

# **UNIFORM POWER OF ATTORNEY ACT**

**Colorado Coalition for Elder Rights and  
Adult Protection**

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# **Uniform Power of Attorney Act: Introduction and Background**

- **“The Uniform Power of Attorney Act was intended to be a relatively simple, inexpensive alternative to the court supervision of conservatorship.” Catherine Anne Seal, Esq., CBA/CLE 5/22/09, “Colorado’s New Power of Attorney Act.”**

# **POA**

## **A. History and Background to the Uniform Power of Attorney Act (hereinafter referred to as UPOAA)**

- 1. Seven years in the making**
- 2. State Survey in 2002 by Prof. Linda S. Whitton, Valparaiso University School of Law- pointed out the gaps found in existing POA statutes**

# POA

**B. Colorado became the third state to adopt the UPOAA, following New Mexico and Idaho. Since then, Nevada and Maine have also adopted the UPOAA. Colorado's UPOAA was signed into law on April 9, 2009 and became effective on 1/1/10.**

# POA

- **The UPOAA is divided into 4 parts.**
  - **Part One of the Act contains the General Provisions.**
  - **The UPOAA is” primarily a “default” statute: “unless” or “except for...”**
  - **Unique Features include:**
    1. **Definition of “Incapacity” - § 702(5)(a): “Inability to manage property or business affairs because the individual (a) Has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance” or (b) is Missing, Detained or Outside the U.S. and unable to return:**

# POA

- **Relationship to Agent under a Medical POA - §703(b).** An agent under the UPOAA does not have the power to make health care decisions for the Principal.
- **Durability - §704 – POA is “durable” unless it expressly states otherwise.**
- **Execution and Acknowledgement before a Notary Public - §705 – Principal’s signature is presumed to be genuine if it is acknowledged before a notary.**

# POA

- **Validity of POA executed before 1/1/10 – §§706 & 707 address the validity and portability of existing POAs executed in Colorado or another state.**
- **When effective: § 709 – immediately, unless the POA expressly states otherwise.**
- **Relationship of Agent to Principal under HIPAA - §709(4) – Agent is “Personal Representative” for Principal for HIPAA purposes.**

# POA

- **Termination of POA - §§ 710(1) and 710(2)(a-d) – spells out the circumstances for termination (including the death of the Principal), unless POA expressly states otherwise.**
- **Effect of Subsequent Dissolution of Marriage or Legal Separation -§710 (2)(c)- authority of Agent automatically terminates unless POA expressly states otherwise.**

# POA

- **Co-Agents and Successor-Agents- §§ 711 (1) and (2) Co-agents may exercise authority independently or Principal may require consensus between or among them. Allows Agent to choose successor-agent unless otherwise provided.**
- **Reasonable Compensation of Agent -§712 permissible, unless POA expressly states otherwise.**

# POA

- **Agent's Acceptance -§713 – Automatic, unless POA expressly states otherwise.**
- **Agent's Duties under POA - § 714. The Act enumerates the Agent's duties, including certain mandatory duties:**
  - **Act in accord with Principal's expectations, if known (otherwise in Principal's best interest)**
  - **Act in good faith**
  - **Act only within the scope of authority.**

# POA

- **Default Provisions re: Agent's Standard of Care:**
  - Act loyally for Principal's benefit
  - Act so as to avoid conflicts of interest
  - Act with care, competence & diligence
  - Keep records of receipts, disbursements, etc.
  - Act cooperatively with Principal's Agent under Health Care POA
  - Attempt to preserve Principal's estate plan

# POA

- **Agent's Exoneration - §715 – The Principal may relieve the Agent of liability for breach of duty except for a breach resulting from (1) Agent's dishonesty or (2) Agent's abuse of confidential or fiduciary relationship**

# POA

- **JUDICIAL REVIEW -§716.** The Act includes broad standing provisions and expands the list of persons who may petition for judicial review of a POA or of an Agent's conduct:
  - Principal or Agent
  - Guardian, Conservator or other fiduciary
  - Agent under a Health Care POA
  - Principal's spouse, parent or descendant
  - Presumptive heirs
  - Presumptive beneficiaries
  - Named beneficiaries
  - A governmental agency with regulatory authority to protect the Principal
  - Principal's caregiver or anyone with an interest in Principal's welfare
  - A person asked to accept the POA

# POA

- **Agent's Liability - §§ 717 & 723. An Agent is liable for violations of the Act, but remedies under the Act are not exclusive and may be combined with other statutory remedies under the Colorado Probate Code and/or any of the basic civil or criminal statutes dealing with “*at-risk*” adults.**

# POA

- **Third Party Reliance and Obligations of Third Parties - §§ 719-720**
  - **Third Parties may rely on the validity of an acknowledged POA but may ask for additional assurances**
  - **Third Parties may be liable for unreasonable refusal to accept POA**

# POA

- **SUBPART TWO OF THE ACT: AUTHORITY, including “Hot Powers” -§724**
  - **The Agent must have a specific grant of authority from the Principal in order to:**
    - **Create, amend, revoke or terminate an *inter vivos* trust**
    - **Make a gift**
    - **Create or change rights of survivorship**
    - **Create or change a beneficiary designation**
    - **Delegate authority granted under the POA**
    - **Waive Principal’s right to be a beneficiary**
    - **Exercise certain powers as a fiduciary**
    - **Disclaim or release property or a power of appointment**
    - **Exercise authority as a partner**
    - **A non-family member Agent cannot use the POA to create an interest in the Principal’s property for self or others unless expressly provided for by the Principal**

# POA

- **Construction of Authority -§ 726**
- **Specific Grants of Authority - §§ 727-739. The Agent may exercise authority, by default, with respect to the following, unless the POA provides otherwise:**
- **Real Property**
- **Tangible Personal Property**
- **Stocks and Bonds**
- **Commodities and Options**
- **Banks and other financial institutions**
- **Operation of entity or business**
- **Insurance and annuities**
- **Estates, trusts and other beneficial interests**
- **Claims and litigation**
- **Personal and family maintenance**
- **Benefits from governmental programs**
- **Retirement plans**
- **Taxes**

# POA

- **GIFTS - § 740 – Unless otherwise provided, an Agent may only make gifts that are limited to the federal tax exclusion amount and that are consistent with the Principal's estate plan and objectives and personal history of making gifts.**

# POA

- **SUBPART THREE OF THE ACT: Statutory Forms - §§ 741-742**
  - **Provides education for the Principal**
  - **Provides information for the Agent**
  - **Provides a Form for Certification by the Agent (optional)**

# POA

- **SUBPART FOUR: Miscellaneous Provisions- §§ 743-745**
  - **Relationship to Other Statutes**
  - **Effect on Existing Powers of Attorney**

# POA

- **Concluding Thoughts and Ethical Considerations**
  - **Potential for Misuse**
  - **The Lawyer's Role as Counselor**
  - **Family Issues and Dynamics**
  - **Capacity, Informed Consent and Confidentiality**