ACTEC Law Journal

Volume 43 | Number 3 Article 5

3-1-2018

A Brief Review of Professor F. Philip Manns, Jr., Powers of Attorney under the Uniform Power of Attorney Act Including Reference to Virginia Law

Howard M. Zaritsky

A Brief Review of Professor F. Philip Manns, Jr., *Powers of Attorney under the Uniform Power of Attorney Act Including Reference to Virginia Law*

*Howard M. Zaritsky**

I must first note that I have not, to the best of my dubious recollection, ever met Professor F. Philip Manns, Jr., even though he teaches in my chosen field at a law school in my own state. I can honestly now say, however, that I very much look forward to doing so, because his article, "Powers of Attorney under the Uniform Power of Attorney Act Including Reference to Virginia Law" has, in one stroke, made me reconsider two of my traditional criticisms of law review articles.

First, this article is extremely well written. Those of us who endured interminable diagramming of sentences have become insufferably intolerant of those who do not understand correct sentence construction. Many law review articles seem to have been written by members of that other generation of lawyers who, through no fault of their own, were not taught grammar or who, through fault of their own, chose not to learn it. Prof. Manns is not a member of this benighted class of substandard writers. He writes with a degree of clarity, precision and wit, that makes reading his article a pleasure. I hope that his students follow in his footsteps.

Second, I have long believed that much of the important information in most law review articles is contained in the footnotes. They are often the first part of the article that I read.[1]

Not so with Prof. Manns's article. His footnotes are precise and helpful, but the text of the article contains the real substance. His text provides both an explanation of the Uniform Power of Attorney Act ("UPOAA") and an analysis of its ambiguities and how practitioners should draft to minimize them.

---

* Howard M. Zaritsky, Rapidan, Virginia. Retired partner, Zaritsky & Zaritsky, Fairfax, Virginia. Fellow of the American College of Trusts & Estates Counsel.

[1] I will even confess that I often read only the footnotes and the introductions and conclusions of an article; I have rarely found that I missed much by doing so.

Prof. Manns was very astute in his choice of subject. In 2017, the Uniform Power of Attorney Act became the majority rule in this country, an accomplishment that many other uniform acts cannot equal.[2]

Virginia was also a very good state to select to demonstrate the problems that arise under the UPOAA. The Commonwealth of Virginia, as Prof. Manns notes, was the first state to validate by statute the durable power of attorney.[3] This gives Virginia the longest history of judicial and legislative interpretation of these relationships. Virginia already had addressed some power-of-attorney issues that other states have not, even before it adopted the UPOAA. Virginia's body of existing law may, however, increase the number of problems raised by the adoption of a comprehensive new statute such as the UPOAA.

Prof. Manns discusses several problems with the UPOAA that should be addressed by state legislatures that adopt it and the drafters who practice under it. For example, Prof. Manns notes that several terms used in both the UPOAA and the Revised Uniform Fiduciary Access to Digital Assets Act have different meanings in the two laws.[4] These inconsistencies could increase the difficulty attorneys-in-fact will encounter in obtaining access the digital assets of a disabled principal.

Prof. Manns also notes a distressing ambiguity in the UPOAA provisions relating to an attorney-in-fact's power to make gifts. The UPOAA states that an attorney-in-fact can make a gift of the principal's assets only with express authority, and that a generic authority "to make gifts" is itself limited to annual exclusion gifts. Prof. Manns notes that the UPOAA limits the power "to make gifts" to gifts "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)."[5] Unfortunately, as Prof. Manns points out, this statement is ambiguous; it could be interpreted either as authorizing annual gifts of amounts up to the gift tax annual exclusion, or lifetime gifts of amounts up to an aggregate of one gift tax annual exclusion.[6] The former seems the more reasonable interpretation, but the statute is simply unclear. Until legislatures clarify this issue, drafters of powers of attorney should be very precise regarding

---

2 This was a relatively quick accomplishment. As Prof. Manns notes, the UPOAA was first adopted in 2006, slightly amended in 2008, and significantly amended in 2016. F. Philip Manns, Jr., *Powers of Attorney under the Uniform Power of Attorney Act Including Reference to Virginia Law*, 43 ACTEC L.J. 151, 151 (2018). It achieved its majority status only in 2017, after Georgia and North Carolina became the 25th and 26th states to adopt it.

3 Act of Apr. 5, 1954, ch. 486, 1954 Va. Acts 581-82. *See* Manns, *supra* note 2, at 154 n.1.

4 *See* Manns, *supra* note 2, at 168 (discussing the use of the word "subject").

5 *Id.* at 171.

6 *See id.* at 172.

the application of an annual exclusion limitation on the power of an attorney-in-fact to make gifts.

Prof. Manns also discusses the difficulties to be expected in integrating the Virginia UPOAA with the agency law doctrines developed by the Virginia courts. Virginia has long required that the authority of attorneys-in-fact under a power of attorney must be strictly construed. Prof. Manns points out that the UPOAA strengthens this rule with respect to "hot powers" (those powers, such as the right to create, amend, or terminate a trust or to make gifts from a principal's assets, which must be expressly granted under a power of attorney), but not with respect to "cold powers" (those powers that are available to the attorney-in-fact by virtue of the mere existence of a power of attorney, such as the power to deal with the principal's real property, tangible personal property, and intangible personal property, and to operate an entity business interest).[7] In fact, as Prof. Manns notes, the rule of strict construction for powers of attorney disappears entirely with respect to cold powers under the UPOAA.[8]

Prof. Manns discusses the interesting Virginia Supreme Court opinion in *Jones v. Brandt*,[9] in which a divided Court held that the testator's attorney-in-fact had authority to make herself the pay-on-death beneficiary of the testator's certificate of deposit. A majority of the Court held that the power of attorney implicitly authorized the attorney-in-fact to change the beneficiary of the certificate of deposit to herself,[10] but a substantial dissent argued that the language of the power of attorney did not clearly grant this authority.[11] Nonetheless, as Prof. Manns points out, the entire Court agreed that, in Virginia for the past century, "expansive language [in a power of attorney] . . . 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."[12] The majority found this express authority in the combination of language that authorized the attorney-in-fact "to sign, endorse, or assign any . . . instrument . . . for deposit,"[13] "to make, sign, acknowledge and deliver any contract,"[14] and "to perform any other acts of any nature whatsoever . . . in any circumstances as fully and ef-

---

7 *See* UNIF. POWER OF ATTORNEY ACT § 201(c) (UNIF. LAW COMM'N 2017) ("[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.").

8 Manns, *supra* note 2, at 157.

9 645 S.E.2d 312, 316 (Va. 2007).

10 *Id.*

11 *Id.* at 317.

12 *Id.* at 315.

13 *Id.* at 314.

14 *Id.*

fectively as [the principal] could do as part of [the principal's] normal, everyday business affairs if acted personally."[15] As Prof. Manns notes, the holding in *Brandt* "cannot survive the effectiveness of the UPOAA"[16] because the power to change the beneficiary of the certificate of deposit to the attorney-in-fact would be a hot power that would have to be authorized clearly and expressly.

Thus, the fundamental rule of construction in Virginia for powers of attorney would be modified under the UPOAA. It would be strengthened for hot powers, negating the result in *Brandt* by adopting a rule of *expressio unius est exclusio alterius*, which rule the majority in *Brandt* expressly rejected.[17] This will present significant problems when drafting hot powers, because any attempt to state all of the types of transactions to which a hot power relates will restrict the power, unless the list is truly comprehensive. A grant of a power without specification of the types of transactions to which it relates may actually produce a broader power.

On the other hand, Prof. Manns explains that the UPOAA removes the rule of strict construction for cold powers. This, he points out, changes inquiries from the existence of a power to the duty of the attorney-in-fact under the power. The UPOAA grants broad cold powers, unless the drafter limits them. The attorney-in-fact is, therefore, highly likely to have the authority to do many things under the UPOAA which would not have been available under the rule of strict construction prior to the UPOAA.

On the other hand, plaintiffs and courts will now look more closely at whether the attorney-in-fact's actions fall within his or her fiduciary duty. In essence, the attorney-in-fact can do many things under the UPOAA, but whether he or she should do them will remain the subject of dispute. As Prof. Manns explains, the UPOAA provides only broad general guidance regarding the extent of the fiduciary duties of an attorney-in-fact, and the case law in Virginia is far from clear.[18] Prof. Manns makes it clear that this is likely to be a key point of litigation in the future.

I have only touched on some of the important points made by Prof. Manns in this article. This is partly due to length restrictions on this

---

15 *Id.*

16 *See* Manns, *supra* note 2, at 205.

17 Jones v. Brandt, 645 S.E.2d 312, 315-16 (Va. 2007).

18 *See* Grubb v. Grubb, 630 S.E.2d 746, 751-52 (Va. 2006) (agent under a power of attorney receiving personal benefit from a transaction must prove the lack of undue influence by clear and convincing evidence); *but see* Parfitt v. Parfitt, 672 S.E. 2d 827, 830 (Va. 2009) (son who had a fiduciary duty to mother as an agent with respect to joint bank account to which he had not contributed need only produce some evidence to negate undue influence).

review, and partly to assure that the reader actually does read Prof. Manns's article. It is well worth the time required to do so and will well reward the modest amount of effort required.