

DIVISION 8: ESTATES, TRUSTS & PROBATE
PROPOSED PUBLIC STATEMENT ON:

UNIFORM DURABLE POWER OF ATTORNEY STATUTE

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SUMMARY OF POSITION OF DIVISION VIII
OF THE DISTRICT OF COLUMBIA BAR ON THE
UNIFORM DURABLE POWER OF ATTORNEY STATUTE

The purpose of the uniform statute is simply to extend the "life" of a power of attorney into a period of mental disability of the principal. Without statutory authority, a power of attorney becomes invalid upon the principal's mental incapacity. That is frequently the time when an effective power of attorney is most needed; the alternative is usually an expensive conservatorship proceeding. Forty-four states have adopted a durable power of attorney statute, in one form or another. Some statutes are much more detailed and/or permissive than others. The statute here proposed for the District of Columbia is the simplest form of durable power statute -- the Uniform Act adopted by the Commissioners on Uniform State Laws. The proposed statute does not alter the prohibition in the D.C. Code against transfers of real estate by an attorney-in-fact. Increased longevity and the danger of loss of mental capacity dictate the need for a durable power of attorney, long recognized in other jurisdictions.

This statement of support for adoption of the Uniform Durable Power of Attorney statute in the District of Columbia is not to be read as opposing adoption of a statute which provides for broader or more permissive use of a power of attorney or for use of a power of attorney to transfer realty.

The views expressed herein represent only those of Division 8: Estates, Trusts and Probate of the District of Columbia Bar and not those of the District of Columbia Bar or of its Board of Governors.

STATEMENT OF DIVISION VIII OF THE DISTRICT OF COLUMBIA BAR

The views expressed herein represent only those of Division VIII, - Estates, Trusts and Probate of the District of Columbia Bar and not those of the District of Columbia Bar or of its Board of Governors.

At common law, a power of attorney becomes invalid upon the death or disability of the principal. As a result, it is really a useless instrument at the time when it is needed the most, namely, when the principal becomes mentally incapacitated. In addition, since persons who are asked to rely upon the power do not know whether the principal has become disabled since executing the power, they may be reluctant to take the requested action without adequate assurance that the principal is still competent.

The principal alternative available for the purpose of managing the business affairs of an incompetent person is that of a conservatorship which has become increasingly cumbersome and expensive. The suggested solution is the enactment of a statute which will permit a power of attorney to be "durable" - one which will survive the incompetency of the principal. The proposed statute would require that the power of attorney contain appropriate language which indicates either an intention on the part of the principal that the power is to survive incompetency or that it becomes effective when the principal becomes incompetent.

The proposed statute is the Uniform Act which was drafted by the National Conference of Commissioners on Uniform State Laws. After its adoption by the Commissioners the proposal began to receive wide acceptance. By 1977, 33 states had passed legislation permitting a power of attorney to survive the incompetency of the principal. According to a study made by The American College of Probate Counsel, 42 states had adopted such legislation by December, 1982. As of March 2, 1983, two additional states (Massachusetts and Alabama) have adopted such legislation. Apparently, then, only the District of Columbia and six states do not presently have such legislation in effect. Maryland and Virginia have had such statutory provisions in force for a period of some years.

Increased longevity, the result of advances in medical knowledge, will probably result in an increase in the chances of people experiencing some form of physical or mental disability during later life, at which time they will either have difficulty or be absolutely unable to manage their financial affairs.

It should also be noted that conservatorships are not only expensive and time-consuming, but that they also involve the emotional strain and even humiliation of an incompetency proceeding.