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F. Philip Manns Jr.

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Responding to Mr. Zaritsky

As he correctly notes, Mr. Zaritsky and I have not met, an omission I hope soon to remedy,[1] but I have read a *lot* of his work, and thank him for closely reading mine. Mr. Zaritsky's comments point a reader of my article to its important points: (1) conflict between the UPOAA and UFADAA regarding agent authority over digital assets; (2) the default numerical limit on gifts made under a bare hot gifting power; (3) the strengthening of the rule of strict construction for hot powers; (4) the abrogation of the rule of strict construction for cold powers; (5) the increased use of fiduciary duty to decide when acts within an agent's expanded cold powers constitute disloyal or imprudent exercises of those powers; and (6) the regrettable lack of clarity in fiduciary-duty case law, especially regarding evidentiary burdens.[2]

Mr. Zaritsky's praise of my work is particularly gratifying, for I have long benefitted from his legal acumen and fine writing, the listing of which would consume too many words of my limit.

Responding to Mr. Hook and Ms. Hayes

I thank Mr. Hook and Ms. Hayes for their careful reading of my article. We have two points of agreement, but more of disagreement, and, as is inevitable in exercises of this type, I will spend most of my words on the points of our disagreement.

Mr. Hook and Ms. Hayes address two issues: "[i] the ostensible 'overlap' between the hot powers of gifting and trust creation, and [ii] the tension between the protection of the principal and of third parties."[3] On the overlap issue, the VaUPOAA and UPOAA are nearly

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1 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, 43 ACTEC L.J. 423, 423 (2018).

2 *Id*. at 424-26.

3 Andrew H. Hook & Jessica A. Hayes, *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.*, 43 ACTEC L.J. 417 (2018).

identical.[4] Mr. Hook and Ms. Hayes agree that the overlap problem exists in both acts. "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."[5]

Regarding "the tension between the protection of the principal and of third parties,"[6] Mr. Hook and Ms. Hayes (1) make a preliminary observation; (2) address three specific points, (a) anti-agent boilerplate, (b) a third party's ability to delay acceptance of an acknowledged power of attorney pending receipt of an opinion from the third party's counsel, and (c) Virginia's forged-principal's-signature exception to the UPOAA's third-party protections; and (3) make a concluding observation.

In their preliminary observation, they write, "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, and that it has omitted the third party protection offered by the UPOAA. This is not only untrue, but impossible."[7] Yet, far from impossible, my commentators have conceded both points.

On the first point—the ability of third-parties to refuse powers of attorney—Mr. Hook and Ms. Hayes concede that the VaUPOAA permits third parties routinely to refuse to accept acknowledged powers of attorney merely by slipping anti-agent boilerplate into form contracts.[8] They write, "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."[9] This difference between the acts is not a small matter; a principal purpose of the UPOAA was to "address the problem of persons refusing to accept an agent's authority."[10] Thus, although Mr. Hook and Ms. Hayes state that "it was the [VaUPOAA] Drafting Committee's goal to stay as true to the UPOAA as possible, avoiding any radical changes while incorporating *minor* changes where Virginia's common law differed in meaningful ways,"[11] the VaUPOAA's permit-

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4 F. Philip Manns Jr., *Powers of Attorney under the Uniform Power of Attorney Act Including Reference to Virginia Law*, 43 ACTEC L.J. 151, 171 (2018) (describing the VaUPOAA cold power to make gifts in accordance with the principal's personal history of making gifts).

5 Hook & Hayes, *supra* note 3, at 418.

6 *Id.*

7 *Id.* at 419.

8 Manns, *supra* note 4, at 185-86.

9 Hook & Hayes, *supra* note 3, at 420.

10 UNIF. POWER OF ATTORNEY ACT prefatory n., at 2 (UNIF. LAW COMM'N 2016). Manns, *supra* note 4, at 184-85.

11 Hook & Hayes, *supra* note 3, at 417-18 (emphasis added).

ting of anti-agent boilerplate is hardly a minor change to a major consumer protection purpose of the UPOAA.

On the second point, the VaUPOAA did *not* effectively omit the UPOAA's third-party protections. Although the VaUPOAA putatively creates a pro-consumer, forged-principal's-signature exception to the UPOAA's third-party protections, a third party easily can negate that by obtaining an agent's certification; a prior article by Mr. Hook conceded that point.[12]

Before we consider the VaUPOAA's and UPOAA's forged-principal's-signature rules, let's consider another aspect of Mr. Hook's and Ms. Hayes's critique of my critique of the VaUPOAA's third-party protections. Under the VaUPOAA, but not the UPOAA, a third party may delay acceptance of an acknowledged power of attorney pending receipt of an opinion from the third party's counsel. I described that as anti-consumer. Mr. Hook and Ms. Hayes state that the rule was included "to make it *easier* for the consumer to use a power of attorney, and not for the purpose of protecting the third party."[13] They reason that "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."[14] Fair enough. While the UPOAA permits a third party to delay acceptance of a power of attorney pending receipt of an opinion of counsel from the principal or agent,[15] the UPOAA does not address a third party's desire for an opinion from its own counsel. Perhaps the UPOAA should be amended to provide that a third party's request for an opinion from the third party's counsel will delay mandated acceptance, yet any such amendment must place a short time limit on when the third party must act. Without a time limit, and the VaUPOAA has none,[16] it is not clear how the Virginia third-party-opinion rule makes it easier for the consumer to use a power of attorney.

Regarding Virginia's forged-principal's-signature exception to the UPOAA's third-party protections, Mr. Hook and Ms. Hayes and I disagree on whether that exception is full or partial. The UPOAA, in exchange for mandated acceptance, places the risk of a forged,

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12 J. Rodney Johnson, *Wills, Trusts, and Estates*, 45 U. RICH. L. REV. 403, 405 (2010).

13 *Id.* at 3 (emphasis added).

14 *Id.* at 3-4.

15 UNIF. POWER OF ATTORNEY ACT §§ 119(d)(3), 120(c)(4).

16 Under the VaUPOAA, the third party must "accept the power of attorney no later than five business days after *receipt* of the . . . opinion of counsel," VA. CODE ANN. §64.2-1618(A)(2) (2017) (emphasis added), yet no time limit exists on when the third party's counsel must provide the opinion to the third party.

acknowledged power of attorney upon the principal, and does so by authorizing two kinds of reliance: (1) permitted reliance on the document, under section 119(c); and (2) permitted reliance on certification by the agent, under section 119(d).[17] Virginia clearly altered its document-reliance rule, in section 64.2-1617(B), by adding the following sentence: "The preceding sentence [creating document reliance] shall not apply to an acknowledged power of attorney that contains a forged signature of the principal."[18]

However, that forged-principal's-signature sentence was *not* added to Virginia's agent-certification-reliance rule in section 64.2-1617(C). Therefore, 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.[19]

Mr. Hook and Ms. Hayes disagree stating, "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."[20] However, they provide no authority for how the forged-principal's-signature rule of subsection (B) would be grafted into subsection (C). In addition, a 2010 *Richmond Law Review* article attributed to Mr. Hook and Ms. Lisa V. Johnson, agreed with my position: "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 26-90(C) [now section 64.2-1617(C)], despite Virginia's amendment of section 26-90(B) [now section 64.2-1671(B)]."[21]

In addition to the arguments that I made in the main article, *Ott v. Monroe*[22] supports my position. In that case, the Virginia Supreme Court held that because the words "[u]nless otherwise provided in the articles of organization or an operating agreement" did not appear in the statutory sentence addressing when an assignee of an LLC interest becomes a member, the assignee-admission rule was a mandatory rule

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17 Manns, *supra* note 4, at 189.

18 VA. CODE ANN. § 64.2-1617(B).

19 Manns, *supra* note 4, at 192.

20 Hook & Hayes, *supra* note 3, at 421.

21 Johnson, *supra* note 12, at 405 ("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." *Id.* at 404).

22 719 S.E.2d 309 (Va. 2011).

that could not be changed.[23] By analogy, the VaUPOAA's failure to include the VaUPOAA's forged-signature rule in the UPOAA's agent's-certification statutory sentence will matter.

Mr. Hook and Ms. Hayes conclude with an additional observation:

> 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." 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.[24]

Their argument seems to be that because the VaUPOAA removed some UPOAA third-party protections, it can't have demolished consumer protections. But it did. Without considering third-party protection at all, the VaUPOAA demolished consumer protections of the UPOAA by (1) permitting anti-agent boilerplate; (2) removing the opinion-expense-shifting provision; and (3) permitting a third party to delay acceptance indefinitely pending action by the third party's counsel. Further, the VaUPOAA's forged-principal's-signature rule is not an antidote to its anti-consumer provisions; rather, it's anti-consumer as well.

When the VaUPOAA's forged-principal's-signature rule does apply—negating document reliance for forged, acknowledged powers of attorney—its most likely consequence will be consumer harm, not benefit. Because of the forged-principal's-signature rule, third parties have a significant incentive to include VaUPOAA-permitted anti-agent boilerplate to obviate that risk. Thus, the greatest consequence of the forged-principal's-signature rule will not be consumer protection, but elimination of the efficacy in Virginia of acknowledged powers of attorney, simply because anti-agent provisions can be expected to abound in contracts written by risk-adverse third parties. "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 revoca-

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[23] *Id.* at 312-13. *See also* F. Philip Manns, Jr. & Timothy M. Todd, *Issues Arising Upon the Death of the Sole Member of a Single-Member LLC*, 99 MARQ. L. REV. 725, 744-48 (2016).

[24] Hook & Hayes, *supra* note 3, at 421 (quoting Manns, *supra* note 4, at 193).

ble living trust rather than a power of attorney, provided the principal can afford the greater costs of creating and maintaining a revocable living trust."[25]

When the VaUPOAA's forged-principal's-signature rule does not apply—when it always allows reliance on an agent's certification that the principal's signature is genuine—it harms consumers by permitting well-advised third parties to eliminate any possible benefit to consumers from the forged-principal's-signature rule, simply by routinely requiring agents to certify that the principal's signature is genuine. On this point, the VaUPOAA is no more anti-consumer than the UPOAA, because both permit third-party reliance upon agent certifications "without further investigation," and as the article notes, perhaps even *with* actual knowledge to the contrary.[26] The consumer harm is the VaUPOAA's bait and switch on who bears the risk of a forged signature of the principal when an agent certification is made.

As noted, "The VaUPOAA upends both halves of the UPOAA scheme [of mandated acceptance and third-party protection], 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."[27]

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25 Manns, *supra* note 4, at 194.
26 *Id.* at 176, 190.
27 *Id.* at 193.