney).
267 *Id*. at 316.
268 *Id.* at 314.
269 UNIF. POWER OF ATTORNEY ACT § 201(a)(4) (UNIF. LAW COMM'N 2016).

> [T]he [Uniform] Act contemplates that the principal will specify any special instructions in the power of attorney to further define or limit the authority granted [under a hot power]. For example, if a principal grants authority to create or change rights of survivorship or beneficiary designations, the principal may choose to restrict that authority to specifically identified property interests, accounts, or contracts. Principals should carefully consider not only whether to authorize any of the acts listed in [the hot powers list], but also whether to limit the scope of such actions."[270]

Brandt falls squarely within the comment. While the instrument in *Brandt* expressly authorized the agent to "make and change beneficiary designations,"[271] it granted that authority for "specifically identified property interests, accounts, or contracts."[272] Therefore, the *expressio unius* principle, imbedded in the UPOAA for hot powers, means that the beneficiary designation power is denied for any arrangements not named when some arrangements are named.

After analyzing *Brandt* in light of the UPOAA, two points become clear. First, we can see that the UPOAA strengthens the rule of strict construction for hot powers (those for which the UPOAA requires "express grant"). Two, when hot powers are granted in an instrument, drafters must be exceedingly careful when adding anything beyond bare statement of the hot power's statutory descriptive term, *e.g.*, "power to create or change a beneficiary designation."[273] The example in the UPOAA comment suggests that the simple statement of the subject grants wide authority and that *any* added language risks restricting the scope of the hot power.

The instrument in *Brandt*, which obviously was not drafted with the not-then-existing UPOAA in mind, added language beyond mere statement of the hot power and thereby would restrict its scope. The hot power is denied for any arrangements not named when certain arrangements are named. If more than mere statement is desired, but limiting the hot power is not, a drafter must carefully include protective language like "including but not limited to."[274]

---

270 *Id.* § 201 cmt. (internal citations omitted).

271 Jones v. Brandt, 645 S.E.2d 312, 317 (Va. 2007) (Russell, J., dissenting) (quoting paragraph 21 of the power of attorney).

272 UNIF. POWER OF ATTORNEY ACT § 201 cmt.

273 VA. CODE ANN. § 64.2-1622(A) (2017).

274 A drafter may find it helpful, when drafting powers of attorney and other documents, to define "include" and its variants as follows. "Including," "include," "included," and "includes" are used in a non-exclusive, non-exhaustive sense, and thereby do not restrict the meaning of the thing to which the description relates.

Yet, while *Brandt* cautions against adding anything to the statutory descriptive terms of hot powers, *Brandt* simultaneously cautions in favor of incorporating the incidental powers list for any hot powers that actually are granted within a power of attorney. For some unknown reason, the UPOAA incorporates the list of incidental powers for all of the cold powers and for the single hot power of making gifts, but not for any other hot powers.[275] Thus, for hot powers other than making gifts, mere statement of the power's statutory descriptive term does not also incorporate the implementing powers of the incidental powers list.

Accordingly, a drafter may want to incorporate the incidental powers list for any hot powers expressly granted by the instrument.[276] Under the UPOAA's strengthened rule of strict construction for hot powers, the mere statement of a hot power's statutory descriptive term without implementing powers results in conferring only "those incidental powers *necessary* to accomplish objects as to which express authority has been given."[277] Incorporating the incidental powers list into the hot powers would obviate controversies about whether a particular incidental power was "necessary."

B. As the UPOAA Abrogates Strict Construction for Cold Powers, Questions of Power Yield to Questions of Duty

Interestingly, although the analysis of *Brandt* shows that the UPOAA likely strengthens the rule of strict construction for hot powers, that analysis also shows that the rule of strict construction effectively is abrogated for cold powers.

Recall that the statutory hot/cold power distinction did not exist when *Brandt* was decided. Professor Kent Sinclair and Gessner Harrison read *Brandt* to provide a road map for drafters to avoid the harsh consequences of the post-*Brandt*, pre-UPOAA rule of strict construction.[278]

> First, as a general rule, practitioners should generally seek to err on the side of caution, being over inclusive and detailed

275 Unif. Power of Attorney Act § 203 (Unif. Law Comm'n 2016) (cross referencing sections 204 to 217, which are the 13 cold powers plus the single hot power of making gifts); Va. Code Ann. 64.2-1624 (cross referencing sections 64.2-1625 to 64.2-1638, which are the 13 cold powers plus the single hot power of making gifts).

276 *See supra* Section II.C.

277 Jones v. Brandt, 645 S.E.2d 312, 315 (emphasis added).

278 *See generally* Kent Sinclair & Gessner H. Harrison, Professor Kent Sinclair and Gessner H. Harrison on *Jones v. Brandt*, 274 Va. 131, 645 S.E.2d 312 (2007) and *Ott v. L & J Holdings*, LLC, 275 Va. 182, 654 S.E.2d 902 (2008) (LexisNexis Expert Commentaries 2008) (discussing Virginia precedent and providing two basic guidelines for practitioners).

> when setting out and describing the various powers to be given to the attorney-in-fact.
>
> Second, practitioners should strongly consider including a broad, general grant of authority similar to the one construed in *Jones* [*v. Brandt*] as a way to help ensure that any particular powers that were overlooked or otherwise not specifically set out in the power of attorney may nevertheless be within the scope of authority conferred upon the attorney-in-fact.[279]

Now, after the UPOAA, extensive cold powers arise by default, so drafters do not need to add to the cold power provisions; rather, drafters need only ensure that they do not inadvertently limit them. Those extensive cold powers arise from three sources (1) the thirteen automatic cold powers arising in any instrument granting the agent authority to do "all acts that a principal could do;"[280] (2) the detailed, subject-specific powers delineated within the definition of each cold power; and (3) the incidental powers automatically accompanying every cold power.[281]

The UPOAA codified Sinclair and Harrison's two drafting suggestions as default rules. The subject-specific power list within each cold power section is their first suggestion, and the incidental powers list is their second. Consequently, we can see that the UPOAA effectively abrogates the rule of strict construction for cold powers.

Now that the UPOAA default rules grant broad agent power for each of the thirteen cold powers, the incidence of cases in which courts find that agents lack power to act will diminish. Consequently, litigants and courts reviewing the conduct of agents under the cold powers will do so under doctrines relating to performance rather than power.

The doctrine of fiduciary duty provides the standards for performance and for liability of agents.[282] Fiduciary duty often is said to consist of two major subparts: the duty of loyalty and the duty of prudence.[283] The duty of prudence relates to the wisdom of the agent in investing, maintaining, buying, and selling the property subject of the agency. The

---

279 *Id*. at 6.

280 VA. CODE ANN. § 64.2-1622(C) (2017).

281 *Id*. § 64.2-1624 (cross referencing to section 64.2-1625 to 64.2-1638, which are the 13 cold powers plus the sole hot power of making gifts).

282 Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 28, 56-57 (2001) (noting that "the category of fiduciary relationships is a continuous spectrum where the scrutiny becomes more forgiving as the slant of the relationship flattens from the true vertical upper hand of the fiduciary," and arguing that "the fiduciary responsibilities of an attorney-in-fact for an incapacitated principal should be high" because of the principal's inability to monitor the agent).

283 John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 655 (1995) ("The law of fiduciary administration, the centerpiece of the modern law of trusts, resolves into two great principles, the duties of loyalty and prudence.").

duty of loyalty relates to how and whether the agent can engage in transactions with her principal, as for instance selling or giving the agent's property to herself.[284] And, when an agent engages in such transactions with her principal, fiduciary duty law typically imposes a presumption of undue influence on the agent.

> The special obligations imposed on fiduciaries by the duty of loyalty help raise the enforcement probability. To overcome difficulties in proof, the law infers disloyalty from its appearance, presuming that a fiduciary will appropriate the principal's asset when it is in her self-interest to do so. This inference alters the usual rules of tort liability by shifting the burden of proof from a plaintiff to a defendant or by prohibiting completely the act in question.[285]

Regarding agent performance duties, the UPOAA is terse, and does not address burdens of proof. UPOAA section 114 simply states a few rules that traditionally have been included within the concept of fiduciary duty. Under section 114, an agent must (1) act in good faith within the scope of the authority granted and in the principal's best interest and reasonable expectations; (2) act loyally without conflict of interest and with the care, competence, and diligence of similar agents; and (3) keep records of all transactions and be ready to account for those transactions when properly requested to do so. The comment to section 114 states that "[a]lthough well settled that an agent under a power of attorney is a fiduciary, there is little clarity in state power of attorney statutes about what that means."[286]

In addition to section 114, UPOAA section 121 states that "the principles of law and equity supplement" the UPOAA, and the com-

---

[284] *Id*. Rather than stating two great principles of loyalty and prudence, the *Third Restatement of Agency* bifurcates fiduciary duty into (i) duties of loyalty and (ii) duties of performance. It states four sub-duties of loyalty: (1) duty not to acquire a material benefit from a third party; (2) duty not to deal with the principal as or on behalf of an adverse party; (3) duty to refrain from competing with the principal; and (4) duty not to use property or confidential information of the principal for the agent's own purposes. Restatement (Third) of Agency §§ 8.01-8.05 (Am. Law Inst. 2006). It states six sub-duties of performance. *Id*. §§ 8.07-8.12.

[285] Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. Rev. 1045, 1055-56 (1991).

[286] Unif. Power of Attorney Act § 114 cmt. (Unif. Law Comm'n 2016) (citing Boxx, *supra* note 282; Carolyn L. Dessin, *Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role*, 75 Neb. L. Rev. 574 (1996)). The UPOAA comment further notes, "Among states that address agent duties, the standard of care varies widely and ranges from a due care standard (*see, e.g.*, 755 Ill. Comp. Stat. Ann. 45/§ 2-7 (West 1992); Ind. Code Ann. § 30-5-6-2 (West 1994)) to a trustee-type standard (*see, e.g.,* Fla. Stat. Ann. § 709.08(8) (West 2000 & Supp. 2006); Mo. Ann. Stat. § 404.714 (West 2001))." *Id.*

ment to section 121 states that "[t]he common law of agency is articulated in the Restatement of Agency and includes contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions."[287]

Professor Boxx points out that while "most fiduciary relationships have some monitoring mechanism," "the attorney-in-fact with an incapacitated principal is uniquely directionless."[288] Thus, "[t]he fiduciary responsibilities of an attorney-in-fact for an incapacitated principal should be high."[289]

The recent *Restatement (Third) of Agency*, in its general description of the agent's fiduciary duties to the principal, states that "distinctive remedies are available to the principal" and that "burdens of proof are often allocated differently than in civil litigation generally."[290]

Given that powers of attorney frequently give rise to non-commercial transactions made on behalf of principals of diminished capacity by familial agents in circumstances where the agent's conduct is reviewed by a court after the principal has died, informational asymmetries abound, so the distinctive remedy of an altered burden of proof will become even more important under the UPOAA.

Yet, a remarkable lack of clarity exists regarding the remedy of altered burdens of proof in the *Restatement (Third) of Agency*, in the UPOAA, and even within a particular jurisdiction. For instance, in Virginia, two Virginia Supreme Court cases, *Grubb*,[291] decided in 2006, and *Parfitt*,[292] decided in 2009, state opposite rules regarding the evidentiary presumption placed upon self-dealing agents. *Grubb*, citing a line of agency cases, held that an agent receiving "considerable personal benefit" from transactions conducted by him for his principal must prove the absence of undue influence by clear and convincing evidence.[293] *Parfitt*, neither citing agency cases nor mentioning *Grubb*, held that such an agent merely is required to produce some evidence to negate undue influence.[294] The difference between an evidentiary burden of persuasion and one of production is vast.[295] Further confounding the matter, in November 2016, the Virginia Supreme Court did not even mention burdens of proof in a decision that permitted an agent—on the day before the incapacitated principal's death—to increase the share in the remainder

---

287 *Id*. § 121 cmt.
288 Boxx, *supra* note 282, at 44.
289 *Id*. at 56.
290 Restatement (Third) of Agency § 1.01 cmt. e (Am. Law Inst. 2006).
291 Grubb v. Grubb, 630 S.E.2d 746 (Va. 2006).
292 Parfitt v. Parfitt, 672 S.E.2d 827 (Va. 2009).
293 *Grubb*, 630 S.E.2d at 741, 751.
294 *Parfitt*, 672 S.E.2d at 830.
295 *See infra* Section IV.B.2.

of the principal's revocable living trust of the agent and her brother from 45% to 100%, thereby eliminating the interest in that trust of the principal's deceased spouse's relatives.[296]

1. *Does* Parfitt *Change the Burden of Proof to a Burden of Production?*

Parfitt held that when a mother added her son to the mother's bank account as a joint owner,[297] (1) the son was constituted an agent, as a matter of law by a banking statute,[298] (2) the son thereby became subject to a fiduciary duty to his mother because of that agency,[299] and (3) from that fiduciary duty, the son became subject to a burden of *production* to rebut a presumption of undue influence[300] when he received "considerable personal benefit"[301] from his transactions with his mother's property. One paragraph of the opinion captures all those points.

> Because [Son] did not contribute any funds to [Mother's] account, he was, by operation of statute, an agent with regard to the entire account. By statute, a confidential relationship was established creating a fiduciary duty. The confidential relationship created a presumption that the self-dealing transactions were "unduly obtained." Accordingly, the trial court

---

296 *See generally* Reineck v. Lemen, 792 S.E.2d 269 (Va. 2016) (failing to discuss the burden of proof where it was alleged co-trustees breached their fiduciary duties).

297 *Parfitt*, 672 S.E.2d at 828. The court described the circumstances of the agent's addition to the joint account as follows: "With the knowledge and assent of his brother Gordon Vance Parfitt ('Vance'), who lived out of state, Jeff was added as a joint owner of Jane's bank account ('joint account') in order to assist Jane in paying her bills. Jane [mother], Jeff [son and agent], and Vance also agreed that Jeff would quit his construction job to care for Jane until care providers could be hired, and that Jeff would pay himself $ 500.00 per week from the joint account to make up for his lost income." *Id*. Presumably, the addition of Jeff was with the consent of Jane, the other owner. The relevance of Vance's consent to his mother's creating a joint account with his brother Jeff is not clear.

298 *Id*. at 830 ("Because Jeff [son] did not contribute any funds to Jane's [mother's] account, he was, by operation of statute, an agent with regard to the entire account. By statute, a confidential relationship was established creating a fiduciary duty.") (citing VA. CODE ANN. § 6.1-125.15:1, (re-codified as VA. CODE ANN. § 6.2-619 (2015))).

299 *Id*.

300 *Id.* ("Accordingly, the trial court erred in holding that there was no confidential relationship, and therefore erred in failing to shift the burden of production to Jeff [agent] and Boyka [agent's wife] to rebut the presumption of undue influence in the various transactions.").

301 *Id*. at 829-30 ("First, it is undisputed that by virtue of their actions with regard to Jane's property, Jeff [agent] and Boyka [agent's wife] received considerable personal benefit. This is a necessary precondition for the burden to be shifted when a transaction is challenged on the ground that it was procured by undue influence in a confidential relationship.") (citing Friendly Ice Cream Corp. v. Beckner, 597 S.E. 34, 38-39 (Va. 2004)).

erred in holding that there was no confidential relationship, and therefore erred in failing to shift the burden of *production* to [Son] and [Son's wife] to rebut the presumption of undue influence in the various transactions.[302]

In *Grubb*, a brother, acting under a power of attorney from his sister, became subject to a fiduciary duty based on that agency, and then became subject to a burden of *proof* to produce *clear and convincing evidence* to rebut the presumption of undue influence when he opened or renewed bank accounts held jointly with his sister.[303] In the *Grubb* litigation, at the trial court, that burden of proof had been placed on the agent; he produced some evidence to rebut the presumption, including his own testimony and that of a bank employee, but the trial court found, and the Virginia Supreme Court affirmed, that the agent's evidence "did not meet the clear and convincing standard."[304] Note that in *Grubb*, the agent produced *some* evidence, but he had not produced *enough* evidence to meet a burden of clear and convincing evidence.

Parfitt was decided only three years after *Grubb*, the cases are irreconcilable, and because *Parfitt* did not discuss *Grubb* and because *Grubb* is consistent with a line of analogous cases, *Parfitt* should be regarded as the aberration. The *Nicholson*[305]-*Kolaitis*[306]-*Grubb* line of cases uniformly states that a subject-specific presumption exists when an agent conducts transactions for her principal in which the agent receives considerable personal benefit and places on that agent the burden to prove by clear and satisfactory evidence that the principal fully understood the nature and character of the transaction.[307]

Even more oddly, *Parfitt* did not cite or discuss *Nicholson* regarding agency, the presumption of undue influence, or the consequent shift in the burden of proof, but *Parfitt* did cite *Nicholson* for a holding regarding the evidentiary rule laid down by the dead man's statute.[308] The so-

---

302 *Id.* at 830 (emphasis added) (citations omitted).

303 Grubb v. Grubb, 630 S.E.2d 746, 751 (Va. 2006) ("When a presumption of constructive fraud arises, the burden of proof shifts to the fiduciary to produce clear and convincing evidence to rebut the presumption.").

304 *Id*. at 752.

305 Nicholson v. Shockey, 64 S.E.2d 813, 820 (Va. 1951).

306 Economopoulos v. Kolaitis, 528 S.E.2d 714, 719 (Va. 2000).

307 *Kolaitis*, 528 S.E.2d at 718 ("The existence of such a [confidential] relationship would give rise to a presumption of fraud and shift to [agent] the burden to *prove* the *bona fides* of the transactions at issue) (citing *Nicholson*, 64 S.E.2d at 817, 820 (emphasis added)); *Nicholson*, 64 S.E.2d at 820 (The evidence of agent failed "to measure up to the clear and satisfactory proof which is required to overcome the adverse presumption of constructive fraud and sustain [the agent's] claim that his [principal] fully understood the nature and character of these deposits.")).

308 Parfitt v. Parfitt, 672 S.E.2d 827, 830-31 (Va. 2009) (discussing VA. CODE ANN. § 8.01-397 (2015)).

called dead man's statute demands evidence beyond the uncorroborated testimony of the adverse party in an action against a party incapable of testifying.[309] *Parfitt* reminded us that *Nicholson* interpreted the dead man's statute to require even greater corroboration in agent cases.[310] Strangely then, *Parfitt* simultaneously lowers one evidentiary burden on the self-dealing agent—to overcome the undue influence presumption—while reminding us of a higher evidentiary burden that the agent bears—to corroborate the agent's own testimony under the dead man's statute at "a higher degree of corroboration [than] is required than in ordinary transactions."[311]

Reineck v. Lemen[312] is even more baffling. There, the Virginia Supreme Court did not even mention evidentiary presumptions when it summarily concluded that the agent acted in the principal's "best interests."[313] Frank's child LaVerne, on the day before Frank died, acted under Frank's power of attorney to create two new trusts and to transfer to them, from an existing trust created by Frank 21 years before his death, $1.24 million of Frank's property. Under the new trusts, at Frank's death, LaVerne and her brother Jeff were to receive the entire trust property, yet under the existing trust, LaVerne and Jeff were to receive only 45%, with relatives of Jane, Frank's predeceased wife, receiving the other 55%. The Virginia Supreme Court examined the case near exclusively as a question of power; its analysis of duty consisted of one paragraph without mention of evidentiary burdens.

Frank's power of attorney had been executed in 1999, prior to enactment of the VaUPOAA, but the VaUPOAA governed its interpretation. Two provisions of the power of attorney addressed agent power to create inter vivos trusts.

One authorized the agent, called the Attorney-in-Fact within the document, "to assign, transfer and convey all or any part of my real or personal property . . . to . . . (ii) any revocable trust established by my Attorney-in-Fact during my lifetime which directs the trustee or trustees

---

309 The dead man's statute, both when *Parfitt* was decided and presently, provides in pertinent part, "In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony." VA. CODE ANN. § 8.01-397 (2017).

310 *Parfitt*, 672 S.E.2d at 831 ("Additionally, '[w]here a confidential relationship existed between the parties at the time of the transaction relied on, a higher degree of corroboration is required than in ordinary transactions.'" (citing Clay v. Clay, 86 S.E.2d 812, 815 (Va. 1955)).

311 *Id.*

312 792 S.E.2d 269 (Va. 2016).

313 *Id.* at 273.

to administer the trust for my benefit."[314] Another permitted the agent to "make, execute, endorse, acknowledge, and deliver any and all instruments . . . including, but not limited to, . . . inter vivos trusts . . . for my benefit during my lifetime and/or the benefit of my wife and my descendants after my death."[315]

> The most natural reading of this clause, and particularly the "and/or" provision, is that the attorney-in-fact could make instruments, including inter vivos trusts, for Frank's benefit when he was alive, and upon his death, for the benefit of either his wife Jane or his descendants or both. Frank's wife Jane had pre-deceased him. This clause says nothing about Jane's possible heirs. The creation of inter vivos trusts by [LaVerne] Lemen for the benefit of [LaVerne] Lemen and [Jeff] Still is entirely in accord with the plain language of this clause.[316]

Having found agent power to exist, the court summarily agreed that LaVerne had not breached any duty.

> The trial court also correctly determined that [LaVerne] Lemen acted in Frank's best interests. It is evident that Frank was concerned with meeting his own needs, taking care of his wife's needs, and providing for his children. The creation of the inter vivos trusts certainly did not harm Frank during his life. Jane had pre-deceased Frank, so the inter vivos trusts did not trench on Frank's regard for his wife's welfare. Finally, the inter vivos trusts did not benefit complete strangers, they benefitted his children.
>
> Frank had sufficient regard for his children to provide for them in his original estate plan, and to name his daughter as his attorney-in-fact should his wife, Jane, be unable to serve. While Frank's original estate plan called for initially 60% and then 55% of his estate to go to Jane's relatives, his later-executed power of attorney made no mention of Jane's relatives or of his earlier estate documents. However, the original estate plan was made with parallel provisions that contemplated an inheritance from Frank's estate to Jane's relatives and Frank's children, and vice versa from Jane's estate to her relatives and Frank's children. Thus, we are satisfied that [LaVerne] Lemen's actions were consistent with the express language of Frank's power of attorney and with the provisions of the Uniform Power of At-

---

314 *Id.* at 272-73 (quoting Article III, section K of the power of attorney).

315 *Id.* at 273 (quoting Article III, section F of the power of attorney).

316 *Id.* at 273.

torney Act, including Code § 64.2–1612(A)(1) [UPOAA section 114(a)(1)].[317]

UPOAA section 114(a)(1) requires that "[n]otwithstanding provisions in the power of attorney, an agent that has accepted appointment shall [a]ct in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest."[318] *Reineck* thereby authorizes agent self-dealing for (1) post-death transfers of the principal's property (as in "did not harm Frank during his life") (2) to the principal's children "provided for in the principal's original estate plan," (3) particularly when the principal's pre-deceased spouse had changed the parallel provisions of her estate planning documents operative at her death. The first two of three *Reineck* factors always will be met whenever the principal's children boost their share of the principal's property passing to them at the principal's death, except in the rare case in which the children were not included at all in the principal's original estate plan.

The third *Reineck* factor is the intriguing one. Under it, children apparently can "protect their interests," by changing their parent's at-death transfers when a step-parent earlier had changed her at-death transfers to the detriment of the children. But if so, this third factor is severely underdeveloped in the *Reineck* opinion. No numeric comparison is made between the detriment occurring at the step-parent's death and the increase effected by the agent's acts effective at the parent's death.

In sharp contrast to the agent's court-approved, self-help remedy in *Reineck*, Virginia law is clear that LaVerne and Jeff, Frank's children, would have had no cause of action against their step-mother's estate for her having altered from the parallel provisions.[319] So from where does *Reineck*'s self-help remedy for adult-child agents arise? Under UPOAA section 114, do we create a rule that "the principal's reasonable expectations" include the self-help remedy?

To what extent is the principal's capacity relevant? In *Reineck*, it appears that Frank had lost capacity prior to his wife's death.[320] Therefore, Frank never would have known that Jane had changed her parallel provisions, nor would Frank have had capacity to change his estate planning documents after Jane's death. Perhaps that is a necessary element for the self-help remedy.

---

317 *Id.*

318 Unif. Power of Attorney Act § 114(a)(1) (Unif. Law Comm'n 2016).

319 Keith v. Lulofs, 724 S.E.2d 695, 699 (Va. 2012) ("language of 'mirror image' wills is insufficient alone to form a contract" not to revoke a will).

320 Reineck v. Lemen, 792 S.E.2d 269, 272 (Va. 2016) (Frank "moved to memory care unit" before Jane completely "disinherited" LaVerne and Jeff).

Regarding statutory duties under the UPOAA, the *Reineck* court found that the agent satisfied the general duty of section 114(a)(1). However, the court failed to mention the more specific duty of section 114(b)(6), which requires the agent "[e]xcept as otherwise provided in the power of attorney," to "attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including: (A) the value and nature of the principal's property; (B) the principal's foreseeable obligations and need for maintenance; (C) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and (D) eligibility for a benefit, a program, or assistance under a statute or regulation."[321]

In *Reineck*, there is no indication that the power of attorney negated the agent's duty under section 114 (b)(6) to preserve the principal's estate plan. However, it is clear that the agent both knew the principal's estate plan and changed it to her advantage. Nonetheless, nothing in the court's opinion addresses the agent's duty under section 114(b)(6), the elements within it, or application of those elements to the case.

The UPOAA's shift from power to duty in reviewing agent conduct will only increase the importance of knowing when and how evidentiary burdens are shifted to agents. If Virginia law is any indication of a larger trend, lawyers must mine evidence codes and cases and likely will find conflicting authorities.

2. *Comparing Burdens of Proof (Persuasion) and Production (Going Forward)*

The distinction between burdens of proof and production reprises the two predominate theories of the effect of presumptions: the Thayer-Wigmore theory, which views presumptions as shifting only the burden of production (sometimes referred to as the burden of going forward), and the Morgan-McCormick theory, which views presumptions as shifting the burden of persuasion (sometimes referred to as the burden of proof).[322] The distinction between a burden of production and a burden

---

321 UNIF. POWER OF ATTORNEY ACT 114(b)(6); VA. CODE ANN. § 64.2-1612(B)(6) (2017).

322 [T]he "Thayer theory" or "bursting bubble theory," states that the only effect of a presumption is to shift the burden of production with regard to the presumed fact. Under this theory, once the party against whom the presumption operates introduces evidence sufficient as a matter of law to establish a prima facie case, the presumption is "spent and disappears," and the party who initially benefited from the presumption still has the burden of persuasion on the factual issue in question. . . . [T]he "Morgan theory," criticizes the "bursting bubble theory" for giving presumptions an effect that is too "slight and evanes-

of proof is more than simply academic; the difference between producing some evidence on a point and proving that point (by clear and convincing evidence) is vast.

Professors Friend and Sinclair explain that most, but not all, presumptions in Virginia are of the Thayer-Wigmore variety, imposing on the party against whom the presumption is directed merely the burden of going forward with evidence to rebut or meet the presumption, and do not shift to such party the burden of proof, which remains throughout the trial upon the party on whom it originally rested.[323] Indeed, the recently enacted Virginia Rules of Evidence (like the Federal Rules of Evidence[324]), state that as a general rule for presumptions,[325] "unless otherwise provided by Virginia common law or statute."[326]

Professors Friend and Sinclair similarly remind us that "[i]t is not, repeat *not*, necessary to conclude that all presumptions must be of one type or the other.[327] Instead, "[e]ach individual presumption must be *scrutinized* and its effects learned by rote."[328] And they tell us "it appears that in Virginia we now have at least four . . . rebuttable or 'true' presumptions that, once invoked, shift to the opposite party not only the

> cent" when viewed in light of the policy reasons that justified their creation. Under the "Morgan theory," a presumption should have the effect of shifting both the burden of production and the burden of persuasion on the factual issue in question to the party against whom the presumption operates. This effect ensures that a presumption, particularly one created to further social policy, has "enough vitality to survive the introduction of opposing evidence which the trier of fact deems worthless or of slight value."

City of Hopewell v. Tirpak, 502 S.E.2d 161, 169 (Va. Ct. App. 1998), *aff'd in part*, *vacated in part*, Bass v. Richmond Police Dep't, 515 S.E.2d 557 (Va. 1999).

323 Charles E. Friend & Kent Sinclair, The Law of Evidence in Virginia § 10-5 (6th ed. 2003 & Cum. Supp. 2008).

324 Fed. R. Evid. 301 ("In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.").

325 Va. R. Evid. 2:301 (approved and promulgated by the Virginia Supreme Court Sept. 12, 2011) (approved by Virginia Assembly by Act of Apr. 9, 2012, ch. 708, 2012 Va. Acts § 8.01-3; and Act of Apr. 9, 2012, ch. 688, 2012 Va. Acts § 8.01-3). The enacting statute made two very slight changes. One added a sentence to Rule 2:102, as follows. "Common law case authority, whether decided before or after the effective date of the Rules of Evidence, may be argued to the courts and considered in interpreting and applying the Rules of Evidence." The other stated that "the Virginia Code Commission shall direct any party with whom the Virginia Code Commission contracts to publish the Code of Virginia to include in the catchline of every section of the Code of Virginia from which any rule contained in the Rules of Evidence has been derived a notation specifying such rule." *Id*. 2:203. The rules are effective June 1, 2012.

326 *Id*. 2:301.

327 Friend & Sinclair, *supra* note 323, at 362 (emphasis in original).

328 *Id*. at 363 (emphasis added).

burden of going forward with the evidence (burden of production) but also the burden of persuasion."[329]

On the preceding pages, I have scrutinized the cases to demonstrate that a presumption of undue influence arises when an agent receives considerable personal benefit from a transaction engaged in with her principal; thus, that presumption belongs on the list as a fifth presumption in Virginia that shifts the burden of persuasion. *Nicholson*[330] established that "subject-specific presumption;" *Kolaitis*, citing *Nicholson*, reiterated it, and *Grubb* applied it. *Parfitt* ignored the *Nicholson-Kolaitis-Grubb* line of cases, but one hopes that such was inadvertent and not a substantive change to the evidentiary presumption facing self-dealing agents. Because questions of loyalty will gain prominence, even preeminence, it hardly seems the time to diminish the evidentiary burden on a self-dealing agent, and appears especially imprudent for *Parfitt* to have done so without careful analysis of the entire body of Virginia agency cases.

C. Cold Power Cases like *Ott* After the VaUPOAA

The importance of the evidentiary burden on the self-dealing agent is shown by contemplating how a cold power case like *Ott v. L & J Holdings, LLC*[331] is affected by the UPOAA.

In *Ott*, Mrs. Monroe, acting pursuant to a power of attorney from Mr. Monroe and acting when he was "unable to communicate or manage his business affairs,"[332] (1) created an LLC in which Mr. Monroe's membership interest was 80% and Mrs. Monroe's was 20%, and (2) Mrs. Monroe then transferred three parcels of land to the LLC. Mr. Monroe had owned two of the parcels in his name alone; the third had been owned by Mr. and Mrs. Monroe as tenants by the entirety.[333]

After Mr. Monroe's death, his executor, who was not his wife, sued to void the transfers. The executor "contended [1] that the deed was a gift, [2] that it failed to comply with the requirements of Code of Virginia § 11-9.5(C) [relating to gifts by agents], and [3] that it was beyond the powers granted to Mrs. Monroe by Mr. Monroe's power of attor-

[329] *Id*. at 362. Friend and Sinclair identify these four: (1) the presumption against suicide that arises in the context of claims under life insurance policies; (2) the presumption of negligence arising in cases involving damaged goods delivered by a common carrier; (3) the presumption of legitimacy of a child born in wedlock; and (4) the statutory presumption regarding birth-related neurological injuries in section 38.2-5008(A) of the Code of Virginia.

[330] Nicholson v. Shockey, 64 S.E.2d 813, 820 (Va. 1951).

[331] 654 S.E.2d 902 (Va. 2008).

[332] *Id*. at 903.

[333] *Id*. at 904.

ney,"[334] because the power of attorney expressly forbade gifts to the agent.[335] The trial court found, and the Virginia Supreme Court affirmed, that Mr. Monroe had received "valuable consideration," so the transaction was not a gift.[336]

Quite obviously, even if the transaction were not a gift, it nonetheless was a self-dealing transaction. While the agent had not given her principal's property to herself, she certainly had sold the principal's property in a transaction in which the agent received considerable personal benefit.[337]

Consequently, under *Nicholson*, *Kolaitis*, *Grubb*, and *Parfitt*, the agent's receipt of considerable personal benefit should have given rise to a presumption of undue influence and placed an evidentiary burden on the agent. As noted earlier in this article, *Grubb* and *Parfitt* are irreconcilable on whether that evidentiary burden is one of proof or merely one of production,[338] yet both agree that there is a presumption of undue influence and that some burden is placed on the agent when an agent receives "considerable personal benefit."

In *Ott*, the court quickly, conclusively, and abruptly stated that there had been no self-dealing and truncated what should have been a multi-level analysis of benefit, presumption, and evidentiary burden.[339] Here is the court's entire self-dealing analysis, a single paragraph at the end of the opinion:

> The circuit court found from the evidence that the deed was not, in fact, a deed of gift despite its caption,[340] that it was

---

334 *Id*.

335 *Id*. at 903 ("'My Agent may not make gifts of my property to the Agent.'") (quoting the power of attorney).

336 *Id*. at 905 ("We agree with the circuit court's analysis.").

337 I intend no inference that Mrs. Monroe engaged in prohibited self-dealing, but only that cases involving agents receiving considerable personal benefit should be analyzed in a particular way. Informational asymmetries in self-dealing cases have lead most courts, including the Virginia Supreme Court in the *Nicholson-Kolaitis-Grubb* line of cases, to place a burden of persuasion on the agent. Neither *Ott* nor *Parfitt* provide any explanation for a decision to diminish that presumption to a mere burden of production (*Parfitt*) or mere conclusion (*Ott*).

338 *See supra* Section IV.B.1.

339 The issue of self-dealing was raised in the appellant's brief. Opening Brief of Appellant at 15-17, Ott v. L & J Holdings, LLC, 654 S.E.2d 902 (Va. 2008) (No. 070228), 2007 WL 5084205, at *15-17.

340 A major issue in *Ott* was the admissibility of parol evidence to construe a deed. The deed was captioned "THIS CORRECTED DEED OF GIFT," but also recited (1) that consideration had been paid and (2) that the deed was exempt from recordation taxes pursuant a Code of Virginia section that did not apply to gifts. Ott v. L & J Holdings, LLC, 654 S.E.2d 902, 904 (Va. 2008). The Virginia Supreme Court held that "[b]ecause the deed could be read either as a deed of gift or as a conveyance for valuable

> given for a valuable consideration and that the evidence showed no donative intent on [Mrs. Monroe's] part.[341] Rather, the court found, the transfer of the property was undertaken for legitimate business reasons and that [Mr. Monroe] and [Mrs. Monroe] each received benefits, including possible future tax benefits, commensurate with their respective percentage interests, without any self-dealing on [Mrs. Monroe's] part. The transaction was, therefore, within the powers granted by [Mr. Monroe's] power of attorney.[342]

At some level, it is difficult to decide which are the anomalous cases. The Virginia Supreme Court conducted neither independent analysis nor citation to the record for the factual findings that it affirmed. Nor was there any discussion of any evidentiary burden upon Mrs. Monroe. Does *Ott* modify the agent-undue influence cases or is it the other way around? It should be the latter, as *Ott* never tells us the basis for the conclusion that there was no self-dealing.

Interestingly, *Ott* seems the model for a typical post-UPOAA cold power case. After it is established that the agent's act under review does not involve a hot power (as would be the situation in *Ott*-like cases once it is decided that the transactions were not gifts), an agent with authority to do "all acts that a principal could do," clearly would have the power to execute a deed contributing the principal's property to the LLC, under the cold power relating to "real property,"[343] and the power to

---

consideration, the [trial] court found it to be ambiguous on its face and admitted parol evidence to resolve the ambiguity. We agree with the circuit court's analysis." *Id*. at 905.

341 The exact quote is, "the evidence showed no donative intent on Lou Ann's part." *Id.* at 906. Lou Ann was Mrs. Monroe, wife of the principal. What does the court mean? That Lou Ann Monroe acted without donative intent to *make* a gift or to *receive* a gift? Or both?

342 *Id*.

343 In *Ott*, the instrument had granted the agent "authority to sell and convey real property, to enter into binding contracts on [the principal's] behalf and to manage [the principal's] business affairs." *Id*. at 903. Similarly, a post-VaUPOAA power of attorney that either (1) grants the agent authority to do "all acts that a principal could do," or (2) grants authority with respect to the subject of "Real Property" grants the agent the following subject-specific powers:

> to "[s]ell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; retain title for security; encumber; partition; consent to partitioning; subject to an easement or covenant; subdivide; apply for zoning or other governmental permits; plat or consent to platting; develop; grant an option concerning; lease; sublease; *contribute to an entity in exchange for an interest in that entity*; or otherwise grant or dispose of an interest in real property or a right incident to real property."

VA. CODE ANN. § 64.2-1625(2) (2017) (emphasis added).

create the LLC, under the cold power[344] relating to "operation of entity or business," which authorizes the agent to buy an ownership interest.[345]

Thus, for cold powers, agent authority for disposing of property for *some* consideration is manifest. So, how will the acts of agents pursuant to cold powers be reviewed by courts? The answer: by litigation of the presumption of undue influence for transactions in which the agent receives considerable personal benefit.[346] However, *Ott* did not do that. *Ott* made no analysis of the self-dealing issue other than to affirm a trial court conclusion that no self-dealing had occurred, and that conclusion said nothing about whether the agent bore any evidentiary burden. Additionally, if *Parfitt* reigns as the evidentiary burden on a self-dealing agent, then the agent need only offer some evidence negating undue influence, but will not bear the burden of persuasion by clear and convincing evidence, as the agent would under the *Nicholson-Kolaitis-Grubb* line of cases.

D. Gift Cases like *Mountjoy* After the UPOAA

One last category of cases remains for extended discussion, and like *Ott* and *Brandt*, we have a pre-UPOAA case to guide discussion of the post-UPOAA law. The category is gifts by agents, and the case is *Smith v. Mountjoy*,[347] a 2010 Virginia Supreme Court case making a baffling definition of "consideration" for this purpose.[348]

In *Mountjoy*, Husband and Wife owned six parcels of real estate as tenants by the entirety.[349] Acting under a durable power of attorney, Wife executed a deed, both in her individual capacity and as agent for Husband, that transferred half of the real estate to Wife's revocable trust and half to Husband's revocable trust.[350] Husband's revocable trust had been created by Wife pursuant to the same power of attor-

---

[344] In *Ott*, the agent's authority to create the LLC was not discussed, but apparently assumed. *Ott,* 654 S.E.2d at 906.

[345] VA. CODE ANN. 64.2-1630(1).

[346] *See In re* Estate of Kurrelmeyer, 895 A.2d 207 (Va. 2006) (reversing trial court decision that self-dealing agent lacked power to engage in transactions, but remanding for determination of whether agent breached fiduciary duty of loyalty), *aff'd after remand*, 992 A.2d 316, 319 (Va. 2010) ("Given that the trial court properly considered extrinsic evidence when evaluating wife's actions and that this evidence supported the court's conclusion that wife's actions fulfilled decedent's intent, we find no merit in son's argument that wife violated her fiduciary duty and engaged in improper self-dealing or made an improper gift to herself when she transferred the Clearwater property into the trust.").

[347] 694 S.E.2d 598 (Va. 2010).

[348] Portions of this section of analysis appeared in F. Philip Manns Jr., Smith v. Mountjoy: *Confusing Power and Duty*, 22 VA. ST. BAR TR. & EST. NEWSL. 12 (Fall 2010).

[349] *Mountjoy*, 694 S.E.2d at 600.

[350] *Id.*

ney.[351] Husband's revocable trust was more favorable to Wife than Wife's revocable trust was to Husband;[352] hence the possibility of self-dealing.

Before the transaction, Husband owned a half-interest in a tenancy by the entirety; after the transaction Husband owned a half-interest in a tenancy in common, and that half-interest was held in a revocable trust. Husband's revocable trust allowed him as settlor to revoke the trust, and if he did not, then upon his death, his half of the tenancy in common passed under the trust to Wife, or if Wife predeceased him, then to Wife's heirs.[353]

Wife's half-interest in the tenancy in common was held in Wife's revocable trust. Similarly, but not identically,[354] Wife's revocable trust allowed her as settlor to revoke the trust, and if she did not, then upon her death, her half of the tenancy in common did not pass completely to Husband, but remained in Wife's trust, to be held to provide all income to Husband for life and principal as the trustee found necessary for Husband's support.[355]

Valuing Husband's before-transaction interest (half an entireties interest) against Husband's after-transaction interest (half a common interest held in Husband's revocable trust plus his contingent rights in Wife's trust) is not straight-forward. What is straight-forward is that Husband's after-transaction interest had *some* value. Incredibly, the Supreme Court said Husband's after-transaction interest had *no* value.

> [W]e hold that *no* consideration passed to [Husband] in exchange for severing the tenancy by the entirety interests and conveying a one-half interest in each of the Properties to the trustee of [Wife's] Trust.[356]

---

351 *Id*. In *Mountjoy*, there was no discussion about whether the power of attorney authorized Wife to create an inter vivos trust on Husband's behalf. All parties and the court apparently assumed she did. *Id.* Had the court waited three weeks to issue its decision, it would have had to consider the effect of the VaUPOAA, which became effective July 1, 2010. Under the VaUPOAA, an agent has the power to "create, amend, revoke, or terminate an inter vivos trust" "on behalf of the principal or with the principal's property" "only if the power of attorney expressly grants the agent the authority." VA. CODE ANN. § 64.2-1622(A)(1) (2017). *See supra* Section I.A.2. There is no indication about whether the power of attorney in *Mountjoy* expressly included that power.

352 *Mountjoy,* 694 S.E.2d at 600.

353 *Id.*

354 *Id*. (The court specifically noted that the survivorship provisions of Husband's and Wife's trusts were not "mirror images.").

355 *See id.*

356 *Id*. at 602. (emphasis added). When a court says, "we hold that no consideration passed," we should assume that it held that *no* consideration passed. However, at a later point in the opinion, the court writes, "[Husband] did not receive a benefit commensu-

Surely, that is counterfactual. First, it is manifest that in exchange for severing the entireties interests and conveying a one-half interest in each of the properties to the trustee of Wife's trust, Husband received at least a half-interest in a tenancy in common held in his revocable trust.[357] Second, it is manifest that a half-interest in a tenancy in common held in a revocable trust is not valueless; its value may be difficult to determine; its value may be less than half the value of the real estate; its value may be less than the value of half an entireties' interest; but its value surely is not zero.

Consequently, through Wife's agency, Husband engaged in a transaction with Wife in which Husband received some value (rather than *no* value). Thus, the transaction was not a gift, so it was a fallacious method of reasoning for the court (1) to decide that Husband received no value, (2) to use that finding to conclude that the transaction was a gift, and (3) to decide that making the gift was beyond the scope of the agency because the power of attorney contained no express authority to make gifts.[358]

The only support the court offers for its no-consideration conclusion is to assert that in the transaction, because of the not-mirrored provisions of Husband's and Wife's trusts, Husband lost his survivorship right in Wife's half, while Wife kept her survivorship right in Husband's half. Here's the entire analysis.

> [T]he disparate provisions of the two trusts allowed [Wife], along with the trustee of [Wife]'s Trust, or her heirs, eventually to obtain fee simple ownership of the Properties, irrespective of whether she or [Husband] died first. That scenario—in which [Wife] and the trustee of her trust, or her heirs, would obtain ownership of the Properties—could not have occurred when the Properties were held as tenants by the entirety, unless [Husband] predeceased [Wife].[359]

---

rate with his interest in the Properties," *id*. at 603, which sounds a lot more like inadequate consideration than the total absence of consideration.

[357] Husband also received contingent rights in Wife's trust. Even that interest has some value, although it might be quite low, because Wife's trust was freely revocable by Wife. Because the value of Husband's interest in Husband's trust is much greater than the value of Husband's contingent rights in Wife's trust, I use Husband's trust to show that, contrary to the court's conclusion, Husband received some consideration in the exchange. *See id.* at 602-03.

[358] The trial court noted that the agent's trial counsel had not argued that the power of attorney authorized a gift. *See id*. at 601. The agent's appellate counsel did not assign error to the holding that the agent lacked the power to make a gift. *Id*. at 602 n.4.

[359] *Id.* at 603.

Even if that factually is correct,[360] it does not mean that Husband received no consideration "in exchange for severing the tenancy by the entirety interests and conveying a one-half-interest in each of the Properties to the trustee of [Wife's] Trust."[361] Even if Husband lost a survivorship right that Wife effectively retained, Husband still received consideration in the overall transaction.[362] There can be no doubt that even if Wife had been successful in the self-interested strategy discerned by the court, Husband at an absolute minimum after the transaction had a life interest in half a tenancy in common.[363] Again, that may have been inadequate consideration for his surrendering half an entireties interest, but it was consideration. The issue is adequacy of consideration, not its existence.

Note the striking similarity to *Ott*. In both *Mountjoy* and *Ott*, a wife acting under a power of attorney created an entity and transferred to that entity property formerly held by the spouses as tenants by the entirety, and both spouses ended up with interests in the entity. *Mountjoy* distinguishes *Ott* as follows:

> The [*Ott*] trial court reached that conclusion [that the transfer was not a gift] based on its factual findings that "the transfer of the property was undertaken for legitimate business reasons and that [the husband and wife] each received benefits, including possible future tax benefits, commensurate with their respective percentage interests, *without any self-dealing* on [the wife's] part." We affirmed the trial court's judgment, holding that the transaction at issue was within the powers granted to the wife under her husband's power of attorney.[364]

---

360 The court's analysis is contrary to the facts it stated. In fact, Husband did have a survivorship right in Wife's half: he was entitled to all the income and discretionary distributions of principal from Wife's half, provided he survived Wife. *Id*. at 600. Consequently, even if the consideration analysis solely is focused on the survivorship rights exchange (although such a limited focus is wrong because consideration law tells us to focus on the entire exchange), Husband received "survivorship consideration" for surrendering his "entireties survivorship right" in Wife's half; Wife may have received more survivorship consideration, but Husband received some. The proper question is adequacy of consideration, not existence.

361 *Id*. at 602 (emphasis added).

362 *See generally* John Ritchie, III, *Tenancies by the Entirety in Real Property with Particular Reference to the Law of Virginia*, 28 VA. L. REV. 608, 613-18 (1942) (discussing the historical development of the tenancy by entirety in Virginia).

363 Even if Husband did nothing and left everything, including Husband's trust, as Wife had created them, and Husband died first, Husband at an absolute minimum had an income interest in half of the real estate for Husband's life.

364 Smith v. Mountjoy, 694 S.E.2d 598, 603 (Va. 2010) (emphasis added) (citations omitted).

Neither *Mountjoy*, in describing *Ott*, nor *Ott*, in deciding the case, told us anything about the facts underlying the *Ott* trial court's conclusion that self-dealing had not occurred. For instance, the LLC's operating agreement, which Mrs. Monroe had caused to be prepared,[365] could have favored Mrs. Monroe as much as the disparate trusts had favored Wife in *Mountjoy*. Indeed, the operating agreement *could* have named Mrs. Monroe as non-probate donee of Mr. Monroe's entire LLC interest at his death.[366] Furthermore, in other litigation involving the parties, Mrs. Monroe claimed that Mr. Monroe's 80% interest became subordinate to her 20% interest following his death.[367]

Ott at least recognizes that inter-spousal transfers of jointly owned property into entities, like LLCs or trusts, are not gifts when both spouses end up with ownership interest in the entities. The interests in the entity are consideration for the transfer. To say that no consideration exists, as was done in *Mountjoy*, is baffling.[368]

Under the UPOAA, the power to "create, amend, revoke, or terminate an inter vivos trust" "on behalf of the principal or with the principal's property" may be done by the agent "only if the power of attorney expressly grants the agent the authority."[369] If the power of attorney in *Mountjoy* did not grant that power, Wife would have lacked authority to create Husband's trust, and the case easily could have been decided on that basis.[370]

---

365 Ott v. L & J Holdings, LLC, 654 S.E.2d 902, 904 (Va. 2008).

366 VA. CODE ANN. § 64.2-620(A) (2017) (permitting "a provision for a nonprobate transfer on death in . . . a certificated or uncertificated security . . . or other written instrument of a similar nature" and also stating "[n]ontestamentary transfers also include writings stating that (i) money or other benefits due to, controlled by, or owned by a decedent before death shall be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing").

367 Opening Brief of Appellant at 1-2, Ott v. Monroe, 719 S.E.2d 309 (Va. 2011) (No. 101278), 2010 WL 8654665.

368 While *Mountjoy* held that no consideration existed, *Ott* found that consideration did exist, and *Ott* had to draw that conclusion because the instrument in *Ott* expressly forbade the agent from making a gift to herself.

369 VA. CODE ANN. § 64.2-1622(A)(1). In *Mountjoy*, the court expressly noted that the VaUPOAA had not become effective prior to its decision. One wonders whether the court rushed the decision to obviate effectiveness of the VaUPOAA, because upon the VaUPOAA's effectiveness on July 1, 2010 (20 days after the decision was rendered), the VaUPOAA expressly applies to "a judicial proceeding concerning a power of attorney commenced before July 1, 2010, unless the court finds that application of a provision of this act would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case that provision does not apply and the superseded law applies." *Id.* § 64.2-1642(3).

370 *Id.* § 64.2-1642(4). Deciding the retroactive application of the VaUPOAA is not an easy matter. The VaUPOAA, like the UPOAA, provides that it applies to all judicial proceedings "unless the court finds that application . . . would substantially interfere with

However, suppose a case like *Mountjoy*, except the instrument grants the hot power to "create, amend, revoke, or terminate an inter vivos trust"[371] "on behalf of the principal or with the principal's property."[372] Obviously, Wife can create a trust like Husband's trust in *Mountjoy*. And, Wife also can transfer Husband's half of the entireties property to Husband's trust, because an agent with "authority to do all acts that a principal could do" has the general authority described in sections 64.2-1625 through 64.2-1637 of the Code of Virginia.[373] One of those cold powers is the power of section 64.2-1632 granting the agent authority with respect to "estates, trusts, and other beneficial interests," and specifically authorizing the agent to "transfer an interest of the principal in real property . . . to the trustee of a revocable trust created by the principal as settlor."[374]

Or, maybe Wife is not allowed to make the transfer to the trust pursuant to the "estates, trusts, and other beneficial interests" cold power.

Perhaps *Mountjoy* means that when a tenancy by the entirety is severed, the transaction is a "gift" unless each spouse receives "identical," "full," or "adequate" rather than "some" or "any" consideration.[375] Yet, such a Virginia-specific rule—transfers are state-law gifts unless full (rather than peppercorn) consideration is paid—creates a conflict between the rules for gifts by agents and the rules for "estates, trusts, and other beneficial interests." Better to say that the agent has the power to enter the transaction and then decide whether she should have entered it, than to resort to unreal manipulations of the settled law of consideration.

Note that in *Mountjoy*-type cases, an estate planning strategy can explain Wife's actions,[376] but it appears that Wife's actions in *Mountjoy*

---

the effective conduct of the judicial proceeding or prejudice the rights of a party," but the VaUPOAA also provides that "an act done before July 1, 2010, is not affected by this act." *Id.* § 64.2-1642(3), (4); UNIF. POWER OF ATTORNEY ACT § 403(3)-(4) (UNIF. LAW COMM'N 2016).

[371] VA. CODE ANN. § 64.2-1622(A)(1) (2017).

[372] *Id.* § 64.2-1622(A).

[373] *Id.* § 64.2-1622(C).

[374] *Id.* § 64.2-1632(B)(7).

[375] Such a rule of state law—treating a transfer as a gift unless full consideration is paid—would mimic the rules for the federal gift tax. Treas. Reg. § 25.2512-8 (as amended in 1992) ("Transfers reached by the gift tax are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration to the extent that the value of the property transferred by the donor exceeds the value in money or money's worth of the consideration given therefor.").

[376] *See* Smith v. Mountjoy, 694 S.E.2d 598, 600 (Va. 2010). The exchange of Husband's survivorship right in Wife's half of the entireties property for a restricted survivor-

were not part of a sophisticated estate planning strategy, for the simple reason that Husband moved to disavow the transactions as soon as he learned about them.[377] Consequently, the facts appeared quite bad for Wife, and the finding of no consideration permitted the court to deny her the benefit of her apparently unauthorized self-dealing. However, in another case, the strategy might be employed fairly, wisely, and strategically to maximize estate tax benefits.

After *Mountjoy*, we do not know the answer to the following question: Is the severance of a tenancy by the entirety into interests in which both husband and wife have rights, albeit unequal, (i) an estate-trust-and-other-beneficial-interests transaction that one spouse is authorized to enter on behalf of the other, as agent, subject of course to her fiduciary duties, or (ii) a not-permitted gift unless the power of attorney expressly grants the agent power to make gifts? Because of that uncertainty, drafters of powers of attorney, especially when the agent anticipates engaging in estate planning transactions for the principal, may want also to grant a gifting power to the agent, yet that will force drafters carefully to address the transfer tax consequences to the agent from the power.[378]

In *Ott*, the court decided that because the agent both transferred and received some consideration in a property exchange with her principal, she had not made a gift, which the power of attorney instrument flatly prohibited, but instead had participated in a permitted exchange. In *Mountjoy*, the court held that the agent had not transferred any consideration in a property exchange with her principal, so she made a gift, which the instrument had not authorized. In neither case did the court analyze the issue as situation of self-dealing to which an evidentiary presumption should attach. In *Ott*, the transaction was held not a gift and permissible, no matter what the relative proportions of consideration transferred by principal and agent, yet in *Mountjoy*, a similar transaction was held a gift, almost no matter what the consideration received by the principal. *Ott* and *Mountjoy* reach opposite conclusions on substantially

---

ship right in Wife's trust could have been for estate planning purposes. The transaction designed by Wife permitted sophisticated decisions to be made if Wife died first. Wife's executor would be able to decide whether (1) to deduct Husband's interest in Wife's trust as marital QTIP property, thereby causing estate taxation in Husband's estate which could be paid by Husband's unified credit, or (2) not to elect QTIP, thereby causing estate taxation in Wife's estate which could be paid by Wife's unified credit. By leaving the real estate as entireties property, Wife's executor would have no ability to choose which of the two estates ultimately would be liable for the estate tax on Wife's half; instead, the first alternative noted above would be automatic and thereby potentially wasteful of Wife's unified credit.

[377] *Id.*

[378] *See supra* Section III.A.2.

identical facts. A far better analysis would have been to analyze both as self-dealing transactions, in which the burden of proof rested with the agent.

The UPOAA will present opportunities both to reconsider whether *Ott*- and *Mountjoy*-type cases should be analyzed as gifts or as self-dealing transactions and to reconsider whether the evidentiary burden on the self-dealing agent is one of production or of persuasion by clear and convincing evidence.

Conclusion

Powers of attorney, which now are durable by default, widely are used both for incapacity planning and for the convenience of principals who have capacity. For any legal arrangement, common understanding facilitates acceptance, and uniformity enables common understanding. The UPOAA provides a common understanding for many, but not all, rules of agency law governing principals, agents, and third parties who deal with them.

Four problematic areas exist within the UPOAA: (1) a missing modifier in the section concerning an agent's authority to make gifts; (2) a failure automatically to grant incidental powers to any hot powers expressly granted by a power of attorney instrument; (3) a missing good faith requirement in the agent certification rule; and (4) the matter of overlap among the theoretically exclusively distinct hot powers.

Virginia's adoption of the UPOAA included about two-dozen changes to the uniform text, nine of which were particularly important: (1) the cold gifting power; (2) the gutting of the primary consumer protection of the UPOAA; (3) the reversal of the forged signature rule; (4) the negation of provisions conditioning effectiveness upon delivery of the instrument to the agent; (5) the expanded agent disclosure rule; (6) the agent's creation and amendment of trusts; (7) the rule of presumed non-ademption; (8) the legally irrelevant failure to adopt the UPOAA *Statutory Form Power of Attorney*; and (9) the curious change to the definition of "incapacity."

Regarding agency law doctrines not particularly addressed by the UPOAA, but obviously affected by it, the UPOAA means that (1) the rule of strict construction is strengthened for hot powers (*Brandt*-like cases); (2) the rule of strict construction disappears for cold powers (*Ott*-like cases); (3) the primary mechanism for reviewing agent self-dealing conduct will be undue influence presumptions; (4) the focus on undue influence presumptions will expose a rift between *Grubb* and *Parfitt*; and (5) courts should reconsider whether *Ott*- and *Mountjoy*-type cases should be analyzed as gifts or as self-dealing transactions invoking evidentiary presumptions.

The UPOAA will increase the prevalence of situations involving the evidentiary presumption applying to self-dealing agents and of situations involving the definition of "gift" for transfers between agent and principal. The UPOAA does not address those questions. If Virginia law is any indication of a larger trend, to address those questions, lawyers will have to mine evidence codes and cases and likely will find conflicting authorities.