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COMMENTARY AND DIALOGUE

Explaining the "Inexplicable": A Response to *Powers of Attorney under the Uniform Power of Attorney Act Including Reference to Virginia Law* by F. Philip Manns, Jr.

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In his article "Powers of Attorney under the Uniform Power of Attorney Act Including Reference to Virginia Law," F. Philip Manns, Jr. notes that Virginia's adoption of the Uniform Power of Attorney Act ("UPOAA") included approximately two dozen changes to the uniform text.[1] "Some of those changes," he says, "are inexplicable; others are misguided."[2]

One of the authors of this commentary, Andrew H. Hook, had the honor of serving as Chair of the Drafting Committee of the Virginia Bar Association's Wills, Trusts, and Estates Section ("Drafting Committee"), which was tasked with studying the UPOAA and making recommendations relating to its adoption in Virginia.[3] Recognizing the value of uniformity among state laws, it was the Drafting Committee's goal to stay as true to the UPOAA as possible, avoiding any radical changes

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1 F. Philip Manns, Jr., *Powers of Attorney under the Uniform Power of Attorney Act Including Reference to Virginia Law*, 43 ACTEC L.J. 151, 152 (2018).

2 *Id.* at 152.

3 *See* J. Rodney Johnson, *Wills, Trusts, and Estates*, 45 U. RICH. L. REV. 403, 403-04 (2010).

while incorporating minor changes where Virginia's common law differed in meaningful ways.

The space allotted prohibits the authors from addressing all of the issues Mr. Manns has raised; however, based on Mr. Hook's experiences while serving on the Drafting Committee, the authors wish to address two issues raised by Mr. Manns – the ostensible "overlap" between the hot powers of gifting and trust creation, and the tension between the protection of the principal and of third parties.

I. Hot Power Overlap

Two of the "hot powers" which must be expressly granted in a power of attorney in order for them to apply under the Virginia UPOAA are the authority to make a gift and the authority to create a trust.[4] This is true under the UPOAA, as well.[5] Because a gift may be made outright or in trust,[6] Mr. Manns concludes that the authority to create the trust to which the gift is made is implicit in the gifting hot power, and therefore, these hot powers overlap.[7]

The intent in the creation of these two separate and distinct hot powers is just that – for these powers to be separate and distinct. Because one hot power requires that the authority to create a trust must be expressly granted,[8] this authority cannot simply be implied from the gifting hot power. Further, in making its recommendations, the Drafting Committee intentionally tied the trust creation hot power to Virginia's Uniform Trust Code, which provides that one manner in which a trust may be created is by an agent under a power of attorney which specifically grants the authority to do so.[9] The Drafting Committee was careful to ensure these provisions were consistent.

Mr. Manns also examines whether the power to make a gift includes the power to create a right of survivorship, which is another hot power under the Virginia UPOAA.[10] Interestingly, he concludes, "It appears not, because the two are separate hot powers, and each must be separately granted by reference to a distinct descriptive term."[11] The authors agree, and suggest the application of this logic to the question of whether gifting authority inherently includes the authority to create a trust.

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4 Va. Code Ann. § 64.2-1622(A)(1)-(2) (2017).
5 Unif. Power of Attorney Act § 201(a) (Unif. Law Comm'n 2016).
6 Va. Code Ann. § 64.2-1638(B)(1).
7 Manns, *supra* note 1, at 178-79.
8 Va. Code Ann. § 64.2-1622(A)(1).
9 Va. Code Ann. § 64.2-719(A)(1).
10 Va. Code Ann. § 64.2-1622(A)(3).
11 Manns, *supra* note 1, at 179.

II. Protection of the Principal vs. Protection of the Third Party

Based on his article, it appears Mr. Manns simultaneously believes that the Virginia UPOAA has failed to adequately protect the principal, making it too easy for third parties to avoid accepting powers of attorney,[12] and that it has omitted the third party protection offered by the UPOAA.[13] This is not only untrue, but impossible.

The Drafting Committee which made the legislative recommendations leading to the adoption of the UPOAA in Virginia was composed of trusts and estates attorneys representing both individuals and banks. The resulting Virginia UPOAA is the product of negotiations between these parties and the Virginia Bankers Association, all of which recognized and had a desire to combat the rising number of financial elder abuse cases. Attorneys for the banks wished to put into place mechanisms which would give the banks confidence in their acceptance of powers of attorney. Attorneys representing mostly individuals lobbied for the maximum protection of the consumer.

Virginia's resolution of these competing interests is a delicate balancing act between protecting the principal and giving him the benefit of knowing his power of attorney is more likely to be accepted. In analyzing this issue, it is important that we not confuse "protecting the third party too much" with encouraging third parties to accept the power of attorney.

While ideally the risk of loss would always be shifted to the agent who acts in bad faith, in practice, by the time the law catches up with that agent, he frequently has no assets with which to make restitution or pay a judgment. The Virginia UPOAA, in conformity with the UPOAA, shifts the risk of loss to the principal in more cases than not, to increase the likelihood of acceptance of a power of attorney by a third party.

Three provisions within the Virginia UPOAA which Mr. Manns cites as evidence that it provides too much protection to third parties are (1) the ability of the third party to preemptively insert boilerplate into their contracts by which the principal relieves the third party from an obligation to engage in a transaction with his or her agent;[14] (2) the ability of the third party to request an opinion of counsel – from counsel for the principal, the agent, or even the third party – before acceptance

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12 *Id*. at 175-76.

13 "The power of attorney in Virginia also will be a decidedly less effective alternative to a Virginia revocable living trust," he says, "for what the VaUPOAA takes away from the UPOAA—third party protection—the Virginia Uniform Trust Code (VaUTC) grants to Virginia trusts." *Id.* at 193.

14 *Id*. at 185-86.

of the power of attorney;[15] and (3) the provisions which shift the risk of the use of an invalid acknowledged power of attorney to the principal.[16]

The intent in giving third parties the option of including in their contracts language whereby the principal agrees that the third party shall not be required to engage in a transaction with his or her agent was admittedly to give third parties a choice as to with whom they would do business. Just as an attorney is not required to take any client who contacts them, the committee which recommended this provision reasoned that a bank, for example, is not required to open an account for anyone who walks through the door, nor should it be required to transact with an agent with whom it does not have a relationship. This, of course, does not preclude the bank from agreeing to nonetheless engage in the transaction with the agent.

The second and third provisions Mr. Manns discusses, however, were included in the Virginia UPOAA in an effort to make it easier for the consumer to use a power of attorney, and not for the purpose of protecting the third party. If third parties were asked to rely on the statements of the agent without being given the ability to request a legal opinion, we would see fewer third parties willing to accept a power of attorney about which they have a question or concern. If third parties were permitted to request an opinion of counsel only from the principal or agent's attorney, the third party would still be less likely to accept the power of attorney simply because the opinion did not come from their own trusted legal advisor. In practice, a third party will generally only request an opinion of counsel when it has a real concern about the power of attorney, and giving it the ability to obtain counsel from its own trusted attorney should result in either the alleviation or the validation of that concern. Likewise, the provisions which shift to the principal the risk of the use of an invalid acknowledged power of attorney exist to make a third party more comfortable in accepting a power of attorney when it does not know whether the agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising his authority.[17] If third parties bore this burden, they would rarely be willing to permit an agent to act.

Virginia's UPOAA was designed not to "demolish" the consumer protections of the UPOAA, as Mr. Manns asserts,[18] but to balance the competing interests of consumer protection and the ease with which a principal's power of attorney may be accepted. To encourage the acceptance of powers of attorney, much of the risk was shifted to the principal.

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15 *Id.* at 187-88.
16 *Id.* at 189.
17 *See* VA. CODE ANN. § 64.2-1617(B) (2017).
18 Manns, *supra* note 1, at 192.

In seeking to promote the acceptance of powers of attorney, however, the Drafting Committee recognized that a line should be drawn, a point at which the risk was shifted to third parties. It chose forgery as that line, providing clearly that a third party may not rely upon as valid an acknowledged power of attorney which contains a forged signature of the principal.[19] This determination was made in an effort to protect the principal who has no idea of the existence of a power of attorney.

Despite the clear language of section 64.2-1617(B) of the Code of Virginia,[20] Mr. Manns expresses some uncertainty as to whether the third party may nonetheless avoid liability for accepting a power of attorney with a forged signature by requesting a certification from the agent.[21] Based on his interpretation of section 64.2-1617(C) of the Code of Virginia, Mr. Manns determines that "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."[22] He continues: "[A]nd if so, the VaUPOAA's demolishing of the consumer protections of the UPOAA is all-encompassing."[23] And finally, he concludes: "The VaUPOAA . . . 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."[24] Fortunately for the principal in Virginia, this interpretation is incorrect; when the signature of the principal has been forged, it is the third party which bears the liability for its acceptance, regardless of whether the agent has provided a certification.

Despite his conclusion that the Virginia UPOAA protects third parties too much, in the next section, Mr. Manns predicts that "The power of attorney in Virginia 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 . . . grants to Virginia trusts."[25] It is difficult to fathom how it is possible for Virginia's UPOAA to simultaneously "demolish consumer protections" while taking away the third party protection of the UPOAA.

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19 VA. CODE ANN. § 64.2-1617(B).

20 "The preceding sentence shall not apply to an acknowledged power of attorney that contains a forged signature of the principal." *Id.*

21 Manns, *supra* note 1, at 192.

22 *Id.* at 192-93.

23 *Id.* at 192.

24 *Id.* at 193.

25 *Id.*

While there can be no perfect solution from the perspectives of both the principal and the third party, Virginia's UPOAA represents a fair and reasonable compromise between the two.