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Georgia Has a New Uniform Power of Attorney Act Effective as of July 1, 2017 (Part 3)

Beginning on July 1, 2017, a new Uniform Power of Attorney Act (the "UPOAA") applies to most written, general financial Powers of Attorney ("POAs") created by individuals in Georgia. This newsletter is Part 3 of our three-part series on the UPOAA.[1] Part 1 covered the most important aspects of the UPOAA other than the power provisions. Part 2 covered the power provisions. This Part 3 will review the Statutory Form POA, discuss the form selection options available to attorneys who prepare POAs for clients, and discuss many of the important issues that should be considered when attorneys are developing new custom POA forms for use in their practices.[2]

As discussed in Part 1, the UPOAA only applies to general, financial POAs that are written and created by an individual on or after July 1, 2017. Therefore, if a document fits the UPOAA definition of a POA[3] and is executed on or after July 1, 2017, the document must comply with the UPOAA in order to be valid. In general, a document will fit the definition of a POA under the UPOAA if the document is a written, general financial Power of Attorney created by an individual and none of the exceptions listed in O.C.G.A. Section 10-6B-3 apply. In order to be valid, the POA must be executed properly. Proper execution means that the principal must sign the POA[4] in front of one or more witnesses and a notary public. The witnesses must then sign the POA, and the notary should notarize the POA. The principal, the witnesses, and the notary must all be in each other's presence when the POA is signed.[5]

This Newsletter first discusses the range of options available to attorneys who wish to provide their clients with valid POA documents under the new UPOAA, and the advantages and

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[1] We are immensely grateful to Blake N. Melton J.D., LL.M., CFP®, CTFA, of Synovus Family Asset Management for his help in interpreting the UPOAA, his insights into planning around many of the issues with the UPOAA, and in his consideration of future corrections and changes to the UPOAA.

[2] The discussion contained in this newsletter is intended solely for general discussion and educational purposes. It is not intended to serve as legal advice or to serve as a do-it-yourself guide. Persons seeking to create a Power of Attorney should seek direct legal advice and assistance from a competent, licensed attorney.

[3] Technically speaking, the UPOAA initially defines a POA much more broadly. O.C.G.A. Section 10-6B-2(7) defines a POA as "a writing or other record that grants authority to a person to act in the place of an individual, whether or not such term is used." However, the UPOAA then provides a series of exceptions that get us to the general rule described above. See new O.C.G.A. Sections 10-6B-3 and 10-6B-2(1), (6), and (9). This definition issue is important since the UPOAA may actually end up applying to more documents than are generally intended by a reference to general financial POAs that are created by individuals. For example, the definition of a POA does not even require that a document refer to itself as a power of attorney in order for it to be considered one.

[4] Under O.C.G.A. Section 10-6B-5(a)(1), the principal can also have another person sign the POA on his behalf, as long as the person who is signing for the principal does so in front of the principal and at the principal's explicit direction. If the principal has another person sign the POA for him, that person must also be in the presence of the witnesses and the notary public at the time the POA is actually signed, witnessed, and notarized.

[5] While only one witness and a notary are required, best practices would dictate using 2 witnesses and a notary.

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disadvantages of each option. It will then discuss some drafting issues that attorneys should consider if they decide to use a custom form for their POAs but want to ensure that their POA form "substantially reflects the language in" the statutory form, as permitted by O.C.G.A. Section 10-6B-20(a)(3).

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I. Options for Determining What Form to Use for Georgia Powers of Attorney to be Created on or After July 1, 2017. Under the Georgia power of attorney laws prior to July 1, 2017, a statutory form was provided, but its use was not required. Due to perceived weaknesses in the statutory form, many estate planning attorneys did not use it. Instead, these attorneys preferred to use a different form. These forms might be provided by a software service to which the attorney subscribed or developed in-house by the attorney or his or her firm. Attorneys who used these custom-drafted forms instead of the Georgia statutory POA form tend to feel that, for various reasons, their custom forms are better and stronger than the statutory form. The creation of a new statutory form, coupled with the new provisions that try to ensure that the POA form used is either identical to or "substantially reflects the language" of the statutory form, has created a great deal of consternation and confusion in the estate planning attorney community. Going forward, estate planning attorneys will likely follow one of a few options in deciding what form to use for POAs. This section discusses these options and looks at the potential advantages and disadvantages of each.

A. Option 1: Continue to Use the Same Custom POA Form Used Before the

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UPOAA Became Effective on July 1, 2017. This option will likely be chosen by many attorneys on the assumption that their existing POA form is as good as, or even better than, the new statutory form. These attorneys may also believe that the potential ability to force a third party to accept a POA using the new provisions included in the UPOAA is not a significant benefit. These attorneys may have had few of their clients report such problems in the past, or they may assume that third parties like banks and other financial institutions will simply find ways around the new provisions and continue to refuse to accept even POAs prepared using the new statutory form. Attorneys who choose this option may need to modify their form's signature page and their standard execution routines to ensure that the POAs are executed correctly, or ensure that their software provider makes appropriate changes.

1. **Advantages.** The advantages for attorneys who continue to use their existing custom forms will likely include: much less time spent developing and implementing a new custom form or the new statutory form instead of on billable work; and the comfort of using familiar forms for drafting and helping clients review and sign new POAs. However, these advantages may be illusory.

2. **Disadvantages.** Attorneys who continue to use the same custom form that they used before the UPOAA took effect on July 1, 2017 face several potential disadvantages. They should also, at a minimum, carefully review their existing forms in light of the UPOAA and make appropriate modifications in order to ensure that the forms do not create unintentional results under the new laws.

   (A) The provisions of the UPOAA that are designed to allow you to force a third party to accept a POA will likely not be available for custom-form-based POAs that do not substantially reflect the language in the new statutory form. One major disadvantage for attorneys who decide to continue using the same POA form that they used prior to the UPOAA is that the attorney's clients may not be able to use the provisions of the UPOAA that are designed to effectively force a third party to accept the POA. These provisions set out time limits within which a third party must either accept a presented POA or give a proper reason that it refuses to do so, and list certain additional documents that the third party can request if it wants additional reassurance of the validity or provisions of the POA. If a third party improperly refuses to accept a presented POA, the person who seeks to have the POA accepted is given the power to seek a court order confirming the validity of the POA or forcing the third party to accept the POA. If a court order must be obtained, the third party that improperly refused to accept the POA can be forced to pay any attorney's fees and litigation expenses that the principal

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or agent incurred in obtaining the order. However, the new provisions that create the power to force a third party to accept a POA will not apply unless the POA document used by the principal meets the definition of a "statutory form power of attorney" contained in new O.C.G.A. Section 10-6B-20(a). A POA will not qualify as a statutory form power of attorney under Section 10-6B-20(a) unless it either (1) uses the exact statutory form set out in new O.C.G.A. Section 10-6B-70, (2) qualifies as a military power of attorney under 10 U.S.C. Section 1044b as in effect on February 1, 2017, or (3) uses a form that "substantially reflects the language in" the 10-6B-70 statutory form. It is highly unlikely that the custom forms used by most attorneys before July 1, 2017, will be deemed to substantially reflect the language in the new statutory form.

(B) As third parties become used to seeing either the statutory form or custom forms that are designed to substantially reflect the language in the statutory form, they may become even less likely to accept POAs that use other forms. Before the UPOAA, third parties, especially financial institutions, were often reluctant to accept POAs. In order to help ensure that their clients can take advantage of the new provisions of the UPOAA that allow a third party to be forced to accept a POA, more and more attorneys will likely either start using the actual statutory form or modifying their custom forms to make them look as much like the statutory form as possible. This means that third parties in Georgia will likely become used to seeing a fairly narrow range of POA documents and start to depend on seeing a standard look. When a third party that is used to seeing fairly standardized POAs is suddenly presented with a custom-form-based POA that does not look like the statutory form, that third party may be even more reluctant to accept that non-standard POA than it was prior to the UPOAA.

(C) A purely custom form that is not significantly updated to reflect the new laws may not actually operate as intended, because of the effect of the UPOAA and its focus on the use of specific defined terms. In an apparent attempt to make the statutory form POA short and simple on its face, and avoid the need for long, detailed lists of permitted acts to be spelled out in POA documents, the UPOAA relies heavily on the use of defined terms and incorporation of powers by reference. This means that the terms used in custom POA forms and the effect of the use of those terms may be affected by the UPOAA in unexpected ways.

(i) All of the general authority provisions will be

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incorporated by reference into the POA by a simple statement that the agent can do any acts that the principal could do for herself. If the POA generally states that the agent has the authority to do all acts that the principal could do, then, under new O.C.G.A. Section 10-6B-40(c), the POA actually grants the agent all of the general authority powers described in new O.C.G.A. Sections 10-6B-43 through 10-6B-55. These general authority powers include, among many others, the extremely broad powers relating to "Personal and Family Maintenance " that are granted by Section 10-6B-52 and, at least potentially,[6] the power under Section 10-6B-50(8) to "reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment that" the principal would otherwise receive or hold with regard to an estate, trust, or "other beneficial interest."

(ii) The use of specific terms in a POA can fully incorporate many general authority power provisions into the POA, and the use of the term "gift" may fully incorporate a specific authority provision into the POA. O.C.G.A. Section 10-6B-41 seems to state that the POA provides particular general authority powers to the agent when the POA uses the descriptive terms referred to in O.C.G.A. Sections 10-6B-43 to 10-6B-56 or refers to these actual Code Sections. The descriptive terms used in these Code Sections include the following words and phrases: "real property;" "tangible personal property;" "stocks and bonds;" "commodities and options;" "banks and other financial institutions;" "operation of an entity or business;" "insurance and annuities;" "estates, trusts, and other beneficial interests;" "claims and litigation;" "personal and family maintenance;" "retirement plans;" "taxes;" and "gift." A grant of general authority to make gifts may also incorporate not only the gifting powers granted and limited by new O.C.G.A. Section 10-6B-56,[7] but also the limitation

[6] As discussed in Part 2 of this newsletter, the power to disclaim is also specifically listed as a specific authority power under O.C.G.A. Section 10-6B-40(a)(9). At this time, it is not clear how the conflict between the broader general authority provision of 10-6B-50(8) and the more specific provision of 10-6B-40(a)(9) will be reconciled.

[7] Note: O.C.G.A. Section 10-6B-56(b) says that "language in a power of attorney granting general authority with respect to gifts shall authorize the agent only to" and then describes certain kinds of gifts. Please see Part 2 of this Newsletter for a more detailed discussion of the gifts authorized by this provision. However, under O.C.G.A. Section 10-6B-40(a)(2), the power to "[m]ake a gift" is a specific authority power that must be expressly granted in the POA. In addition, under the statutory form provided in 10-6B-70, the power to make a gift must be separately initialed. Because, as discussed in the following paragraph, it is not currently clear whether specific authority powers must be separately initialed or otherwise designated beyond just the use of specific language granting those powers in a POA, we cannot be

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in 10-6B-40(b) that prevents an agent from utilizing gifts or otherwise to benefit himself or any individual to which the agent owes a legal obligation of support, unless the agent is either an ancestor, spouse, or descendant of the principal.

(D) If powers that are now specific authority powers are intended to be granted to the agent under the POA, those powers must now be "expressly granted" by the POA form. If a POA is intended to grant any powers that are similar to the specific authority powers listed in new O.C.G.A. Section 10-6B-40(a), then the POA must "expressly grant" those powers. The statutory form contains a list of the specific authority powers and requires the principal to initial each specific authority power in order to expressly grant them. However, O.C.G.A. Section 10-6B-40(a) does not appear to specifically require that these powers be separately initialed or otherwise explain what "expressly grants" is intended to mean. Therefore, it is not currently clear whether the UPOAA legally requires that the principal separately initial each specific authority power in order to grant them if a custom form is used, or whether language specifically granting the desired specific authority powers will be sufficient.

(E) Potentially conflicting provisions of a custom form POA must be clarified to ensure that the form will work as intended. New O.C.G.A. Section 10-6B-40(e) provides that if multiple provisions in a POA are similar or overlap, then the provision providing the broadest authority is to control. Attorneys who intend to continue using their existing custom forms need to carefully review the forms to ensure that any provisions that might be similar or overlap are clarified.

B. Option 2: Use the Actual Statutory Form Set Out in New O.C.G.A. Section 10-6B-70. Many attorneys may decide to simply use the statutory form as it is set out in Section 10-6B-70, without much, if any, modification.

1. Advantages. First, it will likely be fairly quick and simple to come up with a new form template because the exact form is set out in the statute and only needs to be entered into an appropriate document production method. Second, POAs prepared using the exact statutory form will clearly qualify as ones that a third party can be forced to accept through a court process. This may mean that third parties will be fairly quick to accept them voluntarily.

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currently certain whether a specifically granted power to make gifts, without more, will actually incorporate the powers given by 10-6B-56.

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2. Disadvantages. Both the provisions of the UPOAA and the new statutory form set out in O.C.G.A. Section 10-6B-70 present some potentially serious problems and unclear issues. An attorney who uses the actual statutory form, without modifications, fully exposes her clients to these potential problems and uncertainties. A technical corrections bill designed to correct and clarify as many of these potential problems and issues is already in the development process, and will likely be sent to the Georgia Legislature in early 2018. However, there is no guarantee that the final bill will actually make it into law or that it will successfully resolve all the existing issues presented by the statutory form. Even if a perfect technical corrections bill was developed and passed into law intact, it still would not likely become effective any earlier than July 1, 2018, leaving the existing problems and issues in place until at least that date.

C. Option 3: Design and Use a Custom POA Form That Substantially Reflects The Language in the Statutory Form Under New O.C.G.A. Section 10-6B-70. This option attempts to allow custom POAs to take advantage of the rules that allow third parties to be forced to accept POAs while still addressing most or all of the most potentially serious problems and issues created by the new laws and the new statutory form. Attorneys who rely on forms software systems but wish to use this option may need to be proactive in developing their own new custom forms, because the software providers may not be quick to modify their existing templates sufficiently. Attorneys who use and develop their own forms in house should also be proactive in making changes to their existing forms. After all of the time and effort to develop new custom POA forms is put in, many attorneys may find themselves using POA forms that look like the new statutory form with a long list of special instructions attached.

1. Advantages. Developing a new custom POA form that both substantially reflects the language in the statutory form (and thereby gains access to the new provisions that allow you to force third parties to accept it) while also reducing or avoiding the potentially serious problems and issues created by the new UPOAA and the new statutory form will likely be the best of the available options. The attorney who makes a successful attempt at using this option will provide his clients with a POA that should be fairly easy to use and relatively clear to understand, but that reduces the potential for abuse by agents gone bad and that ensures powers that can be used to benefit others are not overly narrow or overly broad.

2. Disadvantages. We do not currently know how to tell if a custom POA will be deemed to substantially reflect the language in the statutory form. This means that, until additional clarity in this regard can be had, it may still be

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difficult to convince or force a third party to accept the POA. Third parties who are nervous about accepting POAs may seize on the slightest differences in order to claim that the POA does not substantially reflect the language in the statutory form, and courts may end up agreeing with them. In addition, we do not know how any language that attempts to modify the powers provided in the UPOAA will be interpreted by courts and others.

II. Some (Likely Not All) of the Important Issues to Consider When Crafting a Custom POA Form That Attempts to Substantially Reflect the Language in the Statutory Form Under New O.C.G.A. Section 10-6B-70. Morgan & DiSalvo believes that, due to the many potential issues currently present in the UPOAA and its statutory form, the best course of action for attorneys will be for the attorneys to prepare their own custom POA forms. As discussed earlier in this newsletter, these custom POA forms should likely try to look as much as possible like the statutory form, to help ensure that they can be used if needed, but they should also contain appropriate and carefully drafted additional provisions to prevent overly broad or overly limited powers from creating problems for clients. This section is intended to discuss many, but likely not all, of the significant issues that attorneys should consider in trying to develop their custom POA forms.

PLEASE NOTE: all of the statements in this newsletter regarding what should be done when developing a custom POA form reflect only the opinions of the authors, and should not be taken as statements of legal authority or any other authority. No one should rely on this newsletter as guidance regarding how to create a custom POA form, or as legal advice regarding the effect of a custom form or any of the suggestions contained in this newsletter.

A. General Drafting Considerations.

1. Carefully Consider Each Potential Modification to the Statutory Form. The more changes you make to the statutory POA form, the greater the risk that it will be deemed not to qualify as a POA that "substantially reflects the language in" the statutory form. Before making a change, you need to be extremely careful to ensure that you have considered the potential benefits of the change and weighed their importance against the potential loss of access to the rules that allow third parties to be forced to accept the document. You also need to ensure that you are not accidentally granting powers that are not intended, that you are not overly limiting powers that are desired, and that you are not creating provisions that will be deemed to overlap so that only the provision with the broader application will be applied.

2. Consider Making Your Custom Form POA Look as Similar as Possible to the Statutory Form. If your custom form looks as much as possible

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like the statutory form, especially in the first pages, it may help increase the likelihood that third parties will accept the POA when it is presented, especially as third parties get used to seeing the statutory form in Georgia. One way to do this may be to use the statutory form as presented in the statute, but to include limitations and modifications as Special Instructions as permitted by the statutory form. If the list of Special Instructions will be long, as many may be, it may be best to put them in an attached document that is simply referenced in the Special Instructions section of the form itself, instead of trying to list all Special Instructions in that section of the form. Also see the additional discussion of the Special Instructions section in paragraph II.A.5 below.

3. Consider Having Your Custom Form Include a Statement That it is Intended to Substantially Reflect the Language in the Statutory Form. Consider including a statement, probably near the front of the POA, that the POA is intended to substantially reflect the language in the statutory form set out in O.C.G.A. Section 10-6B-70. While the use of such a statement likely cannot guarantee that third parties or courts will accept the POA as substantially reflecting the language in the statutory form, it is highly unlikely that such a statement will hurt. And it could help.

4. A Custom POA Form Should Attempt to Meet the Primary Objectives Behind the Development of the New Statutory Form. During the negotiations that took place while Georgia's UPOAA was being crafted and presented to the legislature, two different ways to trigger the acceptance provisions were considered. One way, often referred to as "Alternative A," would have required a third party to accept any POA as long at it was properly executed. The other way, often referred to as "Alternative B," would require a third party to accept a POA only if the POA was executed properly **and** was "substantially in the" statutory form. Alternative A had many supporters among the negotiating parties, because it makes it both clear and easy for attorneys to ensure that the POAs they prepare for their clients will be accepted when necessary. In addition, Alternative A is the option chosen by most of the states that have considered and adopted versions of the Uniform Power of Attorney Act. However, other parties, many of them representatives of banks and other financial institutions, preferred Alternative B, because they believed it would reduce the need for them to closely review and analyze every single POA in order to determine what powers are actually granted to the agent and what limitations on the agent's powers exist. Many of the parties who preferred Alternative B also had serious concerns about potentially being forced to accept POAs that were not prepared by attorneys, fearing that they could end up being forced to help abusive agents or otherwise comply with actions that were not in the interest of principals. These negotiations,

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which finally became part of a rushed process during the waning days of the 2017 Georgia legislative session, resulted in the current requirement that a POA either use the exact statutory form, be a military power of attorney prepared in accordance with federal law, or be based on a form that "substantially reflects the language in" the statutory form. Unfortunately, we don't actually know what this language means, or how it will be interpreted in the future.

One benefit from the negotiation process was that it resulted in the development of a modified Alternative B. Although the modified Alternative B, along with the original Alternative B, was ultimately rejected in 2017, it may still be useful as a way to help ensure that a custom POA form will be accepted by third parties and deemed to substantially reflect the language in the statutory form. Under the modified version of Alternative B, a POA would need to satisfy the primary objectives of the statutory form, by including: (1) provisions that expressly grant or withhold the general authority powers under O.C.G.A. Sections 10-6B-43 to 10-6B-55, using language substantially similar to the descriptive terms used for each power in the statutes; (2) provisions that expressly grant or withhold the specific authority powers under O.C.G.A Sections 10-6B-40(a) and 10-6B-56, using language substantially similar to that used in 10-6B-40(a) and to the descriptive term used in 10-6B-56; and (3) a provision that is substantially similar to the section of the statutory form that appears under the heading "Reliance On This Power Of Attorney."[8]

5. Use the Special Instructions Section. The statutory form clearly contemplates that any changes to the powers granted by the POA will be contained in the Special Instructions section. It also specifically states that special instructions can either be made in this section of the body of the POA (using extra added lines if needed), or in a separate document that is attached to the POA. Attorneys should therefore strongly consider using a similar Special Instructions section in their custom POA forms, and making most or all of their desired changes in that section. As mentioned earlier in this newsletter, if Special Instructions will be lengthy, it may be best to include them all in a separate document that is attached to the POA, and then to simply include a statement in the body of the POA referring to the attachment using language such as "See attached Special Instructions document."

B. Specific Drafting Considerations.

[8] This section of the statutory form states "Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person has actual knowledge it has terminated or is invalid."

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1. Should the POA be Durable, So That it Will Remain in Effect if the Principal Becomes Incapacitated? A durable power of attorney is one that remains in effect even if the principal subsequently becomes incapacitated. New O.C.G.A. Section 10-6B-4 states that a POA is durable unless it specifically states that it will be terminated by the incapacity of the principal. At Morgan & DiSalvo, we believe that general financial POAs should always be durable.

2. Should the POA be Effective and Usable Immediately Upon its Execution by the Principal or Only Upon the Occurrence of Another Event or Contingency? New O.C.G.A. Section 10-6B-9 provides that a POA is effective (and thereby potentially usable) immediately upon its proper execution unless the POA provides that it becomes effective only at a future date or upon the occurrence of a future event or contingency. The most commonly used such restriction will likely be a provision that says that the POA will not become effective unless and until the principal actually becomes incapacitated. If a POA is restricted so that it does not become effective until the principal has become incapacitated, this Section sets out a default method that can be used to determine whether this has occurred, and describes the people who may make that determination. However, if the POA itself provides for the principal's incapacity to be determined by another method, or authorizes specific people to make that determination, then the provisions of the POA will control. If the POA authorizes specific persons to determine whether the principal has become incapacitated,[9] this Section also gives any of those persons the power to act as the principal's personal representatives under the Health Insurance Portability and Accountability Act ("HIPAA"), allowing them to access the principal's health care information and communicate with the principal's health care providers.

At Morgan & DiSalvo, we generally recommend that clients make their POAs effective immediately upon execution, although we do allow clients who feel strongly that they would prefer to have the POA effective only if they become incapacitated to use that restriction,[10] and we believe that this choice should be

[9] If the principal has not specifically designated one or more persons to be able to make the determination that the principal has become incapacitated and the POA has become ineffective, so that the default method of determining the principal's incapacity is used, it does not appear that the agent nominated in the POA will have the ability to access the principal's health care information under Section 10-6B-9(d).

[10] In our experience, when clients want to restrict a POA so that it can be used only when the client has become incapacitated, it is often because they do not want anyone acting under the POA unless it is really, truly, necessary, and it makes them nervous to have the POA out there. However, if the client has a valid reason to be nervous about a particular agent's trustworthiness, we tend to recommend that they just not name that agent at all, instead of naming that agent and then restricting the POA so that it can't be used unless the principal is incapacitated. Imposing the incapacity restriction on the POA when naming a potentially untrustworthy agent does not really protect the principal. It only helps ensure that the agent won't be able to actually take any unwanted actions until after the principal has become incapacitated and can no

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discussed in detail with all clients. It may also be possible to have some agents restricted to acting only if and when the principal has become incapacitated, but allowing other agents to act immediately. For example, a client's spouse might be named as the initial agent and the POA be made effective immediately with regard to that person, but the POA could be limited so that no successor agents can act until the principal has become incapacitated and the initial agent is no longer able or willing to continue acting as the agent.

What if the client needs or wants to name a corporate fiduciary, such as a bank or trust company, to serve as an initial or successor POA agent? Many corporate fiduciaries will not agree to serve as agent under a POA under any circumstances. However, based on Morgan & DiSalvo's experience with this situation, there are at least a few who will. When we have worked with these cases, the corporate fiduciary is generally only willing to serve as an agent under the client's POA if (a) the client has a revocable living trust ("RLT") in place as part of his estate plan, (b) the corporate fiduciary is also named as a successor Trustee under the client's RLT, and (c) the corporate fiduciary's authority under the client's POA is restricted to becoming effective only if the client has become incapacitated. This appears to be based on the assumption by the corporate fiduciaries that they will not have any duty to act under the POA before the client has become incapacitated, and that, once the client does become incapacitated, the corporate fiduciary will be able to further limit its potential exposure to liability as agent by using the POA as little as possible: transferring the client's assets to his RLT and then managing them as successor Trustee. Please note, however, that the POA will still be needed in order for the agent to deal with assets that cannot or should not be moved to the client's RLT during his lifetime. An example of an asset that should not be moved to a client's RLT lifetime is a tax-deferred retirement savings account such as IRA or qualified plan account. If the ownership of any such account is changed to an RLT during the client's lifetime, it may be treated as a full withdrawal of the assets from the account by the client, which would create significant negative income tax consequences.

3. Should the POA Revoke or Terminate Previously Executed POAs?
The execution of a new POA does not automatically revoke or terminate a

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longer revoke the POA. The restriction also creates potentially significant additional hurdles and delays that will arise if and when the use of the POA really is necessary; especially in the very common situation where someone may be losing capacity but not yet so incapacitated that a health care provider or judge is likely to be willing to state that they are completely incapacitated. If a client really has no trustworthy potential agents, it is likely better to use either: (1) use a wiling corporate fiduciary as agent along with a RLT based estate plan; (2) use co-agents and require them to work together at all times; or (3) do not use a POA at all so that, if truly necessary, the client is put under a conservatorship where there is ongoing court supervision of some kind on the conservator.

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previously executed POA under the new UPOAA. One question is now whether a new POA can effectively revoke and terminate any such old POAs simply by stating that it is intended to revoke all previously executed POAs. The statute is not completely clear. New O.C.G.A. Section 10-6B-10 deals with the revocation and termination of a POA. Section 10-6B-10(a)(3) states that a POA will be revoked when "[t]he principal revokes the power of attorney, provided that the principal provides the agent with notice of such revocation by certified mail and provided that such notice is filed with the clerk of superior court in the county of domicile of the principal." This appears to mean that, even if a new POA contains a specific statement that it revokes any previously executed POA, the old POA is not revoked unless and until the appropriate notice has been provided to the agent under the revoked POA and that notice has been filed with the clerk of the appropriate superior court (although, for POAs executed prior to July 1, 2017, which are not subject to the UPOAA, this notice and filing requirement may not apply). However, Section 10-6B-10(a)(5) states that a POA terminates when the POA "provides that it terminates." If a POA states that it will terminate immediately upon the execution by the principal of a new POA that in turn states that it revokes or terminates all previously executed POAs, will the combination of the two statements allow the new POA to automatically terminate the old POA and create a way to avoid the notice and filing requirements of Section 10-6B-10(a)(3)? We don't know.

Morgan & DiSalvo believes that a new POA should normally state that it revokes and terminates all prior general POAs (do not simply use the word "revoke"). However, you may need to create exceptions if there are specific, previously-executed POAs that the client wants to continue to have in effect (such as a POA created using a form provided by a particular third party such as a bank or other financial institution, and that only applies to accounts held at that institution). In addition, consider having all new POAs include a provision stating that they will terminate upon the principal's execution of a later POA, as long as that later-executed POA itself contains a statement that its execution terminates all previously-executed POAs. The biggest risk is that this strategy will fail if tested, and that a previously-executed POA will be found to still be valid if it was not officially revoked and the notice and filing requirements under O.C.G.A. Section 10-6B-10(a)(3) were not satisfied. For now, attorneys who work with estate planning clients should prepare themselves to comply with the notice and filing requirements any time a client wants to ensure that a POA has been properly revoked, or when a client comes in with an existing POA that may fall under the UPOAA and that does not contain the recommended statement that it will terminate upon the principal's execution of a new POA.

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4. Should the POA Agent Receive Compensation in Addition to Being Reimbursed for Reasonable Expenses She Incurred in Acting Under the POA? New O.C.G.A. Section 10-6B-12 provides that the agent under a POA is not to receive compensation unless the POA states otherwise. Should a provision providing compensation for the agent be included, either routinely or in specific cases? At Morgan & DiSalvo, our standard POA does not provide for the agent to receive compensation, and in most cases we believe that providing compensation for the agent creates a potential conflict between the agent's interest and those of the principal. However, in some cases, clients wished to provide compensation for an agent acting under the POA, and in many such cases, doing so may make sense. Under the UPOAA, POA agents may be subject to a greater number of potential duties and a greater potential liability for failure to comply with these duties than existed under previous POA law. For this reason, more clients may wish to ensure that the agent can receive reasonable compensation in addition to reimbursement for any expenses the agent incurs in carrying out her duties. And when a professional or corporate fiduciary is to serve as the agent, a compensation provision will likely be necessary in order to ensure that the agent will serve when needed. Be careful, however: compensation provisions may not be suitable for inclusion as a standard provision in custom POA forms, and, if a compensation provision is used, the POA should likely err on the side of spelling out how compensation is to be determined, instead of just using a general statement such as "my agent is to receive reasonable compensation for his service as agent under this Power of Attorney."

5. If the POA Appoints Co-Agents, Should the Co-Agents be Allowed to Act Independently, or Should Joint Action be Required? New O.C.G.A. Section 10-6B-11 provides that co-agents named in a POA can act independently unless the POA states otherwise. At Morgan & DiSalvo, we believe that this is a serious question that each client needs to carefully consider and answer based on the client's own situation and the reason that co-agents were appointed. In some situations, such as where the client wishes to appoint two children as co-agents just to help ensure that at least one child will be able to take action quickly if needed and both children are trustworthy and generally get along, then allowing each co-agent to act independently may be perfect. However, in other situations, such as a situation where the client isn't fully comfortable with one or both of the appointed agents but still insists on appointing that person, the client may have intended for the co-agents to serve as a check-and-balance system to help reduce the chance of inappropriate or undesirable acts by either agent. In this kind of situation, it would defeat the client's intent to allow the co-agents to act independently, and the POA should likely require that they act jointly in order for them to do anything.

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6. Should the POA Modify Any of the Default Duties That Would Otherwise Apply to Any Accepting Agent? New O.C.G.A. Section 10-6B-14 provides one set of agent duties that may not be modified by the POA (these are mandatory duties), and another set of agent duties that may be modified by the POA (these are the default duties). Should the POA make any modifications to the default duties? Morgan & DiSalvo believes that, in general, the default duties should be retained as created by the UPOAA, with one possible exception. The possible exception relates to the default duty under new O.C.G.A. Section 10-6B-14(b)(4) that requires the agent to keep a record of all receipts, disbursements, and transactions made by the agent on behalf of the principal. Attorneys should consider modifying this duty in their custom POA forms so that the agent is required to retain reasonable records, instead of all records. When discussing POAs with clients, attorneys should also discuss the possibility of modifying this provision in order to expand or contract the list of persons who have a right to receive copies of or access to the records. Expanding this list may help protect the principal against abuse and help prevent situations where distrust arises among a principal's family due to a lack of information or a lack of transparency on the part of the agent, by allowing other trusted parties to provide a level of oversight over the agent. Conversely, a client may wish to modify the record keeping and disclosure duties so that they are as limited as possible under the law. Limiting the agent's duty to keep records and provide access to persons other than the principal can be dangerous, because it can allow an unscrupulous agent to better cover his tracks while financially abusing the principal. However, in some clients' situations, having other persons receive access to the clients' financial information can end up exposing the clients to financial abuse from the other parties or give unreasonable or combative persons an easy way to create problems.

7. Should the POA Limit an Agent's Fiduciary Duty Standard to the Maximum Extent permitted by the UPOAA? New O.C.G.A. Section 10-6B-15 provides that the POA can contain a provision that relieves an agent of liability for a breach of the agent's fiduciary duty, and that the provision will be binding on the principal and the principal's successors in interest. However, this kind of provision cannot: (i) relieve the agent of liability for a breach of duty that was committed by the agent in bad faith or with reckless indifference to the purposes of the POA or the best interests of the principal; or (ii) have been inserted in the POA as the result of "an abuse of a confidential or fiduciary relationship with the principal." The statute does not state that the abuse of the confidential or fiduciary relationship has to have been made by the agent, or that the abused relationship had to have been between the principal and the agent; meaning, most likely, that it

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is designed to cover a fairly broad range of potentially abusive situations. For example, if the principal's financial adviser wrongly convinces the principal to name the adviser's spouse as the principal's agent, and also wrongly convinces the principal to have her attorney to include a provision in the POA relieving the agent of liability for any breach of the agent's fiduciary duty, this provision will likely apply to prevent the provision from applying with regard to the adviser's spouse. Morgan & DiSalvo believes that, in general, the agent's potential liability for a breach of her fiduciary duties should not be limited to the maximum permitted extent, although some reductions may make sense in many cases, and there may even be some situations where it is desirable to limit the agent's potential liability as far as possible. For example, if the agent is a highly trusted person, especially a spouse or a child, and if the agent has significant wealth of her own outside of any resources she may have as a result of her relationship with the principal (in other words, if the agent has deep financial pockets), and if the client's family includes people who are known to have litigious natures or to generally be difficult to deal with on a reasonable basis, then it may make sense to limit the agent's potential liability for a breach of fiduciary duty to help protect her and help discourage any potential litigants. Even in less-potentially-sensitive situations, the principal may want to limit the potential liability for an agent whose breach results from a failure to act, and not from a deliberate, overt action. If the agent is to receive compensation under the POA, it may make sense not to reduce the agent's potential liability as much as an uncompensated agent's liability might be reduced.

Attorneys should discuss this issue with clients. If a client does decide to reduce an agent's potential liability for a breach of fiduciary duty, then attorney should also consider adding language that states that the provision that reduces the agent's liability was not inserted into the POA as a result of an abuse of a confidential or fiduciary relationship with the principal. It may not help to include such a sentence, but it may also not hurt. Estate planning attorneys usually strive to maximize the flexibility of their clients' documents while limiting the potential for fiduciaries named in the documents (including but not limited to the clients' agents under the clients' POAs) to abuse the principal or the principal's intended beneficiaries. The attorney should always discuss the importance of selecting POA agents and other fiduciaries in great depth with clients, and try to help clients select the best possible fiduciaries. In case these efforts fail and a selected fiduciary turns out to have been a bad choice, it may be best to err on the side of keeping the fiduciary's potential liability higher, instead of limiting it, so that it may be easier to hold misbehaving fiduciaries accountable for their improper actions.

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8. What Other General Powers or Limitations Should be Added to a Custom POA Form? The statutory form POA does not address a lot of issues that many attorneys' custom POA forms addressed. Some of these issues are discussed briefly here, and Morgan & DiSalvo recommends that attorneys who wish to prepare new custom POA forms consider including one or more of these.

(A) Limit the agent's ability to agree to any mandatory arbitration clauses. Attorneys preparing new custom POA forms should consider limiting the agent's authority to agree to mandatory arbitration clauses on the principal's behalf before any actual dispute arises. This may help prevent such clauses in contracts from being enforced against the principal if a dispute does arise.

(B) Limit the agent's power to act with regard to any foreign financial accounts. In general, Morgan & DiSalvo recommends that POAs should state that the agent shall not have any signatory authority or other control over any foreign accounts that the principal may have or in which the principal may hold an interest. This restriction is recommended because, if the principal holds foreign accounts or interests in foreign accounts and the agent is given signatory authority or other significant control over any such account or interest, the agent may be required to file Fin CEN Form 114 (Report of Foreign Bank and Financial Accounts) or any similar federal or state forms with regard to the principal's accounts. If the principal has foreign accounts or interests and really wants the agent to be able to act with regard to those accounts or interests, then the principal needs to ensure that he provides the agent with any information needed for the agent to determine whether she is required to file any such forms, and to make the appropriate filings in a timely manner. The fact that the principal may be filing the required forms does not relieve the agent of the need to also file them, and the penalties for failure to file these forms can be substantial. If and when the federal government ever provides us with legal authority that an agent who merely holds power over a principal's foreign accounts or interests under a POA will not become subject to any such filing obligations, then it may be safe to eliminate this provision. In the meantime, we recommend using it.

(C) The power to consent to the admission of a general partner to a partnership in which the principal has a partner interest. Attorneys preparing custom POA forms should consider adding a power that allows the agent to sign any certificate related to the admission of a general

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partner to a general partnership in which the principal is a partner.[11]

(D) A power allowing the agent to exercise a power of substitution with regard to an irrevocable trust. For various reasons, it is common for an irrevocable trust that is intended to be a grantor trust with regard to its creator during the creator's lifetime to include a power that allows either the creator or another person to substitute assets of equivalent value for assets that are held by the trust. This power is generally referred to as a power of substitution. In addition to helping ensure that the trust is a grantor trust during its creator's lifetime, a power of substitution can also be used for other estate and income tax planning purposes. For this reason, attorneys may want to include a provision in their custom POA forms that allows the agent to exercise any power of substitution that the principal may hold with regard to any irrevocable trust that the principal or another person created. The potential for abuse of this kind of power should, of course, be considered, but the potential benefits of having someone able to exercise this kind of power can be great if the principal has become incapacitated but estate or income tax planning is desirable.

9. Should the General Authority Powers That Can be Used to Benefit Persons Other Than the Principal and the Specific Authority Power to Make Gifts be Modified? Absolutely Yes! First some background: Under the general laws of agency, an agent is only allowed to use a principal's assets in a manner that benefits the principal unless the agent is specifically authorized to use the principal's assets in a manner that benefits someone else.[12] If the agent uses the principal's assets in a manner that benefits someone other than the principal (other than in a transaction that also benefits the principal, such as the sale of an asset for adequate consideration in money or money's worth), any benefits so provided will normally be considered gifts by the principal to or for the benefit of the benefitted person unless the benefits are of a kind that the principal is legally required to provide for that person.[13] In addition, even explicitly stated powers that allow an agent to benefit others using the principal's assets likely do not authorize the

[11] *See* O.C.G.A. Section 14-9-204(b).

[12] Under the existing Georgia common law of agency (law based on previously decided court cases, not on existing statutes), an agent acting under a POA may have the authority to continue to make gifts in accordance with the principal's previously established pattern even if the POA does not specifically authorize the agent to do so.

[13] Examples of the kind of benefits that a principal might be legally required to provide for another person include food, clothing, and other support for the principal's dependent minor child (one who is under 18). Therefore, payment of these items by the agent on the principal's behalf would not normally be considered gifts by the principal. Examples of benefits that the principal would likely not be legally obligated to provide for another person, and that will likely result in gifts by the principal if these benefits are provided by an agent acting under the principal's POA, would include paying for a car or living expenses for an adult child.

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agent to do so in a way that effectively changes the principal's estate plan by changing the people who would receive the principal's assets after the principal's death. However, the new UPOAA contains a number of provisions that allow an agent to use a principal's POA to benefit others and, potentially, even to change the principal's estate plan by changing the persons who will receive assets from the principal after her death. (For convenience purposes, in the rest of this newsletter, we will use the term "Benefit Others powers" or "BO powers" to describe any powers that the agent can use to benefit someone other than the principal, including both powers that allow such benefits to be provided during the principal's life and those that let the agent change the persons who will benefit from the principal's property at the principal's death.) At Morgan & DiSalvo, we believe that providing an agent with the ability to make non-taxable gifts on the principal's behalf can provide a desired amount of flexibility without creating too great a risk of abuse of the gifting powers. Many principals will want to limit any powers that allow the agent to benefit others fairly strictly, perhaps allowing such transfers only for the benefit of the principal's spouse or just the spouse and descendants. And many principals will not want anyone to have the power to use their assets for anyone else's benefit. Whenever these powers are to be included in a POA, the attorney should ensure that they are carefully considered by the principal, and that appropriate limits are provided by the POA.

The Benefit Others powers or BO powers contained in the UPOAA include two of the general authority powers: (1) the Personal and Family Maintenance powers contained in new O.C.G.A. Section 10-6B-52 and (2) the power to disclaim contained in new O.C.G.A. Section 10-6B-50. All of the specific authority powers provided by under O.C.G.A. Section 10-6B-40(a) are BO powers, except for the power to access the content of electronic communications under O.C.G.A. Section 10-6B-40(a)(8). For purposes of the discussion in this Paragraph II.B.8, we will focus primarily on the general authority powers and the specific authority power to make gifts that is contained in Section 10-6B-40(a)(2), as limited by Section 10-6B-56. The other specific authority powers will be discussed in more detail below.

The biggest concern with all of the BO powers under the UPOAA and the statutory form is that they can easily be used to financially exploit the principal. In providing the new statutory form POA, Georgia may have made it easier for a would-be agent to simply pull the POA form off the internet, have the principal execute it, and then use the POA to begin abusing the principal and changing the principal's estate plan. The UPOAA does contain three provisions that appear to be intended to help protect against agent abuse of these powers. However, these provisions appear likely to provide insufficient protection on their own. Morgan

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& DiSalvo recommends that attorneys ensure that their custom POA forms provide additional limitations to help further limit the potential for abuse.

(A) Gifts must either be consistent with known objectives of principal or consistent with the principal's best interests. Unless the POA provides otherwise, the power to make gifts under new O.C.G.A. Section 10-6B-40(a)(2), as well as any other powers in the POA that are clearly intended to allow gifts and that use the actual word "gift" to describe the power, must be exercised subject to the limitations set out in new O.C.G.A. Section 10-6B-56(c). This Section provides that any gifts made by the agent must be consistent with the principal's objectives if those are actually known by the agent. If the agent does not actually know the principal's objective, then the agent may make gifts only as the agent determines to be consistent with the principal's best interests 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 law or regulation; and
>
> (5) The principal's personal history of making or joining in making gifts."

Morgan & DiSalvo believes that, while this provision looks fairly strong on its face, it has a couple of major flaws. First, it only applies to powers that are created using the actual word, "gift," and it does not apply to all of the Benefit Others powers. Second, our experience over many years is that bad actor fiduciaries will often use their personal beliefs as to the principal's objectives to support their own improper behavior. Using this criteria as the first and primary source of legal support for gifts could be dangerous.

(B) The agent's ability to benefit from the specific authority

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powers is limited if the agent is not a family member of the principal. Unless the POA provides otherwise, an agent that is not an ancestor, spouse, or descendant of the principal is prohibited from using any of the specific authority powers under new O.C.G.A. Section 10-6B-40(a) to benefit the agent, himself, or anyone whom the agent is obligated to support with the principal's property, whether by gift, right of survivorship, beneficiary designation, or otherwise. Morgan & DiSalvo believes that, while this provision does provide some powerful protection against abuse by some agents and is a good provision to have in the UPOAA, the fact that it does nothing to protect against abuse by family member agents is a big problem. In many cases where financial abuse is committed against an elderly or disabled person, the abusing person is a family member.

(C) The agent must attempt to preserve the principal's estate plan, with some significant exceptions. Unless the POA provides otherwise, O.C.G.A. Section 10-6B-14(a)(6) states that an agent that has accepted appointment shall attempt to preserve the principal's estate plan. However, this requirement is subject to the following exceptions: (a) the requirement only applies to the extent that the principal's estate plan is actually known by the agent; and (b) the requirement only applies to the extent that preserving the principal's estate plan is in the principal's best interest, with that to be determined based on all the relevant factors, including (i) the value and nature of the principal's property, (ii) the principal's foreseeable obligations and need for maintenance, (iii) minimization of taxes and (iv) eligibility for a government benefits. In addition, under O.C.G.A. Section 10-6B-14(c), the agent who fails to preserve the principal's estate plan is not liable to any beneficiary of the principal's estate plan as long as the disruption was the result of the agent's good faith actions. Morgan & DiSalvo believes that this provision is likely to be beneficial, but we have serious concerns about whether it will be sufficient to stop a bad actor agent. It may be that, in attempting to provide protection for well-meaning agents, the provision's exceptions may create potential shelter for less-well-meaning agents.

10. Should the Specific Authority Powers be Used at All? Maybe, But Only With Carefully Crafted Modifications and Limitations. The specific authority power to make gifts, if carefully considered and limited appropriately, may be a power that can be fairly safely included in many clients' POA documents. As for the other specific authority powers, however, Morgan & DiSalvo believes that clients should include them only after very careful

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consideration. Even when deemed desirable, the other specific authority powers should be carefully modified and limited, to reduce the potential for abuse as much as possible while still providing enough flexibility to let them address the concerns they are intended to address. As drafted, a bad actor agent could use many of the specific authority powers to fundamentally change the principal's intended estate plan and change the ultimate beneficiaries of the principal's assets. Most principals would not normally be willing to give an agent this much power. In addition to the general considerations discussed in this newsletter for attorneys who want to prepare a custom POA form, all attorneys who help clients prepare POAs should plan on helping their clients consider the specific authority powers and any limitations to be included for those on a fairly detailed level.

11. What General Changes Should be Made to the Statutory Form POA to Limit the Benefit Others Powers? As discussed above, the statutory form POA contains a number of powers that can allow an unscrupulous agent to commit serious financial abuse. As noted in Paragraph II.B.8.(B) above, the best protections against abuse of the BO powers by an agent do not apply to close family member agents, even though those are often the agents who commit financial abuse. In creating a custom POA form, attorneys should consider using one or more of the following options to further limit these powers:

(A) Specifically limit the persons who can benefit under the POA. To the extent that Benefit Others powers are included in a POA, specifically state that only certain persons or entities other than the principal can be benefitted using those powers, and clearly define those persons and entities. In many cases, the range of others who can be benefitted under the standard powers may be too broad or too narrow. If the principal wants to include individuals that fit into a certain defined category, such as his spouse or his descendants, then class definitions may be used, or specific individuals can be named. Similarly, if the principal wants to allow the agent to make charitable contributions, then the principal can either define potential charities by class or name specific ones. This issue should be decided by each client for himself; and the POA modified appropriately.

(B) Limit the amount of any gifts that can be made. In order to both help protect the principal against financial abuse and help avoid the chance that an agent may accidentally make taxable gifts on the principal's behalf, it may be desirable to limit the value of any gifts that can be made under a POA. Please also note that the power to make gifts, as defined by new O.C.G.A. Sections 10-6B-40(a)(2) and 10-6B-56, needs

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a lot of work and should not be used without modification.

(i) Specifically allow and define transfers that will create non-taxable gifts. The power to make gifts that is spelled out in the UPOAA is potentially both too broad and too narrow to be useful. Instead, consider clearly stating in the POA that the agent can make specific kinds of transfers that will benefit other persons, as long as those transfers will not create taxable gifts. The powers that allow such transfers could include some or all of the following: (a) the power to make gifts of an amount equal to the annual gift tax exclusion (or double this amount, if the principal is married at the time of the gift) to or for the benefit of each potential gift beneficiary,[14] (b) the power to pay an unlimited amount directly to an educational institution for tuition on behalf of a gift beneficiary, (c) the power to pay an unlimited amount in medical expenses on behalf of a potential gift beneficiary, as long as the amounts are all paid directly to a medical provider, doctor, hospital or health insurance company and paid for qualifying expenses; (d) the power to make an unlimited amount of gifts to spouse (we do not recommend that the spouse be able to exercise this power in favor of herself, because this could cause a number of tax and asset protection problems, and this power should likely be limited if the spouse is not a U.S. citizen, because the unlimited marital deduction will not apply in that case); and (e) the power to make gifts to charity.

(ii) If the ability to make taxable gifts is desired, it should be very carefully limited. Attorneys should consider allowing the agent to make taxable gifts under a POA, because doing so may help ensure that the client's estate and tax planning can be optimized. However, any provision that allows taxable gifts to be made should be carefully limited, so that potential beneficiaries are clearly defined and so that the agent is required to consider the principal's overall estate planning objectives when deciding

[14] The annual gift tax exclusion is $14,000 per person per year as of 2017, but it is indexed for inflation and may increase in $1,000 increments in the future. If the principal is married in the year a gift was made, the principal may also be able to use his spouse's gift tax annual exclusion if the principal and the spouse make the election to gift split for that year. For technical reasons, if the POA is intended to allow the agent to make gifts with a value equal to double the annual exclusion amount, the agent should be allowed to do so if the principal is married at the time of the gift, and no reference to having the principal and his spouse make the election to gift split should be included. This is because the gift-splitting election cannot actually be made until the year after a gift has been made, and it is made on the gift tax return for that year.

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whether to make such gifts and how to make them. The provision should also prohibit any potential gift beneficiary from exercising this power, for a number of reasons. At Morgan & DiSalvo, we believe that a broad power to make taxable gifts should be reserved, in most cases, for either very wealthy clients, where estate taxes may be a significant potential problem, or for clients with much smaller estates for whom Medicaid planning may someday be needed. Even in those cases, however, this broad type of power should never be included unless the principal has one or more individuals that can truly be trusted with such a powerful gifting ability.

(C) Use the personal and family maintenance provision under new O.C.G.A. Section 10-6B-52 with extreme caution. We discussed this new power, and our concerns with it, in Paragraph II.A. of our June 2017 Newsletter. This is one of the general powers that can be incorporated into a POA simply by a provision that gives the agent the power to do all acts that the principal could do. However, it is a potentially very broad power that allows the agent to provide benefits to many potential recipients other than the principal. Even though the potential benefits that the agent is allowed to provide to others under this power are not described as gifts by the UPOAA,[15] many of them will be considered gifts under federal gift tax law, yet the power is not limited by any tax considerations. This power can also give an agent who is also a family member nearly unfettered access to the principal's assets for the agent's own benefit. There is some limit built into the personal and family maintenance provision as written: unless the POA states otherwise, this general authority power can only be used for the benefit of the principal, her spouse, her minor children, her adult children, if they are under 25 years old and pursuing a post-secondary education, the principal's parents and the principal's spouse's parents (but the agent can only benefit parents or parents-in-law if the principal had previously established a pattern of benefitting those people), and "any other persons the principal is legally obligated to support." The benefits that can be provided to these persons include those acts necessary to maintain the "customary standard of living" for them; including, but not limited to, providing housing, transportation, credit and debit cards and the funding behind them, health-care and custodial-care related costs, vacations, travel expenses, domestic help, clothing, food, educational

[15] *See* O.C.G.A. Section 10-6B-52(b): "Authority with respect to personal and family maintenance shall be neither dependent upon, nor limited by, authority that an agent may or may not have with respect to gifts under this chapter."

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costs, and memberships in institutions like churches, country clubs, and similar social or professional groups. At Morgan & DiSalvo, we understand the impulse behind the creation of this power: the allowable benefits are the sort of thing that spouses often provide for each other, that parents often provide for children well past the childhood years, and, even, that adult children may provide for elderly parents. Used carefully, this Benefit Others power may provide a POA with desirable flexibility without creating too great a risk of abuse. However, we do not believe this power should be routinely included without discussion or thought. Instead, a client should be encouraged to consider whether the power should be included and, if so, if the client wants to place further limits on who can potentially benefit from it (for example, many clients may not need or want to include their parents or parents-in-law in this kind of provision, some may not want to include adult children even if those children are pursuing post-secondary education, some may want to include their children's descendants, and some may want to include disabled adult children who are not expected to ever be fully independent). If the intended agent is also a potential beneficiary under this power, the client should consider whether it may be desirable to name a different agent to exercise this power with regard to that person.[16] Attorneys should also consider how to better coordinate this power with the specific power to make gifts: for example, if the personal and family maintenance provision is being used to provide housing to an adult child or to a parent, the provision of that housing is a gift to the beneficiary. That gift may qualify for the gift tax annual exclusion, but even if it does, it is still counted for gift tax purposes as a gift. If an agent is using the personal and family maintenance provision to make payments that are actually gifts for gift tax purposes, and then uses the gifting power to make gifts that are intended to qualify for the gift tax annual exclusion, the agent will end up making taxable gifts.

Important note: Buried in the middle of the Personal and Family Maintenance provision is 10-6B-52(a)(6). This provision designates the POA agent as the principal's personal representative under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). This provision states that the agent can receive such health care information as

[16] This note also raises the question of whether under the new POA statute it is even possible to have a special agent who only holds certain powers. The UPOAA clearly allows for initial and successor agents, as well as co-agents, but does not appear to contemplate the possibility that one agent might only hold some powers and a different agent might only hold other powers. We hope this will be clarified in the future.

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needed to let the agent make decisions related to the past, present, or future payment for health care consented to by the principal or anyone authorized to consent to health care on the principal's behalf. This designation may be critical in cases where the principal's appointed health care agent is not the same person as the POA agent, and attorneys should consider including this provision even if the rest of the Personal and Family Maintenance powers are not included in the POA.

(D) Add a statement clarifying that any Benefit Others powers are merely optional powers provided to the agent, that the agent has no duty to actually use such powers, and that the principal intends that no court should have any power to force the agent to exercise any of such powers, either directly or indirectly. In light of the broad general authority powers contained in the UPOAA, especially the personal and family maintenance power, and in light of the very broad specific authority provisions that can be granted by the principal, Morgan & DiSalvo believes that it may be prudent to include this kind of statement, even though traditionally this kind of statement in a POA was not believed necessary. We also ask: is it possible that a nursing home or other creditor of the principal's parent or parent-in-law might try to use the existence of the personal and family maintenance power in the principal's POA to come after the principal's assets? It's generally better to be safe than sorry. Including this kind of statement is not guaranteed to help avoid problems, but it shouldn't hurt, and it could be beneficial.

(E) Take steps to prevent the agent from having a general power of appointment over the principal's assets, or to at least limit the extent of any such general power of appointment. And remember: the personal and family maintenance power needs to be limited, not just the other Benefit Others powers. Any time an individual is put in a position to exercise control over assets, even in a fiduciary capacity such as agent under a POA, there is a risk that the individual's powers can create negative tax and other consequences. In general, under federal estate and gift tax law, an individual that holds the unlimited power to make gifts on another person's behalf or to distribute assets from a trust is considered to have unfettered access to the assets that are subject to that power, if the agent can exercise the power to benefit himself, either directly or indirectly.[17] This is called having a general power of

[17] Internal Revenue Code ("IRC") Sections 2041 and 2514. The individual holding the fiduciary power is essentially deemed to have the power to benefit himself, and thus have a general power of appointment, if he can use the power to

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appointment. Assets subject to a general power of appointment are generally subject to inclusion in the power holder's gross estate for estate tax purposes at his death. If the power holder uses assets that are subject to his general power of appointment to benefit another person during his lifetime, the power holder may be deemed to have made a gift to the benefitted person for gift tax purposes. If an agent under a POA holds any power that creates a general power of appointment in the agent over the principal's assets, unexpected estate and gift tax consequences may result. Even if estate and gift taxes are not a significant concern for the agent, the existence of a general power of appointment may give the agent's creditors access to the principal's assets in certain cases. One way to help avoid these potential issues is careful fiduciary selection: an agent who is not a potential beneficiary of gifts or other gratuitous transfers under the POA will be less likely to hold a general power of appointment over the principal's assets. If the agent is a potential beneficiary under a power, it may also be desirable to limit that power to reduce or eliminate any general power of appointment that power may create. Potential approaches to limiting the powers include:

(i) Limit the value of the gifts or other gratuitous transfers that the agent can make. If an agent is also a potential beneficiary, the attorney should consider limiting the agent's powers so that he can only make gifts of up to a certain amount. For example, gifts made in a given year could be limited so that the total value of all gifts to a given individual beneficiary cannot exceed the value of the gift tax annual exclusion amount for that year (or twice that amount if the principal is married during that year). Gifts could also be limited to no more than a total amount per year equal to the greater of $5,000 or 5% of the assets out of which the gifts could be made.[18] Note, however: limiting the value

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make gifts or distributions to himself or for his own benefit, to his creditors, to his estate, or to the creditors of his estate. Only one of those categories is required; so, in other words, even if the individual only has the power to have assets distributed to the creditors of his estate, he will be deemed to have a general power of appointment. The only question in that case is when the power is deemed to become useable. The individual can also be deemed to have a general power of appointment over assets if he holds the unlimited power, as a fiduciary, to make distributions that would result in the satisfaction of the individual's legal obligation to support another person.

[18] If a general power of appointment is released by the power holder during his lifetime, then the assets that were subject to the released power will be included in the power holder's estate for estate tax purposes. If the power holder simply does not exercise the power, but the power lapses during the power holder's lifetime, the power holder will be deemed to have released the power to the extent that the value of the assets that were subject to the lapsed power at the time of the lapse exceeded the greater of $5,000 or 5% of the aggregate value of all of the assets that could have been used to satisfy an exercise of the lapsed power. IRC Section 2014. In addition, the release of a general power of appointment

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of the assets that can be used to make gifts in any given year may limit the extent of the tax and asset protection problems that exist when a POA agent has a general power of appointment with regard to the principal's assets, but it will not completely avoid them.

(ii) Limit the agent's ability to benefit himself using an ascertainable standard. A power that allows the holder to benefit himself, his estate, his creditors, or the creditors of his estate will not be considered a general power of appointment if it can only be used in accordance with "an ascertainable standard relating to the health, education, support, or maintenance" of the power holder.[19] This kind of limiting standard is often referred to as the "HEMS" standard (for health, education, maintenance, and support). This kind of limitation may avoid the estate and gift tax issues. It may also help (but may not completely avoid) the risk that the power holder's creditors can use the power to gain access to the principal's assets.

(iii) Make the agent's power exercisable only with the consent of an adverse party. Consider prohibiting the agent from directly or indirectly benefitting himself without the consent of a selected adverse party. This is a more involved and technically complex option, but using it properly may both prevent estate and gift tax problems for the agent and the risk that the agent's creditors will be able to access the principal's assets.

(iv) Do not allow the agent to make taxable gifts to himself. If the client wants to allow an agent to make gifts that are larger than those that can be fully covered by the categories of tax free gifting in any given year, then these additional gifts could be permitted, but the agent should not be permitted to use this taxable gifting power to benefit himself, either directly or indirectly. It may be possible to have a different agent, who is not a potential beneficiary, make these gifts. Or, taxable gifting powers can be limited so that an agent who might otherwise be a potential beneficiary is prohibited from using this power to benefit himself,

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during the power holder's life may be considered a gift by the power holder for gift tax purposes. Again, the lapse of a general power will be considered to have been a release if the value of the assets that were subject to the lapsed power at the time of the lapse exceeded the greater of $5,000 or 5% of the aggregate value of all of the assets that could have been used to satisfy an exercise of the lapsed power. IRC Section 2514.

[19] IRC Sections 2041(b)(1)(A) and 2514(c)(1).

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directly or indirectly, while still holding the power to make taxable gifts to or for the benefit of others.

(F) Ensure that the POA does not end up giving the agent incidents of ownership over any life insurance policy the principal may own on the agent's life. If the agent has the power to exercise any incidents of ownership in a life insurance policy the principal owns on the agent's life, the life insurance policy proceeds will be includible in the agent's estate for estate tax purposes even if the proceeds are not payable to the agent's estate.[20] Incidents of ownership are basically any rights that would normally be exercisable by a policyholder, and generally include, but are not limited to, such rights as the right to change the beneficiary on a policy and the right to surrender or cancel the policy. If the principal owns a life insurance policy on the agent's life, and the POA gives the agent the ability to exercise incidents of ownership with regard to the policy, then a nasty estate tax surprise may result at the agent's death. Morgan & DiSalvo believes that a POA should generally include a provision that prevents the agent from having any power over any life insurance policy the principal owns on the agent's life.

(G) Restrict use of Benefit Others powers so all actions taken under them must be consistent with the principal's best interests and the principal's overall estate planning, financial planning, and tax planning objectives. Morgan & DiSalvo recommends that attorneys who are preparing custom POA forms consider taking the limits that Section 10-6B-56(c) places on the Section 10-6B-4-(a)(2) power to make gifts, modifying them, and expanding them so that they apply to some or all of the other powers that can be used to benefit people other than the principal. For example, a POA could provide that all (or a specified subset of) the BO power provisions in the POA may only be used in a manner consistent with the principal's best interests in accordance with the principal's financial planning, estate planning, and tax planning objectives. The POA could also require that, in determining whether a particular action would be allowed, the agent should consider all reasonably relevant factors, including, without limitation, (1) the value and nature of the principal's property and sources of income; (2) the principal's foreseeable obligations and need for support and maintenance in the principal's accustomed standard of living; (3) the potential for minimization of taxes; (4) the principal's potential eligibility for

[20] IRC Section 2042(2).

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government benefits; (5) the principal's existing estate plan and its overall intent; and (5) the principal's history of making or joining in making gifts to individuals and charitable organizations.

12. Additional Modifications to Consider Adding to the Specific Authority Powers Under O.C.G.A. Section 10-6B-40(a) in a Custom Form POA, If They are Used at All. As already discussed in this newsletter, many of the specific authority powers should be used only very carefully, if at all. This section discusses some of the concerns that these specific authority provisions create and suggests ways to reduce the risks that using them may pose. We have omitted a discussion of the power to make gifts that can be given to an agent under O.C.G.A. Section 10-6B-40(a)(2), because we have already discussed that power, and our recommended modifications, in great detail in this newsletter.

(A) The power to create, amend, revoke, or terminate an inter vivos trust under Code Section 10-6B-40(a)(1). This power could be very beneficial to have in a POA. However, without significant modifications, it could also be very dangerous, since it opens up an avenue for potential abuse. Morgan & DiSalvo suggests that attorneys who want to grant this power in a custom POA limit the power so that the agent can either (1) fund (but not revoke,[21] amend, modify, or terminate) an existing revocable trust that the principal created or (2) create a revocable trust that provides only for the benefit of the principal (and possibly to direct the Trustee to the follow the gifting power decisions made by the agent under the POA) during the principal's lifetime and then pours its remaining assets back into the principal's estate at the principal's death. If the client is likely to need Medicaid or other needs-tested benefits in the future, the attorney may want to also consider allowing this power to be used to create certain types of irrevocable trusts that may help the principal qualify for such benefits. In addition, this power could be used to make the otherwise permitted gifts under the POA through a trust structure. However, whatever level of this type of power is permitted, it should be limited as like the other Benefit Others powers. Otherwise, even with well meaning and prudent agents, undesirable gift and estate tax consequences could result, and the principal's assets could end up exposed to the claims of the agent's creditors.

[21] O.C.G.A. Section 53-12-43(a) says that both the POA and the trust language itself must allow the agent to revoke a trust in order for the agent to be able to do so. Morgan & DiSalvo generally does not recommend allowing agents to revoke or otherwise amend or modify revocable trusts.

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(B) The power under new O.C.G.A. Section 10-6B-40(a)(3) that allows an agent to create or change rights of survivorship and the power under new O.C.G.A. Section 10-6B-40(a)(4) that allows an agent to create or change a beneficiary designation. These Benefit Others powers are extremely dangerous and should only be included, if at all, with the inclusion of many significant protections and limits in the POA. Otherwise, they provide too much opportunity for abuse by an unscrupulous agent. While it might be beneficial to have these powers under certain circumstances, the potential benefits in many cases may be heavily outweighed by the risk of abuse that these powers present.

(C) The power under Code Section 10-6B-40(a)(5) that allows an agent to delegate her authority as agent under the POA. If included, this power should be carefully limited so that an agent can only delegate her powers to certain people, including co-agents, successor agents, and, possibly, certain close family members or professional fiduciaries. The people to whom the agent's powers may be delegated should be selected very carefully. In addition, to avoid the potential tax and agent-creditor problems discussed in previous sections of this newsletter, those powers will likely need to consider not only the intended agent but also any persons to whom the agent can delegate her power.

(D) The power under new O.C.G.A. Section 10-6B-40(a)(6) that allows the agent to waive the principal's right to be a beneficiary of a joint and survivor annuity or any survivor benefit under a retirement plan. This is another Benefit Others power that could be extremely dangerous, because it can allow the agent to change the ultimate beneficiaries of the principal's assets (in this case, the asset is the right to receive current or future benefits). As with the power to change a beneficiary designation or create rights of survivorship, it could certainly be beneficial to have this power in certain circumstances, but it is clearly dangerous to have this power held in the wrong hands. If this power is included, it should be subject, at a minimum, to the Benefit Others power restrictions discussed above.

(E) The power under new O.C.G.A. Section 10-6B-40(a)(7) to exercise fiduciary powers that the principal has the authority to delegate. This power would allow the principal to effectively make her agent the fiduciary under another person's estate plan, at least to some extent. Morgan & DiSalvo believes that, to minimize the risk of abuse, most POAs should only allow the agent to exercise fiduciary powers that

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the principal holds with regard to the operation of an Entity or Business as set out in Section 10-6B-48. If it is desirable, in a particular client's situation, to have the principal delegate her fiduciary powers with regard to a particular trust or estate to another person, then we recommend that this delegation be handled through a separate document, not a general durable POA. See O.C.G.A. Sections 53-12-204(3) and 53-12-345. In addition to the tax inclusion for estate tax purposes and asset protection concerns discussed above, this power also adds in the concern of the possible changing of the transferor for various tax purposes, and possibly changing a trust's income tax status.

(F) The power under new O.C.G.A. Section 10-6B-40(a)(8) that allows the agent to exercise authority over the content of the principal's electronic communications. This may be the specific authority power that produces the smallest risk of abuse. As long as the principal is comfortable with allowing her agent to access the principal's electronic communications, this power should likely be included in the principal's POA. However, Morgan & DiSalvo recommends modifying this power to give (or at least attempt to give)[22] the agent access to a broader array of electronic and digital information, because the power as contained in the UPOAA seems to be very narrow. As an example, the provision that Morgan & DiSalvo used in their old POA form regarding electronic and digital assets gave the agent the power: "[t]o manage, access, use, make changes to, delete, transfer, and otherwise handle and control any electronic or digital devices which I may own and any electronic or digital assets in which I may have an interest, specifically including, without limitation, desktop, laptop, and tablet computers, cellular phones of any type, peripheral devices, digital storage devices of any type, and any future digital or electronic device which may be developed, any bank, brokerage, or other financial accounts accessible through electronic means, frequent flyer mile accounts, other reward program accounts, credit accounts, social media accounts, e-mail accounts, e-mails received by me at any time, software licenses, DNS services

[22] The UPOAA power appears to have been drafted with the potential objections of digital service providers such as Google, Facebook, and Yahoo in mind. Many third party digital service providers have, in the past, attempted to prevent POA agents, executors, trustees, and other third parties from gaining access to the digital service accounts held by disabled or deceased persons, claiming that their user service agreements were all-controlling, and that protecting the privacy of the original users overrode any other concerns, such as allowing grieving families access to personal photos and e-mail messages or allowing an agent to access online banking information on behalf of a disabled person. A provision in a POA or other estate planning document that attempts to give an agent, executor, or trustee broader access than an online service provider wants to allow may not work, but it likely doesn't hurt to try.

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accounts, affiliate program accounts, photographs, music, videos, file sharing accounts, accounts used to purchase assets from stores or vendors, tax preparation service accounts, web hosting accounts, or any other electronically accessible accounts or electronically stored or digitally stored assets, information, or other items which may exist now or in the future. This power shall also include, without limitation, the right of my attorney-in-fact to obtain, access, modify, delete, control, and otherwise handle my passwords and any and all other electronic access tools or online credentials which may be associated with any electronic or digital device or any electronic or digital asset in which I may have an interest."

(G) The power under new Section 10-6B-40(a)(9) that allows an agent to disclaim property on behalf of the principal, and the power under new Section 10-6B-50(b)(8) that allows the agent to "reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust, or other beneficial interest." New O.C.G.A. Section 10-6B-50(b)(8) creates a general authority Benefit Others power that empowers the agent to reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust, or other beneficial interest. This power enables the agent to reduce benefits that would otherwise pass to the principal and thereby benefit others by increasing the amount that will pass to them. Confusingly, new O.C.G.A. Section 10-6B-40(a)(9), which is a specific authority provision, also provides the agent with the power to "[d]isclaim property, including a power of appointment." We hope that this is one of the issues that will be fixed by the technical corrections bill that is currently in progress; however, any such fix will not take effect until July 1, 2018, at the earliest. Until then, attorneys preparing custom POA forms should consider clarifying how these two provisions will work together. The attorneys should also help clients carefully consider whether to even include any of these powers, and, if included, what limits should be placed on the agent's ability to exercise these powers.

A well-thought-out, carefully prepared, properly executed POA can be an invaluable part of a client's estate plan. At Morgan & DiSalvo, we want to be able to provide well-thought-out, carefully prepared, properly executed POAs to our clients. We also want to help ensure that our clients are able to take advantage of the provisions of the UPOAA that may allow an agent to force a third party to accept a POA. If you have questions about or want to update an existing POA, or if you just want to ensure that you have one, we are here to help. Please contact our office at (678) 720-0750 or info@morgandisalvo.com to schedule your estate planning

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