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Georgia Has a New Uniform Power of Attorney Act Effective as of July 1, 2017! (Part 1)

By Richard M. Morgan & Loraine M. DiSalvo

Beginning on July 1, 2017, a new Uniform Power of Attorney Act (the “UPOAA”) will apply to most written, general, financial Powers of Attorney (“POAs”) created by individuals in Georgia. This Newsletter is Part 1 of our 3 part series on the UPOAA. Part 1 covers all aspects of the UPOAA other than the power provisions, Part 2 will cover the power provisions, and Part 3 will review the Statutory Form POA.

A POA is a document in which one party (the “principal”) grants authority to another party (the “attorney-in-fact” or “agent”) to act in the place of the principal with regard to economic and financial matters. If you can no longer handle your affairs and you do not have a valid POA, it may be difficult or impossible for anyone else to ensure that your bills get paid and your financial affairs are properly handled. If your incapacity persists for very long, your local probate court will likely need to appoint a conservator. The conservator will be able to handle your financial affairs, but will be subject to ongoing court supervision and inflexible rules. Probate court conservatorship proceedings can take a long time, and they are often expensive. If you have a POA in place, you may be able to avoid the need for a conservatorship proceeding altogether, your agent will not be subject to ongoing court supervision and the inflexible rules that apply to a conservator. If you truly have no one that you can or should trust with your financial matters, then it may be best to do without a POA and rely on the possible use of a formal conservatorship if you ever do become incapacitated. However, most people should have a POA as part of their estate planning.

The Georgia legislature was presented with a number of significant bills dealing with fiduciary and estate planning related issues in its 2017 Session, but House Bill 221, which created the UPOAA, was the only one of these bills that was actually enacted. However, the UPOAA will likely prove to have a major impact on Georgians. The UPOAA added a new Chapter 6B to Title 10 of the Official Code of Georgia. This new Chapter begins at Code Section 10-6B-1. The current statutes relating to POAs will remain as Chapter 6 of Title 10 of the Georgia Code.

The UPOAA makes many important changes to existing Georgia POA law, and is designed to address a number of concerns. One such concern was that, under existing law, there is no way to force third parties, such as banks and other financial institutions, to honor or accept a POA. Another concern was finding ways to better protect people, especially those who are suffering cognitive function impairments, against bad actor agents who are misusing POAs and taking advantage of the principals who they are supposed to be helping.



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The UPOAA's provisions are not all completely clear, but they should still provide a significant improvement over existing Georgia POA related laws, and work to improve the UPOAA has already begun. In May 2017, the Georgia Bar Fiduciary Law Section's Legislative Committee Chair appointed a two person special subcommittee who is charged with drafting a proposed Technical Corrections Bill. Morgan & DiSalvo is proud to announce that Richard Morgan is one of the two members of that special subcommittee.

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 - I. **What Should You Do Beginning July 1, 2017?** POAs executed prior to July 1, 2017 will continue to be valid. However, those who have POAs executed before that date, especially ones that are more than a few years old, should strongly consider having updated POAs prepared. One of the features of the UPOAA is a new statutory form power of attorney; this is literally a suggested POA form contained in the law itself in Code Section 10-6B-70. A POA executed on or after July 1, 2017 must either use the actual statutory form or a form that "substantially reflects the language" in the statutory form¹. The statutory form is not ideal as written. Therefore, we intend to use the statutory form as a starting point, but then to make

¹ In general, words appearing in quotations in this article are taken directly from the UPOAA and reflect its actual language. For purposes of brevity and readability, we have omitted direct citations for these quotations.



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careful modifications so that the POA form is improved but should still qualify as substantially reflecting the language in the statutory form. Updating POA documents may make them easier to use when needed, since third parties will be more likely to honor them. In addition, if the POA is the actual statutory form or it substantially reflects the language in the statutory form, the UPOAA will give the agent the ability to force a reluctant third party to accept the POA. Another potential benefit from updating an older POA is that doing so may help reduce the risk that the POA could be abused by the agent.

- II. **Application Of New POA Act [New O.C.G.A. Sections 10-6B-3 and 10-6B-6].** In general, POAs created before July 1, 2017 and those created on or after July 1, 2017 that are not covered by the UPOAA will still be subject to pre-July 1, 2017 Georgia law. The UPOAA only applies to general, financial POAs that are written and created by an individual on or after July 1, 2017.
- III. **Ability to Force Acceptance of the POA if Certain Conditions are Satisfied [New O.C.G.A. Sections 10-6B-20 through 10-6B-23].** Current Georgia POA laws do not require third parties to accept a POA. The reasoning is that POAs are a contract between the agent and the principal. Since the third parties are not parties to that contract, and have not agreed to the terms of the contract, it is therefore not possible to force the third parties to honor the contract. Unfortunately, a POA that is not honored and accepted is useless, and the inability to force third parties to accept a valid POA has caused a great deal of frustration, difficulties, and, in some cases, even financial losses over the years. The UPOAA changes current law by creating provisions that allow a third party to be forced to accept a POA if certain conditions are satisfied and the third party does not have a proper reason for its refusal to accept the POA.
 - A. **To Force Acceptance of a POA, the POA Must Either Use the Statutory Form or a Form That Substantially Reflects the Language in the Statutory Form.** In order to force a third party to accept a POA, the POA must use a statutory form power of attorney. A “statutory form power of attorney” is defined as one of the following: (the actual statutory form set forth in Code Section 10-6B-70; (ii) a military POA; or (iii) a POA that “substantially reflects the language in the form set forth in Code Section 10-6B-70.” In very broad terms, the actual statutory form in Code Section 10-6B-70 does the following: (i) it gives the principal the ability to grant or withhold a series of general powers; (ii) it gives the principal the ability to grant or withhold a series of special “hot” powers; and (iii) it provides protection for those who are asked to accept the POA by stating that any person may rely upon the validity of the POA unless that person has actual knowledge that the POA has been terminated or is invalid.



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- B. To Force Acceptance of the POA, Certain Steps Must be Followed.** Even if the POA qualifies as a “statutory form power of attorney” under the UPOAA, certain steps must still be followed before a third party can be forced to accept it. First, the agent must present the POA for acceptance to the third party (for example, the agent must present the POA to the principal’s bank and ask that the agent be allowed to use the POA to access the principal’s accounts at that bank). If the third party accepts the POA, great. If not, the third party has up to 7 business days after being presented with the POA to request either an agent’s certification, an English translation, or an opinion of attorney. If any of these documents are requested, the agent must present them. After the requested documents are presented by the agent, the third party has up to 5 business days after receipt of the requested documents to accept the POA.
- C. Agent’s Certifications, English Translations, and Opinions of Attorney.** A third party asked to accept a POA may request and rely upon, without further investigation, any of the following documents: (i) an **agent’s certification** or a **co-agent’s certification**; (ii) an **English translation** of the POA; or (iii) an **opinion of attorney**. An **agent’s certification** is a document signed by the agent, under penalties of perjury, regarding any factual matters concerning the principal, agent, or POA. An **English translation** may be requested if the POA contains at least some language other than English. An **opinion of attorney** explains any matter of law concerning the POA, but the person making the request must provide in writing or other recorded fashion the reason the request was made. The principal, not the third party, must bear any costs associated with obtaining the requested documents, as long as the third party properly requests the documents within 7 business days of having been presented with the POA and asked to accept it.
- D. Even if Requested Documents are Provided, the Third Party May Still Refuse to Accept the POA Under Certain Circumstances.** A third party can still refuse to accept a presented POA if it has a proper reason for doing so. These situations provide the third party with a defense against the penalties that would otherwise apply if the third party refuses to accept the POA. Such reasons include: (i) situations where the third party is not otherwise required to engage in the requested transaction with the principal; (ii) situations where the requested transaction is against federal law; (iii) situations where the third party has actual knowledge that either the POA or the presenting agent’s authority under it have been terminated; (iv) situations where a properly requested agent’s certification, English translation, or opinion of attorney is not provided; (v) situations where the third party has a good faith belief that the POA is not valid or the agent does not have the authority to do the requested act, even if properly requested documents were provided; and (vi) situations where the third party makes, or has actual knowledge that another party has made, a report to protective services stating a good



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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.

- E. Consequences for a Third Party Who Refuses to Accept a POA After All Required Steps Have Been Taken by the Agent and the Third Party Does Not Have a Proper Reason for its Rejection.** If all of the above steps are properly taken, and a third party still refuses to accept the POA even though none of the situations that give it a valid reason to do so exist, then a court can issue an order finding that the POA is valid and requiring the third party to accept it. The court can also force the third party to repay the principal for the principal's reasonable attorney fees and expenses for the litigation that was required to force the third party to accept the POA. The third party may also be held liable for additional actual damages or become subject to other remedies. These additional damages and remedies provisions of the UPOAA are not particularly clear or explicit, and it will likely take more time and, possibly, actual lawsuits before we know the scope of the available damages and remedies.
- IV. To Encourage a Third Party's Acceptance of a POA, the UPOAA Adds Significant Protections For a Third Party Who Accepts a POA [New O.C.G.A. Sections 10-6B-10(d) and 10-6B-19].** Any third party asked to accept a POA may presume and rely upon the following facts as if they are true as long as the third party accepts the POA in good faith and is without actual knowledge that any of these facts is untrue: (i) the signatures are genuine; (ii) the POA is genuine, valid, and still in effect; (iii) the agent is acting within his authority and his authority is being properly exercised; and (iv) the information and opinions provided in any properly requested agent's certification, English translation or opinion of attorney is correct. In addition, actual knowledge is not attributed from one employee to another where the third party being asked to accept a POA is a company.
- V. A POA Must be Signed in Particular Manner to be Valid [New O.C.G.A. Section 10-6B-5].** To be valid under the UPOAA, a Georgia POA must be signed by the principal (or by another individual in the principal's presence at the principal's direct direction), and attested and signed by one or more witnesses and a notary public. The principal, the witnesses, and the notary must all be in each other's presence at the time the document is signed. POAs executed outside of Georgia must comply with the state law that is stated as applicable in the POA. If the non-Georgia POA does not state what law applies, then it must comply with the law of the state where the POA was executed.
- VI. If the Principal Revokes Either the POA or the Agent's Authority Under the POA, a Revocation Notice and a Court Filing May be Required [New O.C.G.A. Section 10-6B-10].** Current Georgia law does not provide any specific notice or court filing requirements for a



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principal who wishes to revoke a POA or an agent's authority under a POA. Under the UPOAA, a principal who wishes to revoke a POA or an agent's authority under a POA will generally be required to (i) send notice of the revocation to the agent via certified mail and (ii) file notice of the revocation with the clerk of the superior court for the county where the principal has his or her primary residence (the principal's county of domicile).

There will be some circumstances under which a POA will be terminated automatically. Under these circumstances, there will not be any requirement that the principal notify the agent or file a notice with any court. These circumstances include: (i) the death of the principal; (ii) the principal's becoming incapacitated, but only in the (fairly unusual) situation where the POA specifically states that it is not intended to be a durable power of attorney (a durable POA remains effective even if the principal becomes incapacitated, while a non-durable power of attorney terminates as soon as the principal becomes incapacitated); (iii) any circumstances under which the POA itself provides that it will terminate (such as a situation where the POA specifically states that it is only effective until a certain date); (iv) the purpose for which the POA was put in place has been accomplished; or (v) the agent resigns, becomes incapacitated, or dies, and the POA does not provide for the appointment of a successor agent.

Similarly, an agent's authority can terminate automatically, with no notice or court filing requirements, under certain circumstances, including: (i) the agent resigns, becomes incapacitated, or dies; (ii) the agent is the principal's spouse, and an action for dissolution or annulment of their marriage is filed (the POA can specifically state that the agent's authority is to continue under these circumstances, in which case it will not be automatically terminated); (iii) the agent is the principal's spouse, and the agent and principal become legally separated (again, the POA can specifically provide that the agent's authority will continue under these circumstances); or (iv) the POA itself terminates.

- VII. **An Agent That Accepts Appointment Under a POA Must Comply With All Applicable Fiduciary Duties [New O.C.G.A. Section 10-6B-14].** The UPOAA provides that any person who accepts appointment as an agent under a POA is subject to various fiduciary duties and can be liable for damages caused by his breach of any of these duties. Unless otherwise provided in the POA itself, a person accepts appointment as an agent under the POA by (i) exercising authority as an agent under the POA, (ii) performing duties as an agent under the POA, or (iii) making any assertion or acting in any other way that indicates acceptance.

Some of the fiduciary duties provided by the UPOAA are mandatory. The mandatory duties cannot be modified by the POA, and so apply to all agents acting under POAs. The UPOAA also provides for other, non-mandatory, default fiduciary duties. The other default duties



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apply as provided by statute if the POA does not modify or waive them, and they apply only as provided by the POA if the POA does modify or waive them.

A. **Mandatory Fiduciary Duties.** The mandatory fiduciary duties imposed by the UPOAA are: (i) the duty to act in the principal's best interests in accordance with the principal's reasonable expectations, to extent the principal's expectations are actually known; (ii) to act in good faith; and (iii) to only act within the scope of authority granted in the POA.

B. **Non-Mandatory Default Fiduciary Duties.** The non-mandatory default fiduciary duties can be modified by the POA itself, but apply as provided by the statute if the POA does not modify them. These duties include: (i) the duty of loyalty, that requires the agent to act for the principal's benefit; (ii) the duty to avoid conflicts of interest that could impair the agent's ability to act impartially and in the principal's best interest; (iii) the duty to act with the level of care, competence, and diligence that would ordinarily be exercised by agents in similar circumstances (the "Prudent Person standard"); (iv) the duty to keep records of all receipts, disbursements, and transactions made under the POA; (v) the duty to cooperate with a person who has the authority to make health care decisions for the principal; (vi) the duty to preserve the principal's estate plan and follow his or her wishes to the extent they are actually known, if doing so is consistent with principal's best interests in light of the value and nature of the principal's property, the principal's foreseeable financial needs, the minimization of the principal's taxes, and the principal's possible eligibility for government benefits. In general, an agent may be able to avoid liability if he is careful to always act in good faith and in accordance with the Prudent Person standard. Please note, however: an agent who is selected because of his special skill or expertise will generally be held to the higher standard that would apply to an expert in determining if the agent acted in accordance with the Prudent Person standard with regard to the matters that fall into the scope of his expertise.

VIII. **Co-Agents May Have an Affirmative Duty to Act to Protect the Principal's Best Interests [New O.C.G.A. Section 10-6B-11(d)].** If an agent has actual knowledge that another agent has breached or is about to breach a fiduciary duty, the agent with the knowledge must notify the principal. If the principal is incapacitated, the agent with the knowledge must take other actions that are reasonably appropriate under the circumstances to safeguard the principal's best interests. An agent who has actual knowledge of an actual or impending breach by another agent and fails to notify the principal or take other protective actions can be held liable for reasonably foreseeable damages that could have been avoided if the agent had properly notified the principal or acted to safeguard the principal's best interests.



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IX. The UPOAA Expands the Options for Obtaining Court Scrutiny of an Agent's Actions and for Holding an Agent Liable for Damages Suffered by the Principal [New O.C.G.A. Sections 10-6B-14 through 10-6B-17]. The UPOAA significantly expands the list of interested persons who may petition the court to interpret a POA, review an agent's actions, and provide appropriate relief for any misconduct. The interested parties include: (i) the principal or agent; (ii) a guardian, conservator, or other fiduciary acting for the principal; (iii) a person authorized to make health care decisions for the principal; (iv) the principal's spouse, parent, or descendant; (v) a presumptive heir of the principal; (vi) a person who would benefit from the principal's property in some manner at the principal's death (such as a person who is named as a beneficiary under a Will executed by the principal), (vii) a government agency that has authority to protect the principal's welfare; (viii) the principal's caregiver or anyone else who can demonstrate a sufficient interest in the principal's welfare; and (ix) anyone asked to accept the POA. If a petition is filed by an interested party, the principal can have the petition dismissed by filing a motion to dismiss with the court. If the principal files a motion to dismiss, the motion will be granted unless the court determines that the principal lacks the capacity to revoke the agent's authority or the POA. In other words, a principal who can still act for himself or herself can have the petition dismissed, but if the principal is found to be incapacitated to the point that he or she can no longer legally change the POA, the suit will be allowed to continue, to help ensure that the principal is protected.

If an agent is found to have violated any duty imposed by the UPOAA or the POA, that agent can be held liable for any damages caused to the principal or the principal's successors in interest by the violation. The agent can be made to (i) restore the value of the principal's property to what it would have been without the violation plus (ii) repay the principal for any attorney's fees and costs that were paid on the agent's behalf from the principal's assets.

X. Miscellaneous Matters.

A. Principal Can Nominate Conservator in POA [New O.C.G.A. Section 10-6B-8]. As under current Georgia POA law, the principal can use the POA to designate the person who the principal wants to serve as his conservator if the principal is found to be incapacitated and a court determines that a conservator should be appointed. The court will follow this selection unless the court finds that someone has shown good cause that the court should do otherwise. The appointment of a conservator does not automatically terminate the POA. Instead, the conservator's appointment overrides the POA only to the extent that the conservator's powers overlap with the agent's powers, unless otherwise directed by the court.



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- B. **The Agent Can Generally Use a Copy of the POA [New O.C.G.A. Section 10-6B-6(d)].** In general, a photocopy or an electronically transmitted copy of an original POA has the same effect as the original POA. The one exception is that an original POA is required for recording in connection with a real estate transaction.
- C. **The Agent Does Not Generally Receive Compensation, But Can Receive Reimbursement for Expenses Incurred [New O.C.G.A. Section 10-6B-12].** Unless the POA specifically provides for the agent to receive compensation for serving as agent, the agent will not receive compensation. However, an agent can receive compensation for any reasonable expenses that the agent incurs in the course of acting as agent.

If you have questions about how the UPOAA may affect you or someone you love, we are here to help you find answers. Please contact our office administrator at (678) 720-0750 or info@morgandisalvo.com to schedule an appointment.