SORT-OF UNIFORMITY:

THE MARYLAND GENERAL AND LIMITED POWER OF ATTORNEY ACT

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The Maryland General and Limited Power of Attorney Act generally use the Uniform Power of Attorney Act as its inspiration. Maryland, however, departs in significant ways from the Uniform Act. The purpose of this paper is to compare various provisions of the Maryland Act with those of the Uniform Act. The format of this paper is to first set out provisions of the Maryland Act followed by discussion.

§ 17-101. Definitions

In general

(a) In this title the following words have the meanings indicated.

Agent

(b)(1) "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise.

(2) "Agent" includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated.

Incapacity

(c) "Incapacity" means the inability of an individual to manage property or business affairs because the individual:

(1) Meets the grounds required for the appointment of a guardian of the property of a disabled person described in § 13-201 of this article; or

(2) Is:

(i) Missing;

(ii) Detained, including incarcerated in a penal system; or

(iii) Outside the United States and unable to return.

Power of attorney

(d) "Power of attorney" means a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term "power of attorney" is used.

Principal

(e) "Principal" means an individual who grants authority to an agent in a power of attorney.

Property

(f) "Property" includes both real and personal property and any right or title in real or personal property, whether held individually or jointly and whether indivisible, beneficial, contingent, or of any other nature.

Statutory form power of attorney

(g)(1) "Statutory form power of attorney" means a power of attorney that is substantially in the same form as one of the powers of attorney set forth in Subtitle 2 of this title.

(2) "Statutory form power of attorney" does not include a power of attorney set forth in Subtitle 2 of this title in which a principal incorporates by reference one or more provisions of another writing into the section of the power of attorney entitled "Special Instructions (Optional)".

Stocks and bonds

(h)(1) "Stocks and bonds" means evidence of ownership in or debt issued by a corporation, partnership, limited liability company, firm, association, or similar entity.

(2) "Stocks and bonds" includes stocks, bonds, debentures, notes, membership interests, mutual fund interests, money market account interests, voting trust certificates, equipment trust certificates, certificates of deposit, certificates of participation, certificates of beneficial interest, stock rights, stock warrants, and any other instruments evidencing rights of a similar character issued by or in connection with any corporation, partnership, limited liability company, firm, association, or similar entity.

DISCUSSION

Estates & Trusts Article § 17-101 provides the definitions for the Power of Attorney Act. It is modeled on the Uniform Power of Attorney Act ("UPOAA") § 102. In certain respects, however, they are different.

Incapacity under the UPOAA is defined as the inability of an individual to manage his or her property because the individual "has an impairment in the ability to receive and evaluate information to make or communicate decisions even with the use of technological assistance." By contrast, the Maryland Act incorporates the description of disability found in the guardianship of property article. It reads that a guardian of the property should be appointed if "the person is unable to manage his property and affairs effectively because of physical or mental disability, disease, habitual drunkenness, addiction to drugs, imprisonment, compulsory hospitalization, confinement, detention by a foreign power, or disappearance."[1] The UPOAA Comment states that the definition of incapacity stresses the consequences of the impairment (inability to manage property and business affairs) rather than the

[1] Both the UPOAA and the Maryland Act also provide that incapacity includes when a person is missing, detained (including incarcerated in the penal system) or outside the United States and unable to return.

impairment itself. The Maryland approach stresses the impairment but has the advantage of coordinating the definition of incapacity for both the new act and for the guardianship provisions.

The UPOAA defines "good faith" as meaning honesty in fact. The Maryland statute does not define good faith. Case law, however, equates good faith with the absence of bad faith which is essentially a contract law construct. *Clancy v. King, 405 Md. 541, 568, 954 A.2d 1092, 1108 (2008) (Harrell, J.)("A general or managing partner acts in bad faith where a primary motivation of his or her conduct is to injure either the firm/venture or his or her business partners.")* Good faith is a standard under the Maryland Act at Estates & Trusts Article § 17-106 which holds that the death or disability of the principal who has executed the power of attorney does not revoke or terminate the agency as to the agent or other person as long as the agent acts in good faith under the power of attorney. UPOAA § 114(a) sets out that an agent who has accepted the appointment shall act in good faith, in accordance with the principal's reasonable expectations, and within the scope of the authority. As is discussed below when addressing Estates & Trusts Article § 17-113, Maryland provides a slightly different standard governing the agent's conduct.

§ 17-102. Disclosure of receipts, disbursements, or transactions by agent

In general

(a) Except as otherwise provided in a power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, on the death of the principal, by the personal representative or successor in interest of the principal's estate.

Request for disclosure

(b)(1) If a request as described in subsection (a) of this section is made, within 30 days after the request is made, the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.

(2) A principal or an interested person may file a petition under Title 15, Chapter 500 of the Maryland Rules in the circuit court for the county in which the power of attorney is recorded to enjoin an agent to comply with this section.

DISCUSSION

Estates & Trusts Article § 17-102(a) is analogous to UPOAA § 114(h). Both sections state that the agent has a duty to account to the principal and to disclose receipts, disbursements or transactions

undertaken on behalf of the principal and only if the principal requests such disclosure. The agent must also disclose if ordered by a court or if asked by another fiduciary acting on behalf of the principal including a guardian, or by government agency having authority to protect the welfare of the principal. Otherwise there is no duty to disclose.

Interestingly, this provision compels a degree of accountability to a court appointed guardian but, other than mandated annual accountings, the guardian does not have to reciprocate. As noted below, Maryland has the attorney in fact account only to the court appointed guardian rather than the principal. Estates & Trusts Article § 17-105 (e)(1). This arrangement establishes "a statutory pecking order, if needed. *Angela M. Vallario, The Uniform Power of Attorney Act: Not a One-Size-Fits-All Solution*, 43 U. Balt. L. Rev. 85, 101 (2014). The UPOAA, on the other hand, provides that the attorney in fact account to both the principal and the guardian. UPOAA § 108.

Estates & Trusts Article § 17-102(b) provides that an agent shall respond to a request by the principal or other proper person within thirty days after the request is made or the agent may substantiate why additional time would be needed to comply with the request. Estates & Trusts Article § 17-102(b)(2) provides that the principal or "an interested person" may file a petition with the circuit court to enjoin the agent to comply with the section. "Interested person" is not defined in the Maryland Act. Estates & Trusts Article § 17-103, however, provides a list of persons who can seek judicial relief against acts or inaction of an agent.

§ 17-103. Petitions to court to construe power of attorney or review agent's conduct

Persons allowed to petition

(a) The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief:

(1) The principal or the agent;

(2) A guardian, conservator, or other fiduciary acting for the principal;

(3) A person authorized to make health care decisions for the principal;

(4) The principal's spouse, parent, or descendant;

(5) An individual who would qualify as a presumptive heir of the principal;

(6) A person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;

(7) A governmental agency having regulatory authority to protect the welfare of the principal;

(8) The principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and

(9) A person asked to accept the power of attorney.

Dismissal of petition

(b) On motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

DISCUSSION

Estates & Trusts Article § 17-103 sets out the standing requirements for petitions to construe the power of attorney or to review an agent's conduct. It parallels UPOAA § 116.

The Comment to the UPOAA § 116 states that: "The primary purpose of this section is to protect the vulnerable or incapacitated principals against financial abuse." The list of persons with standing is fairly broad and includes:

- the principal or the agent
- a guardian or other fiduciary acting for the principal
- a person authorized to make health care decisions for the principal
- the principal's spouse, parent or descendant
- an individual who would qualify as a presumptive heir of the principal
- a person named as a beneficiary to receive any property or contractual right on the principal's death or as a beneficiary of a trust created by the principal
- a government agency having regulatory authority to protect the welfare of the principal
- the principal's caretaker or *another person that demonstrates sufficient interest in the principal's welfare (Emphasis added)*
- a person asked to accept a power of attorney.

Obviously, this gives license to a large group of people who can bring petitions in the circuit court. Accordingly, Estates & Trusts Article § 17-103 provides that the principal on his or her motion can ask that the petition be dismissed and it shall be dismissed "unless the court finds that the principal lacks the capacity to revoke the authority."

§ 17-104. Sufficiency of statutory form power of attorney

Additional or different forms

(a) A person may not require an additional or different form of power of attorney for any authority granted in a statutory form power of attorney.

Refusal to accept power of attorney

(b) A person that refuses in violation of this section to accept an acknowledged statutory form power of attorney is subject to:

(1) A court order mandating acceptance of the power of attorney; and

(2) Liability for reasonable attorney's fees and costs incurred in an action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

DISCUSSION

Estates & Trusts Article § 17-104 is the provision under the Maryland code to give "teeth" to an agent's request for an entity to act on the agent's authority. This is not the same as the Uniform Power of Attorney Act which sets out specific timelines for either compliance or a request for an affidavit, then sanctions. Instead Maryland provides for a statutory form power of attorney which, if under a notary, is subject to a court order mandating acceptance of the power of attorney and may impose liability for reasonable attorney's fees and costs incurred in an action proceeding to confirm the validity of the power of attorney.

Estates & Trusts Article § 17-104(a) provides that the person may not require an additional or different form of power of attorney other than the statutory one. Under Maryland law, of course, one is

not required to use the statutory form but these enforcement provisions will undoubtedly lead to the statutory form being the only form accepted in general use over time.

§ 17-105. Durable power of attorney

Durable power of attorney defined

(a) In this section, "durable power of attorney" means a power of attorney by which a principal designates another as an attorney in fact or agent and the authority is exercisable notwithstanding the principal's subsequent disability or incapacity.

Application of section

(b) This section applies to all powers of attorney.

Designation of another by principal

(c) When a principal designates another as an attorney in fact or agent by a power of attorney in writing, it is a durable power of attorney unless otherwise provided by its terms.

Uncertainty as to death of principal

(d) Any act done by the attorney in fact or agent in accordance with the power of attorney during any period of disability or incompetence of the principal or during any period of uncertainty as to whether the principal is dead or alive has the same effect and inures to the benefit of and binds the principal as if the principal were alive, competent, and not disabled.

Appointment of guardian

(e)(1) If a guardian is appointed for the principal, the attorney in fact or agent shall account to the guardian rather than the principal.

(2) The guardian has the same power the principal would have but for the principal's disability or incompetence to revoke, suspend, or terminate all or any part of the power of attorney or agency.

DISCUSSION

Estates & Trusts Article § 17-105 sets out the durability provisions of a power of attorney. Before Virginia adopted the first Durable Power of Attorney Act, in 1954, all powers of attorney lapsed upon the disability of the principal. This led to certain conceptual difficulties because the agent under a power of attorney traditionally was under the direction and control of the principal. If the power of attorney, however, survived the disability of the principal then the connection between the direction and control by the principal and the agent was severed. As discussed below, this raises issues as to the character of the agent's duty to the principal once the agent was no longer simply following the mandate of the principal.

As with UPOAA § 104, the Maryland Act provides that a written power is presumed a durable power of attorney unless otherwise provided by its terms. This is quite different from the original durable power of attorney statutes which required that it set forth that it was durable rather than that it was not.

Estates & Trusts Article § 17-105(e)(1) provides that if a guardian is appointed for the principal, the agent shall account to the guardian rather than the principal. UPOAA § 108, on the other hand, has the agent accountable to both the guardian and the principal. The UPOAA approach is in keeping with its emphasis on maintaining the autonomy of the principal as far as possible.

§ 17-106. Death, disability, or incompetence of principal

Acts in good faith by attorney in fact or agent

(a)(1) The death, disability, or incompetence of a principal who has executed a power of attorney in writing does not revoke or terminate the agency as to the attorney in fact, agent, or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney or agency.

(2) Unless otherwise invalid or unenforceable, any action taken by the attorney in fact, agent, or other person who acts in good faith under the power of attorney or agency binds the principal and the principal's heirs, legatees, and personal representatives.

Affidavit indicating lack of actual knowledge of death, disability, or incompetence

(b)(1) In the absence of fraud, an affidavit executed by the attorney in fact or agent and stating that the attorney in fact or agent did not have, at the time of doing an act in accordance with the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death, disability, or incompetence, is conclusive proof of the nonrevocation or nontermination of the power at that time.

(2) If the exercise of the power requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable.

Revocation or termination contained in power of attorney

(c) This section may not be construed to alter or affect any provision for revocation or termination contained in the power of attorney.

DISCUSSION

Estates & Trusts Article § 17-106 provides that if an agent is unaware of the principal's death but acts in good faith then the action is enforceable. This section also provides that if an agent executes an affidavit that the agent did not have at the time of the act actual knowledge of the revocation or termination of the power of attorney then it is conclusive proof of its non-revocation or non-termination

at that time. Prudent third parties might request such an affidavit. Maryland provides a form that the affidavit can take.

§ 17-107. Armed services members reported missing in action

If any member of the armed services of the United States has executed a power of attorney, the fact that that person has been reported or listed, officially or otherwise, as "missing in action", as that phrase is used to describe a casualty category applicable to members of the armed services, does not operate to revoke the power of attorney, unless the instrument otherwise provides.

DISCUSSION

Estates & Trusts Article § 17-107 provides that if a member of the Armed Services has a power of attorney and is reported missing in action then the power of attorney is still effective unless the instrument provides otherwise.

§ 17-108. Validity and enforceability of power of attorney

Power of attorney executed in State

(a) A power of attorney executed in this State is valid and enforceable as to persons dealing with the agent.

Power of attorney executed outside State

(b) A power of attorney executed other than in this State is valid and enforceable in this State as to persons dealing with the agent if, when the power of attorney was executed, the execution complied with:

(1) The law of the jurisdiction that determines the meaning and effect of the power of attorney; or

(2) The requirements for a military power of attorney in accordance with 10 U.S.C. § 1044b.

Photocopies or electronically transmitted copies

(c)(1) Except as otherwise provided by law other than this title and subject to paragraph (2) of this subsection, a photocopy or electronically transmitted copy of an original power of attorney is as valid and binding as the original power of attorney.

(2) A clerk of court may refuse to record a photocopy or electronically transmitted copy of an original power of attorney.

Delegation of authority

(d)(1) A principal may delegate to one or more agents the authority to do any act specified in the statutory forms in Subtitle 2 of this title.

(2) Notwithstanding paragraph (1) of this subsection, if a principal designates one or more coagents, all coagents shall act together unanimously unless the power of attorney otherwise provides.

(3) The acts specified in the statutory forms may not, notwithstanding paragraph (1) of this subsection, be deemed to invalidate or limit the validity of other authorized acts that a principal may delegate to an agent.

DISCUSSION

Estates & Trusts Article § 17-108 addresses the validity and enforceability of powers of attorney. Essentially, as with wills, if a power of attorney is valid where executed then it is valid and enforceable in Maryland. This is important in order to make powers of attorney portable in a society where people relocate and/or hold property in several jurisdictions.

Estates & Trusts Article § 17-108(c) also provides that photocopies or electronically transmitted copies of a power of attorney have the force of an original. This is the same as UPOAA § 106(d).

Under the UPOAA § 111, several agents acting under one agreement act independently. In Maryland, however, Estates & Trusts Article § 17-108(d) provides that "all co-agents shall act together unanimously unless the power of attorney otherwise provides." The UPOAA provides that coagents act separately and that a co-agent is not liable for the acts of the other agent unless he or she participates in the bad act or knows of the bad act and does not take action. The Maryland provision defaults to a "check-and-balance" approach.

§ 17-109. Application of title

In general

(a) Except as provided in subsection (b) of this section, this title applies to all powers of attorney.

Powers of attorney outside scope of title

(b) Except as provided in § 17-105 of this subtitle, this title does not apply to:

(1) A power that is coupled with an interest in the subject of the power, is given as security, or is given for consideration, regardless of whether the power is held for the benefit of the agent or another person, including a power given to or for the benefit of a creditor in connection with a credit transaction;

(2) An advance directive appointing a health care agent under Title 5, Subtitle 6 of the Health--General Article or any other power to make health care decisions;

(3) A proxy or other delegation to exercise any right with respect to an entity, including voting rights or management rights or both, or a delegation of authority to execute, become a party to, or amend a document or agreement governing an entity or entity ownership interest;

(4) A power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose;

(5) A power created as part of, or in connection with, an agreement establishing an attorney and client relationship;

(6) A power of attorney that states that it is not subject to this title;

(7) A power authorizing another to prepare, execute, deliver, submit, or file, on behalf of an entity or the governing body or management of an entity, a document or instrument with a government or governmental subdivision, agency, or instrumentality or with a third party;

(8) A power or other delegation of authority contained in a document or agreement governing or binding on an entity that authorizes a person to take action with respect to the entity; and

(9) A power with respect to an entity created in accordance with authorization provided by a federal or State statute that specifically contemplates creation of the power.

DISCUSSION

Estates & Trusts Article § 17-109 describes the application of the Maryland Act. It is explicit that the Power of Attorney Act does not govern health care agents. It also states that a power that's coupled with an interest is not subject to the act.

§ 17-110. Execution of power of attorney

Acknowledgment of writing and witnesses

(a) A power of attorney executed on or after October 1, 2010, shall be:

(1) In writing;

(2) Signed by the principal or by some other person for the principal, in the presence of the principal, and at the express direction of the principal;

(3) Acknowledged by the principal before a notary public; and

(4) Attested and signed by two or more adult witnesses who sign in the presence of the principal and in the presence of each other.

Notary public as witness

(b) The notary public before whom the principal acknowledges the power of attorney may also serve as one of the two or more adult witnesses.

DISCUSSION

Estates & Trusts Article § 17-110 provides for execution of the power of attorney. Under Maryland law any power of attorney executed on or after October 1, 2010 shall be signed by the principal or some other person in the presence of the principal and at the express direction of the principal and acknowledged before a Notary Public and attested by two adult witnesses who sign in the

presence of the principal and in the presence of each other. The Notary can be one of the witnesses. The UPOAA, on the other hand, holds that a signed power of attorney is valid without Notary or witnesses but it only has teeth if it is notarized (UPOAA § 105). The Uniform Act also defines that in the presence of the principal means the conscious presence. The law of Maryland of wills relating to signing within the presence of a testator has been held to mean within the line-of-vision of the person signing. *Grant v. Sandsbury*, 213 Md. App. 144, 73 A.3d 374 (2013) as opposed to the "conscious presence."

§ 17-111. Effect of power of attorney

Effect upon execution

(a) A power of attorney is effective when executed, unless the principal provides in the power of attorney that it becomes effective at a future date or on the occurrence of a future event or contingency.

Effect upon future event or contingency

(b) If a power of attorney becomes effective on the occurrence of a future event or contingency, the principal, in the power of attorney, may authorize one or more persons to determine in a writing or other record that the event or contingency has occurred.

Effect upon principal's incapacity

(c) If a power of attorney becomes effective on the principal's incapacity and the principal has not authorized a person to determine whether the principal is incapacitated, or the person authorized is unable or unwilling to make the determination, the power of attorney becomes effective on a determination in a writing or other record by:

(1) A physician or licensed psychologist that the principal is incapacitated within the meaning of § 17-101(c) of this subtitle; or

(2) An attorney at law, a judge, or an appropriate governmental official that the principal is incapacitated within the meaning of § 17-101(c) of this subtitle.

Determination of incapacity

(d) A person authorized by the principal in the power of attorney to determine that the principal is incapacitated may act as the principal's personal representative to obtain access to the principal's health-care information and communicate with the principal's health-care provider in accordance with:

(1) The Health Insurance Portability and Accountability Act;

(2) Sections 1171 through 1179 of the Social Security Act, 42 U.S.C. § 1320d, as amended; and

(3) Applicable regulations.

DISCUSSION

Estates & Trusts Article § 17-111 outlines the effect of a power of attorney. This tracks UPOAA § 109.

The Comment to the UPOAA version states: "The default rule reflects a 'best practices' philosophy that any agent who can be trusted to act for the principal under a springing power of attorney should be trustworthy enough to hold an immediate power. Survey evidence suggests, however, that a significant number of principals still prefer springing powers…"

The "best practices" in the face of client resistance is a reflection of the difficulty of crafting a good, effective springing mechanism that will actually work when and if needed. Physicians may be reluctant to certify incapacity for a number of reasons. If a client insists on this "objective" trigger, strong hold-harmless or other protections must be within the document. Another approach might be to designate that incapacity shall be deemed if an affirmative vote of certain family members or advisors occurs. That approach is likewise problematic if a principal is marginal and capable of striking out if "crossed." These issues, of course, are not unique to powers of attorney but are also present with revocable trusts and the transition from the settlor as trustee to a successor upon incapacity.

The best practice may reflect the thinking of the estate planning community. Elder law practitioners, on the other hand, are primarily concerned about agents abusing powers of attorney and tend to support springing powers of attorney as the appropriate norm. John C. Crafts, *Preventing Exploitation and Preserving Autonomy: Making Spring Powers of Attorney the Standard*, 44 U. Balt. L. Rev. 407 (2015). (Mr. Crafts supervises an elder law clinic at Faulkner University, Jones School of Law in Montgomery, Alabama.).

§ 17-112. Termination of power of attorney or authority

Power of attorney termination

(a) A power of attorney terminates when:

(1) The principal dies;

(2) The principal becomes incapacitated, if the power of attorney is not durable;

(3) The principal revokes the power of attorney;

(4) The power of attorney provides that it terminates;

(5) The purpose of the power of attorney is accomplished; or

(6) The principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

Authority termination

(b) An agent's authority terminates when:

(1) The principal revokes the authority;

(2) The agent dies, becomes incapacitated, or resigns;

(3) An action is filed for the dissolution or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides; or

(4) The power of attorney terminates.

Lapse of time since execution of power of attorney

(c) Unless the power of attorney otherwise provides, an agent's authority is exercisable until the authority terminates under subsection (b) of this section, even if there has been a lapse of time since the execution of the power of attorney.

DISCUSSION

Estates & Trusts Article § 17-112 sets out the methods of terminating a power of attorney. These provisions are derived from UPOAA § 110.

Estates & Trusts Article § 17-112 (b) (3) terminates a spouse's authority upon the commencement of a divorce and related proceedings.

§ 17-113. Duties of agent relating to power of attorney

Care, competence, and diligence

(a) Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall:

(1) Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest;

(2) Act with care, competence, and diligence for the best interest of the principal; and

(3) Act only within the scope of authority granted in the power of attorney.

Loyalty to principal, cooperation, and recordkeeping

(b) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:

(1) Act loyally for the principal's benefit;

(2) Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;

(3) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

(4) Cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and

(5) Attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

(i) The value and nature of the principal's property;

(ii) The principal's foreseeable obligations and need for maintenance;

(iii) The extent to which the principal's liability for taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes, can be minimized; and

(iv) The principal's eligibility for a benefit, a program, or assistance under a statute or regulation.

Liability for failure to preserve plan

(c) An agent that acts as provided in this section is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

Agent benefitting from actions

(d) An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from an act taken by the agent or has an individual or conflicting interest in relation to the property or affairs of the principal.

Special skills or expertise of agent

(e) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

Decline of property values

(f) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.

Delegation of authority

(g) An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person.

Construction of section

(h) This section may not be construed to reduce any duty of an agent to the principal under existing State law.

DISCUSSION

Estates & Trusts Article § 17-113 sets out the duties of an agent relating to the power of attorney. UPOAA § 114 is where the Uniform Act handles this matter. Although acceptance is not defined under

the Maryland Act (it is under the UPOAA), the standard of care is imposed on the agent who has accepted the appointment. It is broken into two categories: mandatory and optional. The optional provisions apply unless written out of the document.

An agent is to act in accordance with the principal's reasonable expectation to the extent known by the agent (or if not known then to act in the principal's best interest); act with care and competence for the best interests of the principal; and act only within the scope of the agency. The UPOAA version does not have that an agent acts for the best interest of the principal unless the principal's reasonable expectations are not known. It is possible, of course, that a principal may want an agent to take a certain act that is not in his or her best interest. The UPOAA is explicit in providing, assuming no violation of law is involved, that the agent must act at the principal's direction. Maryland, on the other hand, adds ambiguity by introducing the element of best interest regardless of whether or not the principal's expectations are known.

Other provisions that can be written out of a power of attorney include acting loyally and not acting in a way as to create a conflict of interest. These non-mandatory provisions are closer to the traditional fiduciary duty under trust law. This tracks UPOAA § 114(b). Estates & Trusts Article § 17-113, for example, directs that the agent, to the extent possible, preserve the principal's estate plan. UPOAA § 114(c) states that an agent that acts in good faith to preserve such estate plan is not liable to beneficiaries whereas the Maryland version states that an agent that acts consistent with "this section" is not liable. Time will tell whether this is a material difference.

The Comment to UPOAA § 114 states: "Although it is well settled that an agent under a power of attorney is a fiduciary, there is little clarity in state power of attorney statutes about what that means. *See generally* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships,* 36 Ga. L. Rev. 1 (2001); Carolyn L. Dessin, *Acting as Agent under a Financial Durable*

Power of Attorney: An Unscripted Role, 75 Neb. L. Rev. 574 (1996)." Prior to codification in 2010, Maryland statutory law did not set out the agent's duties.

Originally, of course, the common law principles of agency governed powers of attorney. Prior to 1954, the "durable" power of attorney did not exist. The principal appointed his or her agent and the agent followed the directions of the principal. If the principal lost capacity to act, so did the agent because the agent was simply an extension of the principal. Once the principal could no longer direct the agent, the agent had no authority:

> The principal's incapacity undoubtedly terminated the agency because the assumption that an agent acts at the direction of the principal and the principal has the power to terminate the agency at any time. The principal's incapacity would remove both of those essential elements.[2]

Prior to powers of attorney being able to survive the principal's disability, the principal's control of the agent was a defining element of the relationship: "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control …"[3] In other words, it is a relationship historically based on contract, unlike the trustee/beneficiary relationship which is a product of the Equity Courts.[4]

Nevertheless, the agent under a power of attorney has long been considered a fiduciary. When that term defines the scope and character of a trustee's obligations, there is much case law, if not broad consensus, as to the meaning of what being a fiduciary entails. That is not true, however, when the term is used as characterizing the principal/agent relationship as noted in the UPOAA Comment.

In her seminal article addressing the role of an agent when acting under a durable power of attorney, Professor Boxx opens with the observation that the fiduciary relationship in many instances is ambiguous and confusing: "The status of fiduciary is a well-recognized legal concept with a long

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[2] Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L .Rev. 1, 5 (2001).
[3] Restatement (First) of Agency § 1 (1933).
[4] Frederick R. Franke, Jr., *Resisting the Contractarian Insurgency: the Unified Trust Code, Fiduciary Duty, and Good Faith in Contract*, 36 ACTEC L. J. 517, 525 (2010).

history, but nevertheless retains considerable ambiguity and confusion in application."[5] Professor Boxx's thesis, in part, is that the meaning of fiduciary duty varies depending on the relationship giving rise to it. There is no fixed, universal meaning applicable to every relationship.[6]

Because there is little case law describing the nature of the duties of an agent whether under a traditional POA or a durable one, the UPOAA seeks to fill the gap. In the absence of a statute, one would expect that agents were to execute their principal's instructions in good faith under general contract rules until the principal could no longer act.[7] Once disability triggers the durability aspects of a power of attorney, of course, other factors come into play.

The role of the agent was not addressed by the pre-2010 Maryland statute. Until the new statute, Maryland followed the Virginia statutory approach. Virginia adopted the first durable power of attorney statute by permitting a principal to declare in his or her document that the agency would survive his or her disability.[8] The statute did not attempt to spell out a standard to which the agent was to adhere.

The bare-bones approach adopted by Maryland and Virginia, was contrary to that pressed by an early model durable power of attorney act. That approach recognized the utility of a durable power of attorney as a trust substitute but sought to limit the value of the property that could be managed under a durable power attorney. Those involved in drafting the model act also sought to hold agents under a durable power of attorney to standards like those imposed on trustees: "At least some of the draftees thought that a person acting under a durable power of attorney should be held to the same standard as

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[5] Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 2 (2001). Not surprisingly, the Unified Act comments are based largely on the article.

[6] Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligations*, 1988 Duke L. J. 879, 915 (1988)("One could justifiably conclude that the law of fiduciary obligation is in significant respects atomistic. Common core principles may justify the outcomes reached by courts in types or patterns of relationships, but they lose force as applied to other types of relationships.")

[7] "Good faith" in contract generally is the lack of bad faith. Hardly an elevated standard of conduct. Frederick R. Franke, Jr., *Resisting the Contractarian Insurgency: the Unified Trust Code, Fiduciary Duty, and Good Faith in Contract*, 36 ACTEC L. J. 517, 525 (2010). In the interests of full disclosure, the author of these materials is currently designated as an expert witness in a case involving the nature of an agent's duties under the Maryland pre-2010 law. Other ACTEC Fellows are designated as experts for other parties in that litigation.

[8] Boxx at 6.

'other fiduciaries.'"[9] As noted, until 2010, Maryland did not accept that approach but embraced the common law of agency.

Under the common law, the Court of Appeals held that the instrument creating the power of attorney delineate the boundaries of an agent's ability to act and are contracts of agency. *King v. Bankerd*, 303 Md. 98, 105, 492 A.2d 608, 611 (1985) (power to gift not to be inferred). That case held that the instrument creating the relationship must spell out exactly what the agent is authorized to do. A general power purporting to give broad authority (such as the authority to do every act the principal could do) is disregarded: "Another accepted rule of construction is to discount or disregard, as meaningless verbiage, all-embracing expressions found in powers of attorney." See also, *Figgins v. Cochrane,* 403 Md. 392, 942 A2d 736 (2008) (agent failed to take into consideration factors delineated in the instrument related to the power to gift.); *Mitchell v. AARP Life Insurance Program, New York Life Ins. Co.*, 140 Md. App. 102, 779 A.2d 1061 (2001) (Language insufficient to show agent had authority to purchase life insurance).

§ 17-114. Compensation and reimbursement of expenses

Reimbursement of expenses

(a) Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal but the agent is not entitled to compensation.

Compensation

(b) If the principal indicates in the power of attorney that the agent is entitled to compensation, the agent may receive compensation based on what is reasonable under the circumstances or on another basis as set forth in the power of attorney.

DISCUSSION

Estates & Trusts Article § 17-114 addresses compensation and reimbursement. The comparable section under the UPOAA is § 112. Both the Maryland version and the UPOAA version state that the agent is entitled to reimbursement for reasonable expenses. The Maryland version, however, states that

[9] Boxx at 8-10.

the agent is entitled to compensation only if the document so states. The UPOAA states that regardless of the document the agent is entitled to compensation.

§ 17-115. Construction with laws applicable to financial institutions

This title does not supersede other laws applicable to financial institutions or other entities, and to the extent those other laws are inconsistent with the title, the other laws prevail.

DISCUSSION

Estates & Trusts Article § 17-115 regarding the construction with the laws of financial institutions states that the Maryland Power of Attorney Act does not supersede other acts applicable to financial institutions. This is the same as UPOAA § 122.

§ 17-116. Short title

This title may be cited as the Maryland General and Limited Power of Attorney Act.

THE MARYLAND FORMS.

As noted, Maryland provides two statutory forms: a general all-inclusive form and a limited one where the principal selects those powers that he or she wants the agent to possess. Other than mandating execution requirements, however, Maryland does not require use of either form. As noted, however, Estates & Trusts Article § 17-104(a) provides that the person may not require an additional or different form of power of attorney other than the statutory one. This will drive other forms, no matter how superior to the statutory forms, out of use over time.