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Georgia Has a New Uniform Power of Attorney Act Effective as of July 1, 2017 (Part 2)

By Richard M. Morgan & Loraine M. DiSalvo

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

A POA is a document in which one party (the "principal") grants authority to another party (the "attorney-in-fact" or "agent") to act in the place of the principal with regard to economic and financial matters. In addition to the appointment of an agent and any successor agents, the POA should contain a list of powers that the principal authorizes the agent to exercise on the principal's behalf. The general rule is that the agent must exercise those powers only for the principal's benefit. The only exceptions to this general rule under Georgia law are that (a) an agent can satisfy the principal's legal obligation to support another person (for example, the agent can use the POA to provide support to the principal's minor children), and (b) the agent may be able to continue a pattern of making gifts that the principal had previously established (however, this exception is found only in one Georgia court case). In general, however, if the principal wants to give the agent any powers that would allow the agent to benefit someone other than the principal, those powers normally must be specifically stated in the POA.

The reason for the general rule that the agent can only exercise powers under a POA for the benefit of the principal except as specifically stated in the POA is to prevent an agent from diverting the principal's assets away from the principal during the principal's lifetime and away from the principal's intended beneficiaries at the principal's death. Any powers that allow an agent to use the principal's assets to benefit someone other than the principal are highly susceptible to abuse by the agent. Therefore, when these powers are to be included in a POA, it is critical to clearly spell out the powers and any limitations on those powers. The client and his attorney should give very serious consideration to whether or not to include any such powers, and how to structure and limit them if included.

This Newsletter will discuss the powers given to an agent under a POA and the new UPOAA. Please remember, however, while the decision of what powers to give to an agent is a critical part of preparing a POA, the most important decision in preparing a POA is the selection of the initial and successor agents. No matter how carefully the POA is structured or what protections are included in

[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 and his help in coming up with future corrections and changes to the UPOAA.

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the POA or state law, there is no good way to fully protect a principal from an agent who decides to abuse the POA and take advantage of the principal.

I. General Authority Powers vs. Specific Authority Powers [New O.C.G.A. Sections 10-6B-40 to 10-6B-56 and 10-6B-70].

A. General Authority Powers. Many of the powers granted to an agent under the UPOAA are General Authority powers (hereinafter referred to as "general powers") that can simply be incorporated by reference in the POA. There are two different ways to incorporate the general powers in the POA by reference. These include: (1) authorizing the agent to do all things that a principal could do (which thereby gives the agent all the powers set out in new O.C.G.A. Sections 10-6B-43 to 10-6B-55, which powers are discussed below) or (2) providing the agent with general authority as to certain powers that the POA sets out, either by referring to the descriptive terms used in the applicable provisions of new O.C.G.A. Sections 10-6B-43 to 10-6B-55 or by citing the applicable Sections themselves.

B. Listing of General Powers. The general powers that can be incorporated by reference include the powers related to: (1) Real Property (new O.C.G.A. Section 10-6B-43); (2) Tangible Personal Property (new O.C.G.A. Section 10-6B-44); (3) Stocks and Bonds (new O.C.G.A. Section 10-6B-45); (4) Commodities and Options (new O.C.G.A. Section 10-6B-46); (5) Banks and Other Financial Institutions (new O.C.G.A. Section 10-6B-47); (6) Operation of a Business Entity (new O.C.G.A. Section 10-6B-48); (7) Insurance and Annuities (new O.C.G.A. Section 10-6B-49); (8) Estates, Trusts, and Other Beneficial Interests (new O.C.G.A. Section 10-6B-50); (9) Claims and Litigation (new O.C.G.A. Section 10-6B-51); (10) Personal and Family Maintenance (new O.C.G.A. Section 10-6B-52); (11) Retirement Plans (new O.C.G.A. Section 10-6B-54); and (12) Taxes (new O.C.G.A. Section 10-6B-55). In the new statutory form, the subjects with regard to which the general powers are granted are listed so that the principal can either authorize the agent to exercise each specific power or simply initial a statement that the agent can act with regard to "[a]ll preceding subjects."

C. Specific Authority. In general, Specific Authority powers (hereinafter referred to as "specific powers") will only be provided to an agent by a POA if they are specifically granted to the agent in the POA. The power to make gifts under new O.C.G.A. Code Section 10-6B-56 can be granted by either using the appropriate descriptive term in the POA or citing the code Section directly, as if it were a general power. However, unlike the general powers, the power to make gifts under 10-6B-56 will not be granted simply by a statement that the agent has the general authority to do all things that a principal could do. The other specific powers must be specifically described in the POA, and each special power granted must be separately authorized by the principal; the POA cannot simply state that the agent is granted

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all of a referenced list of specific powers. The specific powers are generally ones that allow the agent to do something that might benefit other people, instead of benefitting the principal, and these powers can make it very easy for an unscrupulous agent to abuse the POA. For this reason, these powers are often referred to by those in the estate planning field as "hot" powers.

The specific powers are set out under new O.C.G.A. Section 10-6B-40(a). They include: (1) the power to create, amend, revoke, or terminate an *inter vivos* trust; (2) the power to make gifts; (3) the power to create or change rights of survivorship; (4) the power to create and change a beneficiary designation; (5) the power to delegate authority granted under the POA; (6) the power to waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; (7) the power to exercise fiduciary powers that the principal holds but has authority to delegate; (8) the power to exercise authority over the content of electronic communications sent or received by the principal as such communications are defined under 18 U.S.C. 2510(12); and (9) the power to disclaim assets or powers that the principal would otherwise receive from others, including a power of appointment.

D. Incorporation by Reference. If the principal uses incorporation by reference, whether by citing the actual Code Section or using the same descriptive terms used in the statute, the principal is treated as having incorporated the entire applicable Code Section in the POA. However, the principal may also modify any power that is incorporated by reference in the POA, by stating the applicable modifications in the POA. In general, if multiple non-gifting power provisions ever overlap, the broadest power provision controls.

II. Certain Powers Need Extra-Careful Consideration and Possible Modifications.

A. The General Personal and Family Maintenance Power [New O.C.G.A. Section 10-6B -52].

1. Concern. This is one of the general powers, and it is very easy to incorporate by reference. However, principals should give serious consideration to whether or not to grant this power. If the power is granted at all, the principal should consider whether and how to modify it. It should not be a power that is routinely incorporated with the rest of the general powers. This is because the Personal and Family Maintenance power actually gives the agent the power to effectively make significant, potentially taxable, gifts on the principal's behalf, and it does not include any tax- or asset-protection-related limitations. This power is in addition to, and not limited by, any other gift-related powers in the POA. The power appears to have been included to allow an agent to make payments or take actions that the principal likely would have made or taken for himself or others, and it appears to have been

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written by people who did not realize that many such payments and actions can actually be considered gifts for gift and estate tax purposes.

2. Who Can Benefit From Actions Taken Under the Personal and Family Maintenance Power? Under the statute, actions taken under the Personal and Family Maintenance power can benefit: (1) the principal; (2) the principal's spouse; (3) the principal's minor children; (4) the principal's adult children who are pursuing a postsecondary education and who are under 25 years old; (5) the principal's parents and the principal's spouse's parents, if the principal had established a pattern of benefitting the applicable parents in the past; and (6) any other individual who is legally entitled to be supported by the principal. Other than the principal and his spouse, the potential beneficiaries can either be alive when the POA is executed or born thereafter.

3. What Kinds of Actions Can be Taken Under the Personal and Family Maintenance Power? Under the Personal and Family Maintenance power, the agent can: (1) take any actions needed to maintain the customary standard of living of the principal, the principal's spouse, or any other permissible beneficiaries (hereinafter, references to "permissible beneficiaries" in general shall include both the principal, his or her spouse, and the other permissible beneficiaries listed in this Section); (2) make payments of child support or other family maintenance required by a court, government agency, or any agreement entered by the principal; (3) provide living quarters for the principal, the principal's spouse, or any other permissible beneficiaries, including paying both the costs to acquire the residence and paying ongoing operating costs associated with the residence; (4) provide normal domestic help to maintain the applicable' beneficiary's customary standard of living; (5) provide "usual" vacations and travel expenses for the applicable beneficiary, consistent with his or her customary standard of living; (6) provide shelter, clothing, and food to the applicable beneficiary, in accordance with his or her customary standard of living; (7) provide for appropriate postsecondary and vocational educations for permissible beneficiaries to help them maintain their customary standard of living; (8) pay for "other current living costs" to allow the applicable beneficiary to maintain his or her customary standard of living; (9) pay for a permissible beneficiary's health care and custodial care; (10) continue to provide for a permissible beneficiary to have the use of an automobile or other means of transportation, including registration, licensing, insurance, and replacement costs for any such means of transportation; (11) maintain credit and debit accounts and open new accounts for the convenience of the permissible beneficiaries; and (12) continue making payments incidental to the membership or affiliation of the principal in a

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religious institution, club, society, order, or other organization or to continue other payments to such organizations.

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 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 advisers should consider including this provision even if the rest of the Personal and Family Maintenance powers are not included in the POA.

B. The Specific Power Allowing Gifts [New O.C.G.A. Section 10-6B-56]. This provision allows a POA to authorize an agent to make gifts on behalf of the principal, and contains a number of limitations that apply to any such power. As discussed above, this gifting power can be incorporated by reference, either by citing the specific Code Section or by stating that the agent has the general authority to make gifts on behalf of the principal. However, it is a specific authority power that must be specifically granted, and cannot be included in a statement that simply grants the agent a broad list of powers or states that the agent has all powers that the principal could exercise.

1. Need to Modify Statutory Gifting Power. The wording of new O.C.G.A Section 10-6B-56 has a number of problems as written. As a result, the gifting language used in a POA should ideally be modified to clearly provide the agent with the desired level of gifting powers.

(A) The Permitted Total Gift Value is Poorly Defined. The statute ties the maximum amount that can be given to any specific recipient under the POA to the gift tax annual exclusion amount in effect under Internal Revenue Code ("IRC") Section 2503(b). However, it does so in part by stating that the gift may be "in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code Section 2503(b), in effect on February 1, 2017." The annual gift tax exclusion provided for under IRC Section 2503(b) is indexed for inflation, so that it will periodically increase in increments of $1,000. It is not clear from the statute whether "in effect on February 1, 2017" is intended to refer to the actual annual exclusion amount of $14,000 on that date or whether it refers to the wording of IRC Section 2503(b) as it existed on February 1, 2017, which

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would include inflation indexing adjustments to the gift tax annual exclusion amount.[2] However, this limitation applies "unless the power of attorney otherwise provides." Advisers should generally consider modifying the gifting provisions of their POAs so that the dollar limits on gifts are clear.

The statute also allows the agent to make gifts of up to double the gift tax annual exclusion amount, but only if the principal's spouse agrees to gift split with the principal under IRC Section 2513 "in effect on February 1, 2017." However, a spouse does not actually consent to gift split under federal law unless and until the spouse completes the appropriate section of the principal's gift tax return for the gifts made in that year. The gift tax return is not filed in the same year that gifts are actually made (generally, it's filed the following year), and therefore the spouse's consent to split gifts is actually not made in the same year that the gifts are made. The statute appears to assume, wrongly, that the principal's spouse can agree to make the gift splitting election under IRC Section 2513 in another manner; perhaps by a separate memorandum executed at the time the gift is made. In general, it would be better to simply double the permitted gift amount if the principal is married on the date of the gift, and eliminate any reference to a gift-splitting election by the principal's spouse.

(B) The Power That Allows the Agent to Consent to Gift Splitting With the Principal's Spouse Does Not Work. Under Section 10-6B-56(b)(2), the agent is given the power to consent to gift splitting with the principal's spouse on the principal's behalf. However, the agent is only given the power to consent to split gifts to the extent that such gifts do not exceed the total of the gift tax annual exclusions available with regard to any given donee from both the principal and the principal's spouse. Gift splitting elections do not, and cannot, work this way. Under federal law, a consent to gift split applies to all gifts made by each consenting person and his or her spouse, except for gifts made by one of the consenting persons to the other one. It cannot be limited so that it applies only to certain gifts. Fortunately, this is another provision that applies "[u]nless the power of attorney otherwise provides," and so advisers can and should make appropriate modifications to their clients' POAs.

[2] The statute also does not clearly state that the agent can make annual or other periodic gifts to the same recipient. Instead, it just states that the agent can make "a gift of any of the principal's property" "in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion." O.C.G.A. Section 10-6B-56(b)(1). This leaves open the possible, although most likely unintended, interpretation that no more than a certain amount of gifts can ever be made to any single recipient.

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(C) Even Though the Gift Tax Annual Exclusion is Referenced by 10-6B-56, the Actual Gifts Made Under this Section Do Not Need to Qualify for the Annual Exclusion. The new statute appears to reference the gift tax annual exclusion amount purely to determine the maximum value of gifts that an agent can make on the principal's behalf under the POA. The statute does not actually require that the gift qualify as an annual exclusion gift. This is not necessarily a problem, but it is a quirk that might produce unintended results if not carefully addressed in POAs. In order for a gift to qualify for the gift tax annual exclusion under federal law, it must either be considered to be a gift of a present interest or fit into one of a very few, very narrowly defined exceptions. However, new O.C.G.A. Section 10-6B-56 does not contain a similar requirement. Instead, many kinds of gifts that will be taxable because they do not qualify for the gift tax annual exclusion appear to be permitted, as long as the value of the gift does not exceed the value of the gift tax annual exclusion amount.

2. There Are Some Limitations That Apply to the Gifting Power and Other Specific Powers. There are some provisions in the new UPOAA that appear to be intended to help protect a principal against inappropriate gifts or other abusive transactions by an agent:

(A) Gifts Made by the Agent Must be Consistent With Known Objectives of the Principal or Must Be Consistent With the Principal's Best Interests. The power to make gifts on behalf of the principal is limited by 10-6B-56. Section 10-6B-56(c) says that the gifts made by an agent must be consistent with the principal's objectives if those are actually known by the agent. If the agent does not know the principal's objectives, then the agent must determine whether a proposed gift is consistent with the principal's best interests based on all relevant factors. The factors to be considered include: (1) the value and nature of the principal's property; (2) the principal's foreseeable obligations and need for maintenance; (3) the potential minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; (4) eligibility for government benefits (the statute does not say whose eligibility should be considered); and (5) the principal's history of making or joining in making gifts. However, please note that this limitation on the ability of the agent to provide "gifts" under 10-6B-40 and 10-6B-56 **does not** apply to limit the agent's alternative powers to benefit others, including the power to provide for Personal and Family Maintenance under 10-6B-52, the power to exercise the other various

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specific powers under 10-6B-40, the power to disclaim under 10-6B-50(b)(8), or otherwise.

(**B) An Agent Who is Not a Member of the Principal's Family is Prohibited From Benefitting From the Specific Powers.** Unless the POA specifically provides otherwise, an agent that is not an ancestor, spouse, or descendant of the principal is prohibited from exercising any of the specific powers listed 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. As discussed above at Paragraph I.C., Section 10-6B-40(a) is the list of specific powers, and it allows a lot of extremely broad and potentially abusive powers such as the power to create, amend, or revoke a revocable trust, to create or change beneficiary designations or rights of survivorship, and the power to make gifts, among others. In general, this limitation may be a good thing, but in many cases the person abusing a POA is actually a family member, and not an unrelated third party, so the restriction may not go far enough. In addition, please note that this prohibition **does not** apply to the Personal and Family Maintenance powers under 10-6B-52, the power to disclaim or otherwise refuse to accept assets under 10-6B-50(b)(8),[3] or any other non-specific powers that could be used to benefit others.

C. The Other Specific Powers: Be Careful!

1. All of the Other Specific Powers Need to be Very Carefully Considered and, Possibly, Modified Before They are Included in a POA. The specific powers could be highly dangerous in the hands of an unscrupulous or untrustworthy agent. They can allow the agent to significantly deplete the assets that are available to the principal during his lifetime. They can also allow the agent to determine who is to benefit from the principal's remaining assets at the principal's death, and how those beneficiaries receive their assets. In general, none of these powers should be included in a POA without significant modifications, so that they allow the agent to address potential problems while still minimizing the risk of abuse.

2. Special Caution About The Power to Disclaim. The power to disclaim is currently included in the UPOAA as both a general power included under the heading

[3] If the specific power to disclaim under 10-6B-40 is determined to override the general power that allows disclaimers under 10-6B-50(b)(8), then the power to disclaim may actually be subject to this restriction on specific powers. However, as discussed below, the answer to how the specific power to disclaim should be coordinated with the very broad general powers under 10-6b-50(b)(8) is far from clear at this point. We hope this will be clarified in the coming year, by a technical corrections bill.

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of "Estate, Trusts And Other Beneficial Interests" (new O.C.G.A. Section 10-6B-50(b)(8)) and as a specific power under new O.C.G.A. Section 10-6B-40(a)(9). The general powers given in Section 10-6B-50(b)(8) also appear to be broader than the mere power to disclaim that is listed as a specific power in 10-6B-40(a)(9). This appears to have been an accident which hopefully will be corrected soon. In the meantime, it will be important to ensure that POAs provide for the coordination of these two provisions, to help prevent confusion.

In Part 3 of our 3-part series, we will examine the new statutory form that is contained in the UPOAA. While the new statutory form is not mandatory, and attorneys are free to use other forms if they prefer to do so, as we have previously discussed, the provisions of the UPOAA that allow someone to force a third party to accept a POA are only generally available for POAs that either use the actual statutory form verbatim or "substantially reflect" the language of the statutory form. Unfortunately, the new statutory form itself needs a great deal of work to be ready for prime time. The unanswered question for advisers and their clients is now: how far can we deviate from the statutory form and still be deemed to substantially reflect its provisions?

If you have questions regarding an existing POA, or what actions are permitted, the attorneys at Morgan & DiSalvo are here to help. Please contact our office administrator at info@morgandisalvo.com or (678) 720-0750 to schedule an appointment to discuss your questions.