



2022

Donative Hot-Powers Cases Under the Uniform Power of Attorney Act

F. Philip Manns Jr.

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Agency Commons](#)

Recommended Citation

F. Philip Manns Jr., *Donative Hot-Powers Cases Under the Uniform Power of Attorney Act*, 44 U. ARK. LITTLE ROCK L. REV. 339 (2022).

Available at: <https://lawrepository.ualr.edu/lawreview/vol44/iss3/1>

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

DONATIVE HOT-POWERS CASES UNDER THE UNIFORM POWER OF ATTORNEY ACT

*F. Philip Manns Jr.**

ABSTRACT

Among its significant reforms, the Uniform Power of Attorney Act (UPOAA) denies agents nine types of power unless “the power of attorney expressly grants” them. Those so-called “hot powers” relate to delegations of fiduciary authority and to donative transfers of the principal’s property for less than full consideration. The donative hot powers include creating, amending, or terminating a trust; making gifts; creating or changing beneficiary designations; creating or changing rights of survivorship; and waiving or disclaiming property interests. The rationale for requiring the grant of specific authority is the risk those acts pose to the principal’s property and estate plan.

Although the UPOAA was approved fifteen years ago and thereafter adopted by about thirty U.S. jurisdictions, only a dozen or so judicial opinions address the donative hot powers, and some of them are “unpublished.” Consequently, while “uniformity of application and construction” is a goal of the UPOAA, the number and availability of authorities construing and applying the donative hot-powers provisions is limited.

Within those judicial opinions dealing with donative hot powers, only the power to “make a gift” meaningfully has been considered. Regarding other donative hot powers, most notable is a failure of courts to recognize that transfers they have permitted agents to make required express authority that did not appear to exist. This Article analyzes fourteen donative hot-powers decisions.

Table of Contents

I. Summary of the UPOAA	341
A. Overview of the UPOAA Menu Approach to Agent Power . . .	341
B. UPOAA Gifting-making Authority	343
II. Donative Hot-Powers Cases in General	345
III. Power to Create a Trust	348
A. Liberty Bank of Arkansas v. Byrd	348
IV. Power to Make a Gift	349
A. In re Estate of Adelung	349
B. Davis v. Davis	352
C. Estate of Smith	356
D. Estate of Gagnon	359
E. Chichester v. Cook	361
F. Degroat v. Papa	362
V. Gift-making Hot-Power Requirements Ignored	363
A. Hodgson v. Gibson	363
B. Miller v. Miller	366
VI. Power to Change a Beneficiary Designation	369
A. Cisneros v. Graham	369
B. Campbell v. Lieb	372
C. Estate of Speakman	374
VII. Other Self-interested Agent Transactions	375
A. Norvell v. Norvell	375
B. Ibru v. Ibru	377
VIII. Conclusion	377

I. SUMMARY OF THE UPOAA

A. Overview of the UPOAA Menu Approach to Agent Power

The Uniform Power of Attorney Act (UPOAA) was approved in 2006,¹ slightly amended in 2008,² more significantly amended in 2016,³ and has been adopted by about thirty U.S. jurisdictions.⁴ The UPOAA takes a menu- or subject-based approach to agent powers.⁵ Agent powers are divided into three categories: cold powers; hot powers; and the power to make gifts. “Cold powers”⁶ refer to thirteen powers that can be granted to an agent either (1)

* Professor of Law (retired). Liberty University School of Law (2006–2021); California Western School of Law (1991–2006). Thanks to my colleagues over the years, especially Tim Todd and Rodney Chrisman, at Liberty, and Susan Channick and Michael Yu, at California Western, for years of fruitful discussions about Estate Planning. Thanks to the UALR editors and staff for their careful review of this manuscript.

1. UNIF. POWER OF ATT’Y ACT (UNIF. L. COMM’N, FINAL ACT 2006), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=97b8e123-d225-0b61-e115-d3358fca22ec&forceDialog=0>.

2. In section 211(a), the defined term “estates, trusts, and other beneficial interests” was changed to “estate, trust, or other beneficial interest.” See AMEND. TO UNIF. POWER OF ATT’Y ACT (UNIF. L. COMM’N, May 7, 2008), <https://www.uniformlaws.org/higherlogic/system/downloadaddocumentfile.ashx?documentfileKey=4a0739a7-11ca-b4f5-ecef-bfaf6f7f5bff-&forceDialog=0>. In subsections 211(b)(1), (b)(2), and (b)(8), the term “the fund” was replaced with “an estate, trust, or other beneficial interest.” *Id.*

3. UNIF. POWER OF ATT’Y ACT § 201(a)(8) (NAT’L CONF. OF COMM’RS ON UNIF. STATE L., amended 2016). In 2016, the following was added as a hot power: “exercise authority over the content of electronic communications, as defined in 18 U.S.C. § 2510(12)[, as amended,] sent or received by the principal,” as section 201(a)(8); and then-existing subsection (a)(8), the power to disclaim, was re-numbered as subsection (a)(9). Such was intended to conform with section 9 of the Revised Uniform Fiduciary Access to Digital Assets Act. *Id.* § 201 cmt. Further, the statutory-form power of attorney in section 301 was amended to include a check box for the hot power to “[a]ccess the content of electronic communications.” *Id.* § 301.

4. The website for the uniform law lists twenty-nine jurisdictions: AL, AR, CO, CT, GA, HI, IA, ID, KY, MD, ME, MT, NC, NE, NH, NM, NV, OH, OK, PA, SC, SD, TX, UT, VA, WA, WI, WV, WY. *Power of Attorney Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=b1975254-8370-4a7c-947f-e5af0d6cb07c> (last visited Oct. 17, 2021). *Uniform Laws Annotated* adds the Virgin Islands. 8B U.L.A. (Supp. 2020). A list prepared by The American College of Trust and Estate Counsel lists twenty-seven jurisdictions; it indicates that Pennsylvania has not adopted the UPOAA. *ACTEC 50-State (Plus D.C.) Survey of Powers of Attorney* at 41 (Aug. 2019), https://www.actec.org/assets/1/6/Douglass_Powers_of_Attorney_Survey.pdf (last visited Mar. 14, 2021).

5. F. Philip Manns, Jr., *Powers of Attorney Under the Uniform Power of Attorney Act Including Reference to Virginia Law*, 43 ACTEC L.J. 151, 158–63 (2018).

6. In the UPOAA, each cold power has its own section; each such section delineates subject-specific powers, and those delineations are extensive. *Id.* at 159. The Maryland version of the UPOAA includes nearly the entire statutory text relating to agent powers in its “Maryland Statutory Form Limited Power of Attorney” form, and the document runs to fourteen pages when formatted on letter-sized paper. MD. CODE ANN., EST. & TRUSTS § 17-203.

individually by reference to the descriptive term for the subject of that power⁷ or (2) collectively by grant of “authority to do all acts that a principal could do.”⁸

“Hot powers”⁹ refer to nine powers, enumerated under UPOAA section 201(a), that the agent may do “on behalf of the principal or with the principal’s property only if the power of attorney *expressly grants* the agent the authority.”¹⁰ They include powers to (1) “create, amend, revoke, or terminate an inter vivos trust;” (2) “make a gift;” (3) “create or change rights of survivorship;” (4) “create or change a beneficiary designation;” (5) “delegate authority granted under the power of attorney;” (6) “waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;” (7) “exercise fiduciary powers that the principal has authority to delegate;” (8) “exercise authority over the content of electronic communications, as defined in 18 U.S.C. Section 2510(12), sent or received by the principal;” or (9) “disclaim property, including a power of appointment.”¹¹

We can observe that the hot powers relate to either delegations of fiduciary authority or to donative transfers of the principal’s property for less than full consideration. “The rationale for requiring a grant of specific authority to perform the [hot-powers] acts . . . is the risk those acts pose to the principal’s property and estate plan.”¹² The UPOAA thereby followed “a growing trend among states to require express specific authority for such actions as making a gift, creating or revoking a trust, and using other non-probate estate planning devices such as survivorship interests and beneficiary designations.”¹³

7. UNIF. POWER OF ATT’Y ACT § 202(a) (2016) (“An agent has authority described in this [article] if the power of attorney refers to general authority with respect to the descriptive term for the subjects stated in Sections 204 through 217 or cites the section in which the authority is described.”).

8. *Id.* § 201(c) (2016).

9. Julie P. Forrester, *Rethinking Powers of Attorney in Real Estate Transactions*, 71 SMU L. REV. 369, 374 n.29 (2018).

10. UNIF. POWER OF ATT’Y ACT § 201(a) (2016) (emphasis added).

11. *Id.* § 201(a)(1)–(9) (2016).

12. *Id.* § 201 cmt. (2016). See Rebecca C. Morgan & Randolph Thomas, *Financial Exploitation by Agents Under Powers of Attorney: It is a Crime!*, 34 CRIM. JUST. 31, 32 (2020) (“[T]he amount of financial exploitation committed by agents under powers of attorney . . . deserves to be the focus of this article, and to be treated as a priority by the criminal justice system.”); Linda S. Whitton, *Navigating the Uniform Power of Attorney Act*, 3 NAELA J. 1, 9–10 (2007).

13. UNIF. POWER OF ATT’Y ACT § 201 cmt. (2016) (citing CAL. PROB. CODE § 4264 (West Supp. 2006); KAN. STAT. ANN. § 58-654(f) (2005); MO. ANN. STAT. § 404.710 (West 2001); WASH. REV. CODE ANN. § 11.94.050 (West Supp. 2006)).

Note that for hot powers, except the power to “make a gift,”¹⁴ a list of subject-specific powers does not exist, nor are the incidental powers incorporated by reference for them.¹⁵ Gift-making authority therefore is a unique hot power; for it, both a list of subject-specific powers and the incorporation of incidental powers exist. Consequently, gift-making authority should be regarded in its own third category of UPOAA agent powers.

B. UPOAA Gifting-making Authority

The UPOAA places three types of restraints on gift making by agents. Separate limits exist for (1) permitted gift recipients, (2) permitted gift circumstances, and (3) permitted gift amounts.¹⁶

Permitted Gift Recipients. Under the UPOAA, unless the instrument otherwise provides, an agent who is not an ancestor, spouse, or descendant of the principal may not make a transfer to the agent (or to the agent’s dependent) by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.¹⁷ The UPOAA also places general duties on agents, separate from the gifting rules, that potentially limit an agent’s ability to make gifts to herself. Those general agent duties are of two types: minimum mandatory duties, not alterable by the instrument, and default duties. The mandatory agent duties are to: (1) act in accordance with the principal’s reasonable expectations, if known, and otherwise in the principal’s best interest; (2) act in good faith; and (3) act only within the scope of authority granted.¹⁸ The default agent duties are to: (1) act loyally; (2) act not to create conflicts of interest that impair impartiality; (3) act with ordinary care, competence, and diligence; (4) keep records of all transactions; (5) cooperate with the principal’s health care agent; and (6) attempt to preserve the principal’s estate plan.¹⁹

Permitted Gift Circumstances. Under the UPOAA, an agent may not make any gift to any person until the agent has determined that the gift is consistent with the principal’s objectives actually known by the agent, or if the principal’s objectives are unknown, “as the agent determines is consistent with the principal’s best interest based on all relevant factors, including [] (1)

14. *Id.* § 203 (2016) (granting incidental powers for sections 204 through 217; sections 204 to 216 are cold powers; section 217 is the power to make gifts).

15. Manns, *supra* note 5, at 161. UNIF. POWER OF ATT’Y ACT § 201 cmt. (2016) (“The Act does not contain statutory construction language for any of the acts enumerated in subsection (a) [the hot powers] other than the making of gifts (*see* Section 217).”).

16. Portions of this section of analysis appeared in Manns, *supra* note 5, at 169–72.

17. UNIF. POWER OF ATT’Y ACT § 201(b) (2016). That limit was considered in *Cisneros v. Graham*, 881 N.W.2d 878 (Neb. 2016), discussed *infra* Section VI.A.

18. UNIF. POWER OF ATT’Y ACT § 114(a) (2016).

19. UNIF. POWER OF ATT’Y ACT § 114(b) (2016). Factor 6 was considered in *In re Est. of Speakman*, 2017 WL 4232565, at *3–4 (Ohio Ct. App. 12th Dist. Fayette County 2017), discussed *infra* Section VI.C.

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 statute or regulation; and (5) the principal's personal history of making or joining in making gifts."²⁰

Unlike the rule regarding permitted gift recipients, the UPOAA provisions regarding permitted gift circumstances do not expressly permit waiver of those circumstances, because the phrase "except as otherwise provided" is absent. In addition, one of the three mandatory, unwaivable, general agent duties is the duty to "act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest."²¹

Permitted Gift Amounts. Under the UPOAA, an agent may not make a gift unless the instrument expressly grants the authority to "make a gift."²² Yet, for an express statement of gifting power, another rule emerges. Under the UPOAA, if an instrument simply grants the "authority to make a gift"²³ without further elaboration, the agent can make gifts, but in a quite limited amount (*i.e.*, "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)").²⁴ For 2021, section 2503(b) of the Internal Revenue Code provides that "the first \$15,000 of gifts to any person . . . are not included in the total amount of taxable gifts under § 2503 made during that year."²⁵ The per donee

20. UNIF. POWER OF ATT'Y ACT § 217(c) (2016). Factors 1–3 were considered in *In re Estate of Adelung*, 947 N.W.2d 269 (Neb. 2020), discussed *infra* Section IV.A. Factor 2 was considered in *Campbell v. Lieb*, 2018 N.M. App. 1, 6–14 Unpub. LEXIS 296, discussed *infra* Section VI.B. Factor 5 was considered in *Davis v. Davis*, 835 S.E.2d 888 (Va. 2019), discussed *infra* Section IV.B.

21. UNIF. POWER OF ATT'Y ACT § 114(a)(1) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2016). That limit was considered in *Hodgson v. Gibson*, No. 12081-MA, 2017 Del. Ch. LEXIS 32 (Del. Ch. Feb. 24, 2017), discussed *infra* Section V.A. Two other agent duties are not allowed to be altered: "[(1) to] act in good faith; and [(2) to] act only within the scope of authority granted in the power of attorney." UNIF. POWER OF ATT'Y ACT § 114(a)(2)–(3) (2016).

22. *Id.* § 201(a)(2) (2016).

23. *Id.* § 201(d) (2016).

24. *Id.* § 217(b)(1) (2016). A significant question of interpretation exists regarding the numerical limit. Does the hot-power limit renew annually or is it a single limit on the aggregate sum of all gifts to each donee whenever made under the power of attorney? See Manns, *supra* note 5, at 173 (discussing the missing modifier and the lurking single limit under the UPOAA gifting power).

25. Rev. Proc. 2020-45, 2020-46 I.R.B. (Nov. 9, 2020), § 3.43 (providing inflation-adjusted amounts for calendar year 2020 for 26 U.S.C. § 2503(b)(2)).

limit doubles “if the principal’s spouse agrees to consent to a split gift pursuant to Internal Revenue Code Section 2513”²⁶

Gift-making authority is a single-member subset of the hot powers, for which mere statement of the descriptive term “make a gift” is insufficient to grant plenary authority.²⁷ Rather, additional language is required to overcome the annual-exclusion, per-donee limit.²⁸ Thus, the power to make a gift in excess of the annual-exclusion per-donee limit can be described as a third category of agent powers, i.e., a “boiling-hot power.”²⁹

II. DONATIVE HOT-POWERS CASES IN GENERAL

Although the UPOAA was approved fifteen years ago and about thirty U.S. jurisdictions have adopted it, only a dozen or so judicial opinions address the donative hot powers, and some of them are unpublished. Consequently, while “uniformity of application and construction” is a goal of the UPOAA,³⁰ the number and availability of authorities construing and applying the donative hot-powers provisions are limited. Perhaps that is because the overwhelming majority of cases of this type settle.³¹ And, if so, that is not a recent phenomenon. In 1985, the Maryland Court of Appeals remarked that “[s]imilar to other jurisdictions, Maryland appellate courts have had relatively few occasions to analyze powers of attorney. . . . [W]e last addressed the substantive law relating to powers of attorney over a half century ago”³²

This Article analyzes fourteen donative hot-powers decisions, grouped in the following categories.

26. UNIF. POWER OF ATT’Y ACT § 217(b)(1) (2016). Split gift treatment under section 2513 means that the spouse who did not make a gift is treated as having made a gift, and the spouse who did make the gift is treated as not having made the gift—the kind of “deeming” exercise tax lawyers love. *See* 26 U.S.C.S. § 2513 (LEXIS through Pub. L. No. 117-42).

27. UNIF. POWER OF ATT’Y ACT § 217(b) (2016).

28. *Id.* at § 217 cmt.

29. Manns, *supra* note 5, at 171–72.

30. UNIF. POWER OF ATT’Y ACT § 401 (2016) (“In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.”).

31. *See* Mark R. Caldwell, Elliott E. Burdette & Edward L. Rice, *Winning the Battle and the War: A Remedies-Centered Approach to Litigation Involving Durable Powers of Attorney*, 64 BAYLOR L. REV. 435, 510 (2012) (“Perhaps no other method serves as a more powerful incentive to induce settlement than a well-drafted petition or motion for summary judgment that clearly outlines the consequences of the attorney-in-fact’s actions and his or her personal exposure.”).

32. *King v. Bankerd*, 303 Md. 98, 104, 492 A.2d 608, 611 (Md. 1985) (citing *Kaminski v. Wladerek*, 149 Md. 548, 131 A. 810 (Md. 1926)); *see* Randall D. Van Dolson & G. Warren Whitaker, *Gifts by Agents Under Durable Powers of Attorney*, 9 PROB. & PROP. 33, 38–42 (1995) (analyzing pre-UPOAA law and presenting a state-by-state survey on agent gifting authority).

*Power to Create a Trust.*³³ In one case, the power-of-attorney instrument expressly included language permitting the agent to create a trust.³⁴ Without citing the statutory requirement requiring such express powers, the appellate court concluded that the trust created by the agent did not meet the conditions, stated in the instrument, precedent to the agent's power to create a trust.³⁵

*Power to Make a Gift.*³⁶ Six cases expressly addressed an agent's power to make a gift.³⁷ At the trial court level, two cases permitted gifts,³⁸ and four cases did not.³⁹ After appellate consideration, none was permitted.⁴⁰ Three gift cases involved express grants of authority to make gifts.⁴¹ In one case, the condition precedent to making gifts had not been met.⁴² In another, the court ignored the instrument because the agent had not acted specifically pursuant to it.⁴³ In a third case, the appellate court reversed because the trial court had improperly dismissed a claim that the instrument was forged.⁴⁴

In the three cases in which gifting authority was *not* expressly granted, one case flatly invalidated all agent gifts,⁴⁵ which is the expected response under the UPOAA when the power to make gifts is not expressly granted. However, in the second case, when reversing the trial court's permitting of the gifts, the appellate court noted the lack of the hot power and also had to analyze its state's cold gift-making authority.⁴⁶ In the third case the court analyzed an agent's gifts to herself as a matter of fairness.⁴⁷ Under the UPOAA, this appears unnecessary because when an agent lacks express authority to make gifts, all gifts are invalid whether fair or not.

33. UNIF. POWER OF ATT'Y ACT § 201(a)(1) (2016).

34. *Liberty Bank of Ark. v. Byrd*, 2016 Ark. App. 86, 7, 482 S.W.3d 746, 750.

35. *Id.* at 7–8, 482 S.W.3d at 750–51.

36. UNIF. POWER OF ATT'Y ACT § 201(a)(2) (2016).

37. *In re Estate of Adelong*, 306 Neb. 646, 947 N.W.2d 269 (Neb. 2020); *Davis v. Davis*, 298 Va. 157, 835 S.E.2d 888 (Va. 2019); *In re Estate of Smith*, 164 Idaho 457, 432 P.3d 6 (2018); *Estate of Gagnon*, 2016 ME 129, 147 A.3d 356 (Me. 2016); *Chichester v. Cook*, 234 W. Va. 183, 764 S.E.2d 343 (W. Va. 2014); *Degroat v. Papa*, No. 12738-VCZ, 2020 Del. Ch. LEXIS 169 (Del. Ch. Apr. 30, 2020).

38. *Davis*, 298 Va. at 166, 835 S.E.2d at 891; *Chichester*, 234 W. Va. at 187, 764 S.E.2d at 347.

39. *Adelong*, 306 Neb. at 654, 947 N.W.2d at 280; *Smith*, 164 Idaho at 466, 432 P.3d at 15; *Gagnon*, 2016 ME at P7, 147 A.3d at 358–59; *Degroat*, 2020 Del. Ch. LEXIS at 67–68.

40. *See infra* Section IV.A–F.

41. *Adelong*, 306 Neb. at 651–52, 947 N.W.2d at 278–79; *Chichester*, 234 W. Va. at 185, 764 S.E.2d at 345; *Gagnon*, 2016 ME at P4, 147 A.3d at 358.

42. *Adelong*, 306 Neb. at 679, 947 N.W.2d at 294.

43. *Gagnon*, 2016 ME at P14, 147 A.3d at 360.

44. *Chichester*, 234 W. Va. at 191, 764 S.E.2d at 351.

45. *Smith*, 164 Idaho at 473, 432 P.3d at 22.

46. *Davis v. Davis*, 298 Va. 157, 168–72, 835 S.E.2d 888, 892–95 (2019).

47. *In re Estate of Degroat*, No. 12738-VCZ, 2020 Del. Ch. LEXIS 169, at 35–36 (Apr. 30, 2020).

Gift-making Hot-Power Requirements Ignored. Against that strong denial of agent-gifting are two cases in which courts permitted transactions by agents that significantly benefited the agents. In the first, to fund his father's care an agent chose to sell property that was specifically devised to his stepmother, rather than expend property that would become the agent's upon his father's death.⁴⁸ In the second, an agent expended over \$900,000 of his principal's funds to maintain a residence that the agent owned.⁴⁹

*Power to Change a Beneficiary Designation.*⁵⁰ Three cases involved the agent's changing a beneficiary designation. In only one did the court expressly apply the UPOAA.⁵¹ That case involved an agent's collecting a certificate of deposit, which had a beneficiary designation, and depositing the proceeds into a checking account of which the agent was a joint owner with the principal.⁵² Rather than decide the case as one in which that section 201(a)(4) hot power had not been expressly granted, the court determined that the larger agent restriction in section 201(b) applied.⁵³ In two cases, the courts failed to recognize that the power to change a beneficiary designation must be expressly granted. In the first, an agent removed a beneficiary designation that shifted ultimate disposition of the property from his father's caregiver to himself, and there was no indication that the beneficiary-change hot power had been granted.⁵⁴ In the second, an agent removed a beneficiary designation, and the agent did not personally benefit from the removal, yet the court never addressed whether the agent had expressly been granted power to create or change a beneficiary designation.⁵⁵

Other Self-interested Agent Transactions. Two cases involved allegations of self-interested or fraudulent transfers by agents.⁵⁶ In them, the trial court dismissed the cases without addressing the merits of those claims.⁵⁷ In each, the appellate court reversed and remanded for them to be addressed.⁵⁸

48. *Hodgson v. Gibson*, No. 12081-MA, 2017 Del. Ch. LEXIS 32, at 2–4 (Feb. 24, 2017).

49. *Miller v. Miller*, 935 N.E.2d 729, 736, 742 (Ind. Ct. App. 2010).

50. UNIF. POWER OF ATT'Y ACT § 201(a)(4) (2016).

51. *Cisneros v. Graham*, 294 Neb. 83, 84–85, 881 N.W.2d 878, 881 (2016).

52. *Id.* at 86–87, 881 N.W.2d at 881–82.

53. *Id.* at 94, 881 N.W.2d at 886 (citing NEB. REV. STAT. § 30-4024(2) and noting that it is almost identical to Unif. Power of Att'y Act § 201(b) (2016), “with the main difference being that [the UPOAA] uses the word ‘descendant’ whereas [the NUPOAA] uses the word ‘issue.’”).

54. *Campbell v. Lieb*, No. A-1-CA-35487, 2018 N.M. App. LEXIS 296., at *1–2, 9 (Aug. 7, 2018).

55. *In re Estate of Speakman*, No. CA2016-11-017, 2017 Ohio App. LEXIS 4151 (Sept. 25, 2017).

56. *Norvell v. Norvell*, 275 So.3d 497 (Ala. 2018); *Ibru v. Ibru*, 239 Md. App. 17, 194 A.3d 424 (2018).

57. *Norvell*, 275 So.3d at 501; *Ibru*, 239 Md. App. at 30–31, 194 A.3d at 432.

58. *Norvell*, 275 So.3d at 507; *Ibru*, 239 Md. App. at 49, 194 A.3d at 443–44.

Note that three of the cases discussed are “unpublished.”⁵⁹ With the present widespread availability on the internet of electronic versions of “unpublished decisions,” that status becomes less relevant. The precedential value of unpublished decisions varies by jurisdiction,⁶⁰ yet even when non-precedential, the cases demonstrate how courts are deciding issues involving agents acting under powers of attorney when the UPOAA governs.

III. POWER TO CREATE A TRUST

A. Liberty Bank of Arkansas v. Byrd

In *Liberty Bank of Arkansas v. Byrd*,⁶¹ a child of the principal, and executor of his mother’s estate, sued the successor trustee of his stepfather’s trust, alleging that the stepfather improperly used a power of attorney to transfer to the stepfather’s trust property jointly held by the spouses.⁶² After a bench trial, the trial court found that the agent had breached his fiduciary duty because the agent could not overcome a presumption of undue influence.⁶³ The trial court imposed a constructive trust on the stepfather’s trust assets in favor of the executor of the mother’s estate.⁶⁴ The Court of Appeals of Arkansas affirmed.⁶⁵

During the marriage, the wife transferred about \$1 million of separately owned assets to herself and her husband as joint tenants with the right of survivorship.⁶⁶ The husband individually created a revocable trust and, while the wife was incapacitated, used a power of attorney to transfer that jointly held property to the trust.⁶⁷ The trust instrument provided that after the husband’s death, “all of the trust income and any needed principal” would benefit his wife, but upon her death substantially all of the trust property would be paid to the *husband’s* descendants.⁶⁸

59. *In re Estate of Degroat*, No. 12738-VCZ, 2020 Del. Ch. LEXIS 169 (Apr. 30, 2020); *Campbell*, 2018 N.M. App. LEXIS 296; *Hodgson v. Gibson*, No. 12081-MA, 2017 Del. Ch. LEXIS 32 (Feb. 24, 2017).

60. Merritt E. McAlister, “Downright Indifference”: Examining Unpublished Decisions in the Federal Courts of Appeals, 118 MICH. L. REV. 533, 549–61 (2020); Elizabeth Earle Beske, *Rethinking the Nonprecedential Opinion*, 65 UCLA L. REV. 808, 811–13 (2018).

61. 2016 Ark. App. 86, 482 S.W.3d 746.

62. *Id.* at 3, 482 S.W.3d at 748.

63. *Id.* at 4–5, 482 S.W.3d at 748–49.

64. *Id.* at 4–5, 482 S.W.3d at 749.

65. *Id.* at 10, 482 S.W.3d at 752.

66. *Id.* at 1–3, 482 S.W.3d at 747.

67. *Byrd*, 2016 Ark. App. at 2, 482 S.W.3d at 747–48.

68. *Id.* at 2 n.1, 482 S.W.3d at 748 n.1.

In its de novo review,⁶⁹ and without analyzing the subject as a hot power (a subject for which a power must be expressly granted), the appellate court noted that the power-of-attorney instrument provided that the agent “could execute a trust instrument with dispositive provisions identical to [the principal’s] existing 2004 will.”⁷⁰

However, the court noted, “the trust instrument [executed by the agent] provided that upon [the principal’s] death, the jointly held assets were to be disposed of according to [the agent’s] estate plan, not [the principal’s] plan.”⁷¹ The court quoted the UPOAA provision that an agent “shall attempt to preserve the principal’s estate plan, to the extent actually known by the agent.”⁷² And, the court noted, “[i]t is undisputed that [the agent] knew the details of [the principal’s] estate plan.”⁷³ Thus, the court concluded, the trial court “correctly found that [the agent’s] actions were contrary to [the principal’s] testamentary intent and plan.”⁷⁴

IV. POWER TO MAKE A GIFT

A. In re Estate of Adelung

In *In re Estate of Adelung*,⁷⁵ the Supreme Court of Nebraska considered a case in which one sibling acting as personal representative of their parent’s estate sued another sibling, who had acted as their parent’s agent, for an

69. *Id.* at 5, 482 S.W.3d at 749 (“Arkansas appellate courts have traditionally reviewed matters that sounded in equity de novo on the record with respect to factual and legal questions.”).

70. *Id.* at 7, 482 S.W.3d at 750.

71. *Id.* at 8, 482 S.W.3d at 750.

72. *Id.* at 7, 482 S.W.3d at 750 (citing ARK. CODE ANN. § 28-68-114(b)(6)) (emphasis in original).

73. *Byrd*, 2016 Ark. App. at 7, 482 S.W.3d at 750.

74. *Id.* at 8, 482 S.W.3d at 750. The court also rejected the argument that the husband, as a co-owner of the jointly held assets, had the authority to make the transfers. The court, reviewing rules for joint ownership, stated (1) that a spouse’s right of survivorship can be dissolved voluntarily only by the action of both parties, (2) that the wife’s interest continued after the transfer to trust, and (3) that upon the husband’s death, the wife as surviving joint tenant became entitled to all of the jointly held assets transferred to trust. *Id.*, 482 S.W.3d at 751. Because of that last point, it seems that any contribution that the husband had made to the jointly held assets transferred to the trust was of no moment. As survivor, wife owned all. *Id.*

75. *In re Estate of Adelung*, 306 Neb. 646, 947 N.W.2d 269 (2020). The case featured an extended discussion of jurisdiction in Nebraska courts and ultimately concluded that the Nebraska Uniform Power of Attorney Act (NUPOAA) expanded “county court jurisdiction to ‘construe a power of attorney or review the agent’s conduct and grant appropriate relief.’” *Id.* at 663, 947 N.W.2d at 285 (quoting NEB. REV. STAT. § 30-4016(1)). And, “In common-law and equity actions relating to decedents’ estates, the county court has concurrent original jurisdiction with the district court.” *Id.* at 665, 947 N.W.2d at 286.

accounting.⁷⁶ The agent had (1) collected and retained for himself rents belonging to the decedent arising from the decedent's life estate in a farm and (2) had written checks on the decedent's funds to himself and to others.⁷⁷ The trial court determined amounts for each of the two categories that "were improperly obtained"⁷⁸ and entered judgment for the estate.⁷⁹ The agent appealed, and the Nebraska Supreme Court conducted a *de novo* review.⁸⁰

The agent acted under a 2008 instrument and engaged in transactions both before and after the effectiveness of the Nebraska Uniform Power of Attorney Act (NUPOAA),⁸¹ which became effective January 1, 2013.⁸² UPOAA section 403 addresses the UPOAA's effect on powers of attorney existing at the Act's effectiveness,⁸³ and the NUPOAA adopted section 403 without substantive change.⁸⁴ The parties disputed the application of section 403(4) that provides "an act done before [the effective date of this [act]] is not affected by this [act]."⁸⁵ The Nebraska Supreme Court stated that its "research did not uncover an examination by any court of language similar to that in § 403(4)."⁸⁶

76. *Id.* at 653, 947 N.W.2d at 279. The plaintiff also alleged breach of fiduciary duty, unjust enrichment, and conversion. *Id.* However, the court said that those claims were actions at law and "[b]ecause the county court treated the matter as an equity action, it necessarily tried the case on some basis other than conversion or unjust enrichment." *Id.* at 656, 947 N.W.2d at 281.

77. *Id.* at 650, 947 N.W.2d at 277.

78. *Id.* at 654, 947 N.W.2d at 280.

79. *Id.* ("The [trial] court entered judgment against [the agent]. It determined that the value of the improperly obtained farm income was \$114,550 and that together with the improper gifts obtained by [the agent], he must reimburse the estate \$190,550.")

80. *Id.* at 656, 947 N.W.2d at 281 ("Equity questions arising in appeals involving the Nebraska Probate Code are reviewed *de novo*.")

81. Regarding pre-NUPOAA Nebraska law and gifting authority, the court stated, "No gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument and there is shown a clear intent on the part of the principal to make such a gift." *Adelung*, 306 Neb. at 673, 947 N.W.2d at 291 (citing *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003)). Oddly, during this part of its analysis, the court did not refer to the instrument's language regarding gifts—although it would when reviewing the propriety of the agent's post-NUPOAA acts. *Id.* at 678, 947 N.W.2d at 294. The court noted that the agent argued "that he did not use the power of attorney to collect the farm rents." *Id.* at 673, 947 N.W.2d at 291. The court simply concluded that "[o]ther than [the agent's] relationship as the decedent's agent, the record does not establish any basis during the decedent's lifetime enabling [the agent] to collect [and keep for himself] the farm rents." *Id.* at 674, 947 N.W.2d at 292.

82. *Id.* at 666–67, 947 N.W.2d at 287.

83. UNIF. POWER OF ATT'Y ACT § 403 (NAT'L CONF. COMM'RS ON UNIF. STATE L. 2016).

84. *Adelung*, 306 Neb. at 669, 947 N.W.2d at 288–89.

85. UNIF. POWER OF ATT'Y ACT § 403(4) (2016).

86. *Adelung*, 306 Neb. at 667, 947 N.W.2d at 288 (citing NEB. REV. STAT. § 30-4045(4)).

Quoting the official commentary to the Uniform Trust Code on the analogous matter of acts by a trustee prior to the effectiveness of that Code,⁸⁷ the court held that “the plain language of the statute makes it clear that the NUPOAA does not apply retroactively to acts done before its effective date.”⁸⁸ Thus, the NUPOAA applied to acts done between January 1, 2013, and the principal’s death.⁸⁹

For acts to which the NUPOAA applied, the court first concluded, “We are not persuaded that the drafters of the uniform act or the Nebraska Legislature intended to loosen the rule of strict construction with respect to gift making.”⁹⁰ The agent argued that the following UPOAA provision overturned the rule of strict construction: “if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.”⁹¹ The court responded, “At least as to gifts made by an agent, we disagree.”⁹² The court noted that the text of the UPOAA’s broadest-authority-controls rule expressly excepts from its application the requirement that the hot powers be expressly granted.⁹³

The court then turned to the instrument’s language regarding “gifting”:

Gifting. To carry out on my behalf any plan or pattern of gifting to my issue, including gifting to my Agent, which had apparently been established or clearly contemplated by myself. In determining whether to initiate or continue any such gifting plan, my Agent shall give consideration to the size of my estate in light of what might reasonably be anticipated as my future needs and the potential federal estate taxes which may be due upon my death in order that such taxes may be lessened or eliminated. If a gifting plan has not been initiated by me, my Agent shall have complete discretion to make gifts to my issue, including making gifts to my Agent, after consideration of the foregoing factors.⁹⁴

87. *Id.* (quoting UNIF. TR. CODE § 1106, cmt., 7D U.L.A 380 (2018)).

88. *Id.* at 669, 947 N.W.2d at 288–89.

89. The court concluded that the statute of limitations barred liability for acts prior to February 1, 2012. *Id.* at 672, 947 N.W.2d at 290. “Although [defendant agent] raised the statute of limitations below, the county court’s judgment made no mention of it.” *Id.* at 670, 947 N.W.2d at 289.

90. *Id.* at 678, 947 N.W.2d at 294.

91. *Id.* at 676, 947 N.W.2d at 293.

92. *Adelung*, 306 Neb. at 676, 947 N.W.2d at 293. However, the court’s analysis does suggest that the UPOAA alters the rule of strict construction for cold powers.

93. *Id.* at 293 (citing NEB. REV. STAT. § 30-4024(5), which is substantially similar to UNIF. POWER OF ATT’Y ACT § 201(e) (2016)). UPOAA section 201(e) provides, “Subject to subsections (a), (b), and (d), if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.” UNIF. POWER OF ATT’Y ACT § 201(e) (2016). UPOAA section 201(a) states the hot powers that arise “only if the power of attorney expressly grants the agent the authority.” *Id.* § 201(a).

94. *Adelung*, 306 Neb. at 678, 947 N.W.2d at 294.

The court stated that the language was at most a general grant that did not specifically refer to the agent's keeping farm rentals for himself or to the agent's making checks payable to the agent or his spouse or child.⁹⁵

The court noted that the instrument stated only two reasons for making gifts: reasonably anticipated needs of the principal and reducing federal estate taxes.⁹⁶ Neither objective had been furthered by the gifts made by the agent. First, the agent testified that the decedent "had less than \$50,000 in the bank" and was "broke,"⁹⁷ and second, an "accountant testified that 'currently, you could pass through your estate over 12 million without any federal estate tax.'"⁹⁸ Thus, the court said, "[u]pon our de novo review, we are not persuaded that the provisions of the NUPOAA authorized the gifts [the agent] made on the decedent's behalf."⁹⁹

Consequently, in *Adelung*, although the instrument expressly authorized gifts, expressed conditions precedent to that authority had not been met. Because gifting authority under the instrument had not been triggered, the court did not address whether the instrument expanded the UPOAA's otherwise applicable annual exclusion limit.

B. Davis v. Davis

In *Davis v. Davis*,¹⁰⁰ the Supreme Court of Virginia reversed a trial court's order validating over \$2 million in gifts made by an agent because the power-of-attorney instrument did not expressly grant the agent power to make gifts and the terms of Virginia's cold-gifting power had not been met.¹⁰¹ In *Davis*, the principal was rendered a quadriplegic in 1993,¹⁰² and soon thereafter¹⁰³ appointed his mother as agent under a power of attorney.¹⁰⁴ For the next twenty years, the principal lived on the family farm, in his mother's house. He was cared for by his mother, by his sister, and by Rae, an employee of the farm.¹⁰⁵

95. *Id.*

96. *Id.* at 679, 947 N.W.2d at 294.

97. *Id.*

98. *Id.* No authority, other than quoting the accountant's testimony, is given for the "over 12 million" amount. *Id.*

99. *Id.*, 947 N.W.2d at 294–95.

100. 298 Va. 157, 835 S.E.2d 888 (2019).

101. *See id.* at 176, 835 S.E.2d at 897.

102. *Id.* at 162, 835 S.E.2d at 889.

103. The court noted that "the power of attorney involved in this appeal was executed in September of 1993." *Id.* at 168, 835 S.E.2d at 892 n.3 (noting that the VaUPOAA applied to powers of attorney created before its enactment).

104. *Id.* at 163, 835 S.E.2d at 889.

105. *Id.*, 835 S.E.2d at 889–90.

In May 2013, the principal was hospitalized and subsequently moved to a nursing facility.¹⁰⁶ The principal and Rae married on October 1, 2013, “in a closed-door ceremony conducted in [the principal’s] room” in the nursing facility without any of the principal’s family present.¹⁰⁷ Two weeks later, “[o]n October 15, 2013, [the agent] learned of the marriage from a friend who noticed that Rae had changed her last name . . . to [the principal’s last name] on a popular social media website.”¹⁰⁸

Ten days later, “on October 25, 2013, [the principal] triggered a ‘code blue,’ which indicated that he was incapacitated and in jeopardy of dying.”¹⁰⁹ The hospital staff informed the agent of the principal’s condition.¹¹⁰ Six days later, the salient events leading to the litigation occurred:

On October 31, 2013, using the power of attorney [the principal] had given her, [the agent] transferred the vast majority of [the principal’s] personal property to herself. She also executed three deeds of gift transferring all of [the principal’s] real property to [the principal’s sister and brother]. The value of the property subject to these transfers was over \$2 million. [The agent] did not inform [the principal] of these transfers. [The principal] subsequently passed away on November 15, 2013.¹¹¹

The executor of the principal’s estate filed an action seeking “aid and direction regarding the validity of [the agent’s] transfers of [the principal’s] property just prior to his death and the interpretation of [the principal’s] will.”¹¹² The agent testified that (1) although she knew that the principal had made a will, she did not know of the will’s contents, and (2) she made “the transfers of [the principal’s] property to protect it for [the principal] and to have it in ‘safer hands’ until things cleared up with his health.”¹¹³ The trial court concluded that the property transfers made by the agent were valid because they were authorized by both the instrument’s “sell and convey” language and by Virginia’s addition to the UPOAA that grants an “all-acts” agent power to continue the principal’s “personal history of making lifetime gifts.”¹¹⁴

The Supreme Court of Virginia reversed. It first stated its standards of review. “We review the legal effect of a written power of attorney document

106. *Davis*, 298 Va. at 164, 835 S.E.2d at 890.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Davis*, 298 Va. at 164, 835 S.E.2d at 890.

113. *Id.* at 165, 835 S.E.2d at 890.

114. *Id.* at 166, 835 S.E.2d 891. See Manns, *supra* note 5, at 183–84.

de novo.”¹¹⁵ And, “In interpreting a power of attorney document, we employ both statutory principles from the [Virginia] Uniform Power of Attorney Act . . . and common law principles.”¹¹⁶ Next, the court noted, “When examining the power of attorney document to determine the existence of express authority, we thus strictly construe the document’s language and give its terms their obvious meaning.”¹¹⁷

In its “strict construction” analysis, the court first considered whether the instrument’s “sell and convey” language “include[d] the authority to make gifts or transfers for inadequate consideration.”¹¹⁸ The court noted that “[a]lthough ‘convey,’ standing alone, includes the ability to make gifts, [the agent in the present case] only has the authority to ‘sell *and* convey.’”¹¹⁹ Regarding that legal doublet, the court noted the following:

Because we construe powers of attorney strictly and Code § 64.2-1622(A)(2) [UPOAA § 201(a)(2)] requires a power to be “expressly granted,” “sell and convey” should be construed narrowly. Strictly construed and employing its obvious meaning, “sell and convey” does not include the authority to make gifts or transfers for inadequate consideration.¹²⁰

In a standard UPOAA jurisdiction, that first conclusion—that the instrument did not expressly authorize the agent to make a gift—would have ended the case.¹²¹ However, the Supreme Court of Virginia had to consider Virginia’s addition to the UPOAA that grants an “all-acts” agent power to “make gifts in any amount of any of the principal’s property to any individuals [or entities] in accordance with the principal’s personal history of making or

115. *Id.* at 168, 835 S.E.2d at 892 (citing *Jones v. Brandt*, 274 Va. 131, 135, 645 S.E.2d 312 (2007)).

116. *Id.* (citing VA. CODE ANN. §§ 64.2-1600 et seq., 64.2-1619).

117. *Id.* at 169, 835 S.E.2d at 893 (citing *Jones*, 274 Va. at 137, 645 S.E.2d 312; *Walker v. Temple*, 130 Va. 567, 570, 107 S.E. 720 (1921)). The two cited cases were decided before enactment of the VaUPOAA. How a rule of strict construction of “the document’s language” survives the UPOAA is not clear; for instance, the UPOAA permits a vast amount of incorporation by reference, (a one-line instrument generates about twelve pages of incorporated words), and the UPOAA expressly provides that on overlap, the broadest grant controls. UNIF. POWER OF ATT’Y ACT § 201(e) (2016).

118. *Davis*, 298 Va. at 170, 835 S.E.2d at 893.

119. *Id.* (emphasis in original).

120. *Id.*

121. The court further concluded that even if the instrument’s “sell and convey” language constituted an express power to make gifts, the trial court erred in not applying the annual exclusion [\$14,000 for the relevant year] “per recipient limit to the over \$2 million of property that [the agent] transferred to herself and her surviving children.” *Id.* at 171, 835 S.E.2d at 894 (citing VA. CODE ANN. § 64.2-1638(B)(1), which is substantially similar to UNIF. POWER OF ATT’Y ACT § 217(b)(1) (2016)).

joining in the making of lifetime gifts.”¹²² The court assumed, without deciding the point, that the instrument gave the agent “the authority to ‘do all acts that a principal could do.’”¹²³

Oddly, in construing that not-uniform part of the VaUPOAA,¹²⁴ the Supreme Court of Virginia first noted, “In construing the Uniform Power of Attorney Act, ‘consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.’”¹²⁵ Then, the Supreme Court of Virginia stated that “[w]hether a transaction is a gift is a question of law we review de novo.”¹²⁶

The court reviewed the circumstances of the principal’s history of gift giving and found that “[t]here is insufficient evidence to support the [trial] court’s conclusion that [the agent’s] transfers were in accordance with [the principal’s] personal history of making lifetime gifts, and the [trial] court erred”¹²⁷ The court analyzed three transactions the principal conducted: (1) a ninety-year land lease for \$1,000 to a son of Rae (made about five years before the principal and Rae married); (2) permitting the leased land to collateralize a loan to Rae’s son to build a barn on the leased land; and (3) giving \$10,000 to the principal’s brother.¹²⁸ Regarding the first two transactions, the court concluded that “[b]ecause there was valid consideration, the ninety-year lease and the use of the leased property as collateral were not gifts made by [the principal].”¹²⁹

However, the court then stated that even if the lease and the use of the leased property as collateral were lifetime gifts by the principal, the gifts made by the agent “were not in accord with these gifts given by [the principal].”¹³⁰

122. *Id.* at 171–72, 835 S.E.2d at 894 (quoting VA. CODE ANN. § 64.2-1622(H)).

123. *Id.* at 172, 835 S.E.2d at 894 n.4. The court noted, “The power of attorney document’s full context therefore suggests that [the agent] did not have the authority to do ‘all acts’ on [the principal’s] behalf, but only those acts pertaining to managing [the principal’s] financial and business affairs. No party raised this argument. We therefore will assume without deciding that Code § 64.2-1622(H) applies to [the principal’s] power of attorney.” *Id.* The instrument was executed in 1993, long before the UPOAA was drafted. *Id.* at 163, 835 S.E.2d at 889. Not surprisingly, the instrument does not track the “all acts” language of the VaUPOAA.

124. Strangely, when addressing the first issue of whether the instrument expressly grants authority to make gifts—which is part of the UPOAA—the Supreme Court of Virginia did not mention the promotion of uniformity. *See Davis*, 298 Va. at 168–71, 835 S.E.2d at 892–94.

125. *Id.* at 172, 835 S.E.2d at 894–95 (quoting VA. CODE ANN. § 64.2-1640).

126. *Id.* at 174, 835 S.E.2d at 895 (citing *Smith v. Mountjoy*, 280 Va. 46, 53, 694 S.E.2d 598 (2010)). *Smith v. Mountjoy* made a baffling definition of consideration when deciding whether an agent had made a gift. *See generally* F. Philip Manns Jr., *Smith v. Mountjoy: Confusing Power and Duty*, 22 TRUSTS & ESTATES NEWSLETTER 11 (Winter 2010) (published by the Virginia State Bar Trusts & Estates Section).

127. *Davis*, 298 Va. at 176, 835 S.E.2d at 897.

128. *Id.* at 173–74, 835 S.E.2d at 895.

129. *Id.* at 174, 835 S.E.2d at 896.

130. *Id.* at 175, 835 S.E.2d at 896.

It noted that the agent's gifts were transfers of real and personal property while the principal's transactions had been a lease and a security agreement.¹³¹ In addition, the \$10,000 gift to his brother was not a conveyance of real or *tangible* personal property, and it had been a one-time transfer.¹³² The court noted the one-time aspect to distinguish *Ridenour v. Commissioner*,¹³³ in which the principal had a history of making annual exclusion gifts to his family.¹³⁴

Regarding the general nature of the principal's personal history of making gifts, the court noted, "There was no evidence at trial showing that [the principal] had ever gifted his real or personal property in fee simple to anyone—much less gifted property valued over \$2 million."¹³⁵ Finally, the court declared that the agent's transfers fell outside Virginia's cold-gifting power for another reason: the transfers were gifts *causa mortis* rather than the "lifetime gifts" authorized in the Virginia cold-gifting power.¹³⁶ Because the instrument had not expressly granted the agent power to make gifts and the terms of Virginia's cold-gifting power had not been met, the court reversed. "[W]e hold that the [trial] court erred in holding that [the agent] had the authority to execute the transfers which gifted [the principal's] real and personal property to herself and her surviving children, and we rule that such transfers were invalid."¹³⁷

C. Estate of Smith

In *Estate of Smith*,¹³⁸ the Supreme Court of Idaho affirmed a trial court's setting aside, by summary judgment, of a series of transactions entered into by an agent because the power-of-attorney instrument did not expressly grant the agent power to make gifts.¹³⁹ In 2008, the principal executed a power of attorney naming as agent her son, who also was an attorney at law.¹⁴⁰ On July

131. *Id.*

132. *Id.* In this section, the court inserted the adjective "tangible" because the principal had given "personal property" (cash) to his brother. In the next paragraph, the court said that there was no evidence that the principal "had ever gifted his real or personal property" to anyone. *Id.* at 176, 835 S.E.2d at 896.

133. *Davis*, 298 Va. at 173, 835 S.E. 2d at 896.

134. *Id.* at 173, 835 S.E.2d at 895.

135. *Id.* at 175–76, 835 S.E.2d at 896.

136. *Id.* In Virginia, the principal's personal history of making gifts grants an all-acts agent power to make gifts. VA. CODE ANN. § 64.2-1622(H) (2021). Under the UPOAA, that history is not an independent source of agent power; rather, if an agent is expressly granted the power to make gifts, the principal's gift-giving history is a factor for the agent to consider when deciding whether to make gifts. UNIF. POWER OF ATT'Y ACT § 217(c)(5) (2016).

137. *Davis*, 298 Va. at 176, 835 S.E.2d at 897.

138. *In re Estate of Smith*, 164 Idaho 457, 432 P.3d 6 (2018).

139. *Id.* at 473, 432 P.3d at 22.

140. *Id.* at 463–64, 432 P.3d at 12–13.

3, 2012, the agent formed an LLC; he and his mother were the only members.¹⁴¹ The day after the LLC's formation, the agent, acting under the 2008 instrument, first transferred all of his mother's real and personal property to the LLC, for \$10, and then transferred all of his mother's interest in the LLC to himself for \$10.¹⁴² The Supreme Court of Idaho noted that "[b]y the end of the day on July 4, 2012, [the agent] had exclusive ownership and control of all of [the principal's] assets."¹⁴³

After the principal's death, another of her sons challenged the transactions pursuant to section 116 of Idaho's version of the UPOAA.¹⁴⁴ The defendant agent advanced three "standing" arguments against the plaintiff's brother's claims.

First, the agent argued that section 116 relief must be sought while the principal is alive, citing a Delaware Court of Chancery decision making that conclusion under the Delaware Act.¹⁴⁵ The Supreme Court of Idaho indicated that although the UPOAA could be clearer on the point, it would not "impos[e] a time limitation on the filing of petitions where one cannot be found in the statutory text."¹⁴⁶

Second, the agent argued that his brother lacked "successor-in-interest" standing under section 117, because the brother was not entitled to property under the principal's Will.¹⁴⁷ The court agreed that, at the time of the trial proceeding, the brother was not a "successor in interest" but stated that section 117 "is not designed as a second standing requirement."¹⁴⁸ Rather, the court said, the statute "prescribes the means by which a court can impose liability against an agent who is found to have violated the Act."¹⁴⁹ Those remedies include "requiring the agent to restore the value of improperly transferred property."¹⁵⁰

141. *Id.* at 465, 432 P.3d at 14.

142. *Id.* at 465, 473, 432 P.3d at 14, 22.

143. *Id.* at 465, 432 P.3d at 14.

144. *Smith*, 164 Idaho at 469, 432 P.3d at 18. Idaho's version of section 116 is identical to the UPOAA, except that Idaho added a paragraph permitting a court to award reasonable attorney fees and costs to a prevailing party. IDAHO CODE ANN. § 15-12-116(3) (2021).

145. *Smith*, 164 Idaho at 470, 432 P.3d at 18–19 (citing *In re Edward J. Burke Estate*, C.A. No. 10768-MA, 2016 Del. Ch. LEXIS 121, 2016 WL4217752, at *4–5 (Del. Ch. Aug. 10, 2016)). The Delaware Act is substantially similar to the UPOAA. See *ACTEC 50-State (Plus D.C.) Survey of Powers of Attorney*, *supra* note 4, at 10.

146. *Smith*, 164 Idaho at 470, 432 P.3d at 19.

147. It appears that the plaintiff brother ultimately became entitled to property from the principal's estate as intestate successor when the will, a holographic one naming the agent as sole beneficiary, was set aside as the product of undue influence. *Id.* at 466, 432 P.3d at 15.

148. *Id.* at 470, 432 P.3d at 19 (citing IDAHO CODE ANN. § 15-12-117 (2021), which is identical to UNIF. POWER OF ATT'Y ACT § 117 (2016)).

149. *Smith*, 164 Idaho at 470, 432 P.3d at 19.

150. *Id.*

Third, the agent argued that his brother lacked standing to demand an accounting under section 114(h). While apparently agreeing that the brother did not “fit one of the roles that the statute enables to request an accounting,”¹⁵¹ the court added that the agent’s “argument neglects the fact that the accounting here was ordered by the [trial] court pursuant to its own statutorily provided authority.”¹⁵²

Having established both the brother’s standing to seek judicial review of the agent’s conduct and the trial court’s authority to order an accounting, the Supreme Court of Idaho addressed the agent’s contentions that the transactions were authorized by the instrument.¹⁵³ The agent first argued that the transactions were not gifts, because they were supported by consideration, and second that even if they were gifts, the instrument expressly authorized them.¹⁵⁴

The court, citing the Restatement (Second) of Contracts, concluded that “disparity [in value] is enough for us to inquire into the adequacy of consideration and to conclude that the transactions were indeed gifts.”¹⁵⁵ Regarding its finding of disparity, the court stated, “In this case, the entirety of [the principal’s] assets, which included at least \$1,000,000 in real property, was transferred to [the LLC] for \$10 and other nominal and past consideration. These same values were then once again on the move when [the agent] transferred [the principal’s] membership interest in [the LLC] to himself.”¹⁵⁶

Having found that the transactions were gifts, the court turned to whether the instrument authorized them. As the court noted, the question turned on “the specificity of language required to authorize gift-making ability and satisfy the requirement under [UPOAA section 201(a)(2)].”¹⁵⁷ The court then stated, “Language in the 2008 power of attorney certainly overlaps with many instances that generically could be considered gift making; however, on its face, the power of attorney does not use the explicit statutory phrase ‘make a gift.’”¹⁵⁸

151. *Id.*

152. *Id.* The statutory structure here is clear. Under UPOAA section 116, a descendant of the principal can “petition a court to construe a power of attorney or review the agent’s conduct, and grant appropriate relief.” UNIF. POWER OF ATT’Y ACT § 116 (2016). Under UPOAA section 114(h), certain persons can require an agent “to disclose receipts, disbursements, or transactions conducted on behalf of the principal.” A descendant of the principal is not on the section 114(h) list, so she cannot seek an accounting. However, the descendant can seek judicial relief, and as part of its “relief,” the court can order the accounting because “a court” is on the section 114(h) list. UNIF. POWER OF ATT’Y ACT § 114(h) (2016).

153. *Smith*, 164 Idaho at 472, 432 P.3d at 21.

154. *Id.* at 472–73, 432 P.3d at 21–22.

155. *Id.*

156. *Id.* at 473, 432 P.3d at 22.

157. *Id.* (citing IDAHO CODE ANN. § 15-12-201(1)(b) (2021)).

158. *Id.* at 473, 432 P.3d at 22.

The court quoted and contrasted the Idaho Statutory Form Power of Attorney that has two provisions regarding making gifts. The first, like the UPOAA Statutory Form, grants power to “**Make a gift**, subject to the limitations of the uniform power of attorney act, chapter 12, title 15, Idaho Code, and any special instructions in this power of attorney.”¹⁵⁹ When initialed by the principal, that power would be subject to the annual exclusion limit.¹⁶⁰ The second, a not-uniform addition, grants power to “**Make a gift** without limitations except any special instructions in this power of attorney.”¹⁶¹ When initialed by the principal, that power would not be subject to the annual exclusion limit.¹⁶²

The court concluded, “Given the clear mandate under [UPOAA section 201(a)(2)] and the significance the Act places on unmistakably defining grants of specific authority, we hold that the 2008 power of attorney did not expressly authorize gift-making ability and that therefore [the agent’s] transactions were correctly invalidated by the [trial] court.”¹⁶³

D. Estate of Gagnon

In *Estate of Gagnon*,¹⁶⁴ the court did not address UPOAA hot-powers issues, even though the principal had “signed a durable power of attorney appointing” an agent.¹⁶⁵ In that case, both the trial court and the Supreme Judicial Court of Maine decided that the Maine Uniform Power of Attorney Act did not apply because the agent had not acted “specifically pursuant to the power of attorney.”¹⁶⁶

In 2005, the principal asked a nephew “to assist her with her financial affairs.”¹⁶⁷ Apparently, no documents were executed at that time.¹⁶⁸ From 2005 until his death in 2012, the nephew made a substantial number of ATM withdrawals from the principal’s bank account.¹⁶⁹ Toward the end of that

159. *Smith*, 164 Idaho at 473, 432 P.3d at 22 (quoting IDAHO CODE ANN. § 15-12-301 (2021)) (emphasis in original).

160. IDAHO CODE ANN. § 15-12-217(2)(a) (2021). *See* UNIF. POWER OF ATT’Y ACT § 217(b) (2016).

161. *Smith*, 164 Idaho at 473, 432 P.3d at 22 (quoting IDAHO CODE ANN. § 15-12-301). Unlike the Idaho statutory form, the UPOAA statutory form permits override of the annual-limit exclusion amounts only by a statement in the “Special Instructions” section; there is no “check-the-box” option. *See* UNIF. POWER OF ATT’Y ACT § 301 (2016).

162. IDAHO CODE ANN. § 15-12-301.

163. *Smith*, 164 Idaho at 473, 432 P.3d at 22.

164. *In re Estate of Gagnon*, 147 A.3d 356, 2016 ME 129 (2016).

165. *Id.* at 358, 2016 ME at P4.

166. *Id.* at 360, 2016 ME at P14.

167. *Id.* at 357, 2016 ME at P3.

168. *See id.* at 358, 2016 ME at P3–4 (stating that the principal did not sign a durable power of attorney formally appointing the individual as her agent until 2011).

169. *Id.*

period, in June 2011, the principal “signed a durable power of attorney appointing [the nephew] as her agent, *which included the power of self-gifting*.”¹⁷⁰

After the nephew-agent’s death, the principal asked another relative “to help with her finances.”¹⁷¹ The second relative discovered a substantial number of suspicious bank account withdrawals by the deceased nephew. Thereafter, the principal filed a claim against the agent nephew’s estate “alleging unauthorized withdrawal of funds, fraud, breach of fiduciary duty, and undue influence.”¹⁷² The trial court applied an undue influence presumption against the agent nephew, concluded that he had breached his fiduciary duty, and awarded damages.¹⁷³ The Supreme Judicial Court of Maine affirmed.¹⁷⁴

Notably for present purposes, the trial court ruled that the agent “had not violated any duty imposed by the Maine Uniform Power of Attorney Act because he had not acted pursuant to his grant of that power.”¹⁷⁵ The nephew agent’s estate argued that the trial court had erred in calculating damages “because the power of attorney specifically granted [the agent] the power to give gifts to himself from [the principal’s] assets.”¹⁷⁶ The trial court also found that “there was no evidence that [the agent] accessed [the principal’s] account specifically pursuant to the power of attorney.”¹⁷⁷ The appellate court agreed with that finding and added, “In fact, there was no evidence that [the agent] even provided a copy of the document to the bank.”¹⁷⁸

It is difficult to square that conclusion with the Uniform Power of Attorney Act. Under it, a power of attorney is a “writing or other record that grants authority to an agent to act in place of the principal.”¹⁷⁹ 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 upon the occurrence of a future event or contingency.”¹⁸⁰ There is no requirement in the UPOAA that a power of attorney becomes effective only upon presentation to a third party.

Under the UPOAA, the power of attorney is a contract interpreted according to its terms and the uniform act. For instance, suppose an instrument

170. *Gagnon*, 147 A.3d at 358, 2016 ME at P4 (emphasis added).

171. *Id.* at 358, 2016 ME at P5 (“After [Paul] Gagnon died in November 2012, Poulin asked Gagnon’s nephew, Robert Gagnon, to help with her finances.”).

172. *Id.* at 358, 2016 ME at P5.

173. *Id.* at 358–59, 2016 ME at P6–7.

174. *Id.* at 361, 2016 ME at P18.

175. *Id.* at 358, 2016 ME at P6.

176. *Gagnon*, 147 A.3d at 360, 2016 ME at P13.

177. *Id.* at 360, 2016 ME at P14.

178. *Id.* at 360, 2016 ME at P14. Presumably, the nephew-agent made the ATM withdrawals with a card and PIN number and did not otherwise need to demonstrate authority to the bank to act for the principal. *See id.*

179. UNIF. POWER OF ATT’Y ACT § 102(7) (2016).

180. *Id.* § 109(a).

was executed, and an agent never presented it to a third party. However, the agent expended her own funds preserving the principal's property. Would the agent's claim for reasonable compensation under section 112 be barred because she never presented a document to a third party?

In *Gagnon*, the principal authorized the agent to make gifts to himself of the principal's property by a contract. That, of course, does not immunize gifts from scrutiny. Limitations exist on gifting authority within the UPOAA. In addition, under the UPOAA, Maine may apply evidentiary presumptions against such gifts. Nonetheless, powers of attorney with gifting powers should be analyzed under those doctrines, not with a newly created element of effectiveness dependent upon third-party presentation.

E. *Chichester v. Cook*

In *Chichester v. Cook*,¹⁸¹ the Supreme Court of Appeals of West Virginia reversed summary judgment in favor of the agent after siblings challenged the authority, under a power of attorney, of another sibling's giving of their parent's property to himself.¹⁸² The trial court had found that "since the power of attorney expressly authorized [the agent] to convey the property to himself, and that there was corroborating evidence of [the principal's] intent to permit such a transfer, there was no breach of any fiduciary duty by [the agent] as [the principal's] power of attorney."¹⁸³ The Supreme Court of Appeals of West Virginia reversed.¹⁸⁴

The appellate court noted that the siblings challenging the agent's authority "contend that the power of attorney, thus signed, did not include a paragraph on the first page allowing [the agent] to convey the property to himself."¹⁸⁵ And, "they contend that the initials on page one of the power submitted by [the agent] are not those of [the principal]."¹⁸⁶ According to the appellate court, the trial court "rejected those contentions as self-serving and noted specifically that no expert handwriting analysis had been presented to show that the initials were not those of [the principal]."¹⁸⁷ The West Virginia Supreme Court held that "summary judgment was not warranted on the basis of the lack of a handwriting expert."¹⁸⁸

181. 234 W. Va. 183, 764 S.E.2d 343 (W. Va. 2014).

182. *Id.* at 184, 764 S.E.2d at 344 ("This action arose from a dispute between a brother and two sisters concerning the authenticity of a power of attorney for the parties' father and the validity of two deeds.").

183. *Id.* at 187, 764 S.E.2d at 347.

184. *Id.* at 191, 764 S.E.2d at 351.

185. *Id.* at 190, 764 S.E.2d at 350.

186. *Id.*

187. *Chichester*, 234 W. Va. at 190, 764 S.E.2d at 350.

188. *Id.*

Having concluded that there was a genuine issue of material fact regarding the authenticity of the gifting provision in the instrument, the West Virginia Supreme Court reversed the trial court.¹⁸⁹ In so ruling, the court noted that “in reinstating [the plaintiffs’] claims based on forgery and alteration of the power of attorney, their claims of breach of fiduciary duty, fraud and wrongful interference with testamentary capacity are also reinstated for further litigation in the proceedings below.”¹⁹⁰

In its analysis of the case, the West Virginia Supreme Court applied provisions of the West Virginia Uniform Power of Attorney Act,¹⁹¹ but did not address that Act’s provisions regarding gifts made by an agent. That is not particularly surprising, given that the court made no comment about the breach of fiduciary duty claim other than to reinstate it for consideration by the trial court on remand.¹⁹²

F. Degroat v. Papa

In *Degroat v. Papa*,¹⁹³ a principal executed a power of attorney in favor of his second ex-spouse.¹⁹⁴ That agent had purchased and downloaded the power of attorney form and “[t]he power of attorney did not permit [the agent] to make gifts to herself or to take any action in satisfaction of a legal obligation of [the principal’s] agent.”¹⁹⁵

In a post-trial opinion, the Delaware Court of Chancery concluded as follows: “Instead of honoring this relationship and the trust [the principal] instilled in her, [the agent] took advantage of the opportunity to take his assets.”¹⁹⁶ To reach that conclusion, the court engaged in an 80-page analysis, with 394 footnotes, recounting in detail dozens of transactions in which the agent engaged in self-dealing. “On every front, [the agent] has failed to demonstrate that [the principal] consented to these transactions or that they were otherwise fair. [The agent] has breached her common law fiduciary duties.”¹⁹⁷

Almost as an afterthought, the court added, “So bracketed, the facts that underpin [the agent’s] common law fiduciary duty breaches prove she also breached the POA Act. [The agent] abused her position as [the principal’s]

189. *Id.* at 191, 764 S.E.2d at 351.

190. *Id.* Presumably, if the trial court should determine that the instrument had not been forged, then its earlier ruling—that the instrument authorized the gifts—would stand. *Id.*

191. *Id.* at 188, 764 S.E.2d at 348.

192. *See supra* note 190 and accompanying text.

193. No. 12738-VCZ, 2020 Del. Ch. LEXIS 169 (Del. Ch. Apr. 30, 2020).

194. *Id.* at *1–2.

195. *Id.* at *20 (describing instrument).

196. *Id.* at *1.

197. *Id.* at *44.

agent.”¹⁹⁸ The court cited to chapter 49A of Title 12 of the Delaware Code, The Delaware Durable Personal Powers of Attorney Act.¹⁹⁹

In important part, section 49A-201 of Title 12 of the Delaware Code creates a set of hot powers, quite similar to the UPOAA, and includes, within them, the power to “[m]ake a gift.”²⁰⁰ Consequently, the court simply could have negated all agent-gift transactions without further analysis.

For some transactions, the agent argued that the principal had ratified them. The court made findings of fact about the lack of the principal’s consent to various transactions,²⁰¹ before ultimately concluding, “[o]n every front, [the agent] has failed to demonstrate that [the principal] consented to these transactions”²⁰²

Under the UPOAA, and Delaware law, agent gifts flatly are prohibited without express authorization. Fairness is not an issue, but ratification can be. Therefore, the analysis in *Degroat* exclusively should have focused on ratification, not fairness.

V. GIFT-MAKING HOT-POWER REQUIREMENTS IGNORED

A. Hodgson v. Gibson

In *Hodgson v. Gibson*,²⁰³ the agent for an incapacitated principal, living in an assisted care facility, sought to sell the principal’s residence, but the principal’s spouse, who continued to live in the residence, objected.²⁰⁴ The agent then filed an action seeking a declaratory judgment permitting the agent to sell the residence.²⁰⁵

The spouse conceded the agent’s authority, but argued that the agent was breaching his fiduciary duty because (1) the sale contravened a specific devise in the principal’s Will of the residence to the spouse; (2) the sale contravened the principal’s expectation that his spouse would not be forced out of the residence; (3) the principal had sufficient funds in investment accounts to cover his living expenses for thirteen years; (4) the sale would prevent the principal

198. *Id.* at *46.

199. *Degroat*, 2020 Del. Ch. LEXIS 169, at *46 n.300300 (citing 12 DEL. CODE ANN. § 49A-114). *See generally* DEL. CODE ANN. tit. 12, §§ 49A-101 to 49A-301.

200. DEL CODE ANN. tit. 12, § 49A-201(b)(2).

201. *Degroat*, 2020 Del. Ch. LEXIS 169 at *45, *50, *52, *53, *54, *66.

202. *Id.* at *44.

203. No. 12081-MA, 2017 Del. Ch. LEXIS 32 (Del. Ch. Feb. 24, 2017) (Master’s Report). Regarding the authority of various pronouncements from the Delaware Court of Chancery, *see* Joel Edan Friedlander, *Performing Equity: Why Court of Chancery Transcript Rulings Are Law*, U. PENN. INST. FOR L. & ECON., Jan. 4, 2021, Research Paper No. 20-58, <https://ssrn.com/abstract=3760722>.

204. *Hodgson*, 2017 Del. Ch. LEXIS 32, at *1.

205. *Id.*

from returning home to be cared for by his spouse; and (5) the sale was a conflict of interest for the agent, who could have sold other real property of the principal in which the agent had an interest. The Delaware Court of Chancery entered “a judgment declaring that [the agent] has the authority as agent of [the principal] to sell the [house].”²⁰⁶

The court upheld the agent’s authority on summary judgment notwithstanding the agent’s benefit in two significant ways. First, the principal’s Will specifically devised the residence to the principal’s spouse, and the agent was one of the Will’s ultimate residual devisees.²⁰⁷ Obviously, if the agent expended property of the principal other than the residence, then the residue of the principal’s estate would bear the principal’s living expenses. Second, instead of selling the residence, the agent could have sold other real estate owned by the decedent in partnership with the agent. Thus, among the property over which the agent had the power of sale, he decided to sell real property that would adeem a specific devise to his stepmother rather than expend property that the agent would own after his father’s death.²⁰⁸

Although recognizing a conflict of interest, the court created an easily satisfied test for the agent to overcome. Under it, the agent need show only that “it was *no longer beneficial* for [the principal] to retain his solely-owned residence”²⁰⁹ And, the court surmised, the principal’s “reasonable expectation was that his agent would sell the [principal’s residence] regardless of the specific devise in his Will.”²¹⁰ Regarding that crucial finding of fact—the principal’s reasonable expectation when he no longer could live in the residence—the court granted summary judgment based on the three aspects of the undisputed record.²¹¹

First, the court noted, the spouse’s only benefit under the principal’s Will was the specific devise of the residence.²¹² Second, under that Will and a prenuptial agreement entered into between the principal and the spouse, the

206. *Id.* at *17. Judge Slights, Vice Chancellor of the Delaware Court of Chancery, “adopt[ed] and affirm[ed] the Master’s Summary Judgment Recommendation in full.” *Hodgson v. Gibson*, 2017 WL 4539899, *3, ¶12 (Del. Ch. Oct. 10, 2017). *See also* *Hodgson v. Gibson*, 2017 WL 4861776, *1 (Del. Ch. Oct. 26, 2017) (Ordered that “[agent] is authorized to sell the real property” and “[p]etitioner’s request for attorney’s fees is denied”).

207. *Hodgson*, 2017 Del. Ch. LEXIS 32, at *3. In his Will, the principal “left his tangible personal property to his son [agent] and daughter, the [residence] to [his spouse], and his residuary estate to his Trust.” *Id.* Under the trust, after the principal’s death, the trust property was to “be distributed in equal shares to his son [agent] and daughter, *per stirpes*.” *Id.*

208. Delaware applies the identity theory of ademption by extinction, although recognizing that “the application of the rule may, in many instances, defeat the intention of the testator.” *Burke v. Burke*, 2017 Del. LEXIS 347, at *6–7 (Del. 2017) (quoting *In re Hobson’s Estate*, 456 A.2d 800, 802 (Del. Ch. 1982)).

209. *Hodgson*, 2017 Del. Ch. LEXIS 32, at *11 (emphasis added).

210. *Id.*

211. *Id.* at *7–12.

212. *Id.* at *7–8.

principal's "testamentary plan regarding the [residence] could be altered at any time prior to [the principal's] death."²¹³ Third, the power of attorney expressly authorized the sale of the residence.²¹⁴ From these the court concluded, "If, for any reason, it was no longer beneficial for [the principal] to retain his solely-owned residence, then [the principal's] reasonable expectation was that his agent would sell the [residence] regardless of the specific devise in his Will."²¹⁵

The court next addressed whether the principal benefitted from having his spouse remain in their marital home, while he lived in an assisted living care facility, and found that the principal did not. "Although [the spouse] claims that her husband would be very upset if he knew she was being forced to move, the only evidence on this issue is to the contrary."²¹⁶ Yet, the evidence adduced to the contrary was an answer to an interrogatory in which the agent stated the following:

[The principal] informed [the agent] that it was not his intent to pass the property to [the principal's spouse] and eventually to her heirs by way [sic] their inheritance from [the principal's spouse], but rather his intent was that [the principal's spouse] should not have to move if he were to die while they both were still living in the house.²¹⁷

However, if so, then the court's tightly bound conclusions about the principal's testamentary plan, based on the documents, unravel. The principal's statement, as reported by the agent, shows that the principal misunderstood the effect of the specific devise in his Will. Under that Will, if the principal died owning the house, it would pass to the spouse, regardless of any other facts,²¹⁸ and the spouse, now sole owner, could do whatever she wanted with it, including passing it to her heirs or devisees. Consequently, the principal appears to have been laboring under a belief that he was creating a life estate or some other limited ownership in his spouse. How then could the court conclude that the principal's "reasonable expectation was that his agent would sell the [principal's residence] regardless of the specific devise in his Will?"²¹⁹

The modern trend in all fiduciary law, including agency, is broad power, combined with after-the-fact litigation about whether an act breached a fiduciary duty. If any court should understand that, a Delaware court should. If the agent lacks a power to sell, then every sale is not authorized, and

213. *Id.* at *10.

214. *Id.* at *10–11.

215. *Hodgson*, 2017 Del. Ch. LEXIS 32, at *11.

216. *Id.* at *12.

217. *Id.* at *12 n.29.

218. Delaware applies the identity theory for specific devises. *See Burke*, 2017 Del. LEXIS 347, at *6–7.

219. *Hodgson*, 2017 Del. Ch. LEXIS 32, at *11.

consequently a breach of fiduciary duty. But the converse is not true, a power to sell does not make all sales proper. The existence of the power to sell is not dispositive in deciding the propriety of a particular sale.

In addition, the court did not address whether the case was one in which an express grant of a hot power was needed. The case was decided under the Delaware Durable Personal Powers of Attorney Act.²²⁰ That act, enacted in 2010,²²¹ is substantially similar to the Uniform Power of Attorney Act.²²² The Delaware Act requires express grant of powers, among others, to “[m]ake a gift,”²²³ “[c]reate or change rights of survivorship,”²²⁴ and “[c]reate or change a beneficiary designation.”²²⁵

One could easily, using substance-over-form reasoning, regard this case as the agent’s making a gift of the house to himself, for which an express grant of gift-making authority would be necessary. In addition, the Delaware Durable Personal Power of Attorney Act, like the UPOAA, limits expressly granted gift-making authority to the annual exclusion amount. Thus, if *Hodgson* were considered a gift case, the instrument would have needed express language to permit the agent (1) to “[m]ake a gift”²²⁶ and (2) to exceed the “amount per donee . . . [of the] federal gift tax exclusion under Internal Revenue Code § 2503(b)”²²⁷ It is not clear that the instrument in *Hodgson* contained either the hot power to make gifts or the “boiling” hot power to make gifts in excess of the annual exclusion limit.

B. *Miller v. Miller*

In *Miller v. Miller*,²²⁸ one sibling challenged the accounting of another sibling who had acted as agent for their mother.²²⁹ Among the challenged transactions was the agent’s use of over \$900,000 of the mother’s funds to maintain a residence owned by the agent.²³⁰ The trial court had accepted the

220. *Id.* at *1, n.11.

221. 77 Del. Laws 467 (2010).

222. See Jennifer D. Odom et al., *Financial Powers of Attorney*, 30 PROB. & PROP. 9, 9 (2016) (noting that “states not adopting the UPOAA have adopted pieces of it” and that “Delaware adopted most of the UPOAA in 2010”).

223. DEL. CODE ANN. tit 12, § 49A-201(b)(2).

224. *Id.* § 49A-201(b)(3).

225. *Id.* § 49A-201(b)(4).

226. *Id.* § 49A-201(b)(2).

227. *Id.* § 49A-217(b)(1).

228. 935 N.E.2d 729 (Ind. App. 2010).

229. *Id.* at 733, 737.

230. *Id.* at 741 (“[The son challenging the accounting] argues that the trial court should have found that the [agents’] decision to spend [the principal’s] money to maintain 608 [Columbus Street] was a breach of their fiduciary duties to her and ordered that the amount spent—\$908,581.74—be refunded to [the principal’s] estate.”).

accountings and released the agent from all liability.²³¹ The Court of Appeals of Indiana affirmed.²³²

The appellate court stated that the power of attorney “did not prohibit the [agents] from engaging in transactions that gave them some benefit,”²³³ yet failed to quote language in the instrument. Instead, the court cited the comment to UPOAA section 114 that “explain[s] that ‘[t]he public policy which favors best interest over sole interest as the benchmark for agent loyalty comports with the practical reality that most agents under powers of attorney are family members who have inherent conflicts of interest with the principal arising from joint property ownership or inheritance expectations.’”²³⁴

The court also assumed, without deciding, that a presumption of fraud arose, but found that the agent had rebutted the presumption:²³⁵

[I]n any event, there is no evidence that, in fact, [the agent] benefited as a result of the [residence] expenditures. He bought [the residence] only because his father had asked him to, he viewed it as a bad investment but retained it for the sake of his parents, neither he nor his family lived there, and at the time of the hearing he was just hoping to sell the residence for the price he had paid for it a decade before. The [agents] continued to spend approximately \$200,000 per year on [the residence] only because it was what they reasonably believed [the principal] would want them to do and what [the principal] and [the principal’s spouse and parties’ father] had historically done.²³⁶

But of course, all of that analysis skips the necessary first step of whether the agent possessed the power to make a gift. Although Indiana has not adopted the UPOAA, its statutes regarding an agent’s power to make gifts to himself mimic the UPOAA (or rather the UPOAA mimics Indiana law, the latter having been enacted in 1991).²³⁷ Indiana law requires express grants of all powers,²³⁸ including the power to make gifts,²³⁹ and its gift-powers section

231. *Id.* at 746.

232. *Id.*

233. *Id.* at 741.

234. *Miller*, 935 N.E.2d at 741.

235. *Id.*

236. *Id.* at 741–42.

237. The Reporter for the Uniform Power of Attorney Act, Professor Linda Whitten, taught at Valparaiso Law School, in Indiana. See UNIF. POWER OF ATT’Y ACT (UNIF. L. COMM’N, Final Act 2006), *supra* note 1, pmb1.

238. IND. CODE ANN. § 30-5-5-1 (LexisNexis through 2021).

239. *Id.* § 30-5-5-9.

limits gifts by the agent to himself to the annual exclusion amount²⁴⁰ unless otherwise provided in the instrument.²⁴¹

In *Miller*, the agent spent over \$900,000 of the principal's funds to maintain a home that the agent owned and had purchased for "approximately \$900,000."²⁴² Even if the agent "just hoped to sell the residence for what he paid for it a decade before," how does using his principal's funds to maintain the agent's property not constitute a gift to the agent? And if it is a gift, then an express power is necessary.

The court noted that the agent bought the residence because the agent's parents were reluctant to purchase the residence, where the agent's father had lived as a child, due to "estate tax reasons."²⁴³ Perhaps we should view this case as the agent's having made a gift to his parents by purchasing a residence that the parents wanted to maintain but not purchase, and the parents thereafter made gifts to the agent by maintaining the residence. If so, the true character of the parents' transfers as gifts emerges. And if the agent wanted to continue such gifts by his principal to himself, he would need an express power.

The court seemed to analyze the case as if the agent possessed power to maintain the principal's pattern of giving gifts to the agent. Nothing in the *Miller* opinion indicates that the instrument authorized (1) gifts or (2) agent gifts to himself in excess of the annual exclusion limit.²⁴⁴ Instead, it appears that the Indiana courts applied a cold-gifting power, of the sort codified by

240. *Id.* § 30-5-9(a)(2) ("The attorney in fact or a person that the attorney in fact has a legal obligation to support may not be the recipient of gifts in one (1) year that total more than the amount allowed as an exclusion from gifts under Section 2503 of the Internal Revenue Code.").

241. *Id.* § 30-5-5-1(d) ("A power of attorney may in writing delete from, add to, or modify in any manner a power incorporated by reference, including the power to make gifts under section 9 of this chapter.").

242. *Miller*, 935 N.E.2d at 734. ("[The agent's father] asked [the agent] to purchase the property. [The agent] agreed, and in 1999 he paid the home's appraised value—approximately \$900,000—and purchased 608 [Columbus Street], with court approval.").

243. *Id.* at 734.

244. *See* IND. CODE ANN § 30-5-5-9 (LexisNexis through 2021). "[L]anguage conferring general authority with respect to gift transactions means the principal authorizes" the agent to "[m]ake gifts to organizations, charitable or otherwise, to which the principal has made gifts, and satisfy pledges made to organizations by the principal" and to "[m]ake gifts on behalf of the principal to the principal's spouse, children, and other descendants or the spouse of a child or other descendant," but the agent "may not be the recipient of gifts in one (1) year that total more than the amount allowed as an exclusion from gifts under Section 2503 of the Internal Revenue Code." *Id.* Thus, under Indiana law, the power to make gifts is a hot power, and the power to make gifts to the agent in excess of the annual exclusion amount is a boiling hot power, i.e., requiring express authorization to exceed the annual exclusion amount. In *Miller*, because the agent received gifts in excess of the annual exclusion amount, he would need this boiling hot power.

Virginia, which grants an all-acts agent the authority to make gifts in accordance with the principal's personal history of making lifetime gifts.²⁴⁵

VI. POWER TO CHANGE A BENEFICIARY DESIGNATION

A. *Cisneros v. Graham*

In *Cisneros v. Graham*,²⁴⁶ in June 2013, the principal was diagnosed with terminal pancreatic cancer and ““given only a few months to live.””²⁴⁷ In July 2013, the principal executed a power of attorney in favor of the agent, who was her deceased husband's nephew.²⁴⁸ In August 2013, the principal and the agent signed an account agreement that designated the agent as the co-owner with a right of survivorship of the principal's checking account.²⁴⁹ About ten days later, the agent cashed a certificate of deposit (“CD”) of the principal, for which an individual other than the agent was payable-on-death beneficiary, and deposited the proceeds into that checking account.²⁵⁰ After the principal's death two weeks later, the agent became the owner of the checking account, now containing the proceeds of the CD.²⁵¹

On summary judgment, the trial court found that the agent committed constructive fraud and entered judgment in the amount that the CD-beneficiary plaintiff would have received under the CD's pay-on-death provisions.²⁵² The Nebraska Supreme Court affirmed.²⁵³

The court found that UPOAA section 201(b) unambiguously denied the agent authority to conduct the CD transaction.²⁵⁴ That section places the following limit on agent power:

Notwithstanding a grant of authority to do an act described in subsection (a) [the hot powers list], unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or descendant of the principal,

245. See VA. CODE ANN. § 64.2-1622(H) (LexisNexis through 2021). Under the UPOAA, “the principal's personal history of making or joining in making gifts” is a factor for an agent to whom the hot power to make a gift expressly was granted to take into consideration, when deciding to make a particular gift. UNIF. POWER OF ATT'Y ACT § 217(c)(5) (2016).

246. 294 Neb. 83, 881 N.W.2d 878 (2016).

247. *Id.* at 85, 881 N.W.2d at 881.

248. *Id.*

249. *Id.* at 86, 881 N.W.2d at 882.

250. *Id.*

251. *Id.*

252. *Cisneros*, 294 Neb. at 84, 881 N.W.2d at 881.

253. *Id.* at 105, 881 N.W.2d at 892.

254. *Id.* at 94–95, 881 N.W.2d at 886–87 (citing NEB. REV. STAT. § 30-4024(2) and noting that it is almost identical to UNIF. POWER OF ATT'Y ACT § 201(b) (2016), “with the main difference being that [the UPOAA] uses the word ‘descendant’ whereas [the NUPOAA] uses the word ‘issue’”).

may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.²⁵⁵

The court noted that "it is undisputed that [the agent] is not the 'ancestor, spouse, or issue' of [the principal]."²⁵⁶ Therefore, the court added, the agent "needed express authority from [the principal] in the power of attorney to deposit the proceeds of the CD into the checking account. We find no such express authority."²⁵⁷

The court reviewed portions of the instrument granting powers "to deposit or withdraw any money or credits in any bank" and to "redeem . . . any notes . . . or investments of any kind."²⁵⁸ The court concluded that the agent "did not have authority to give himself an interest in [the principal's] property, and specifically, he did not have the authority to deposit the proceeds of the CD into the checking account with right of survivorship that he co-owned with [the principal]."²⁵⁹

The court also rejected two other arguments made by the agent. The agent argued that UPOAA section 114(d) immunized him from liability.²⁶⁰ That section provides, "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 the act or has an individual or conflicting interest in relation to the property or affairs of the principal."²⁶¹

The court quoted Professor Volkmer's article reviewing the NUPOAA and addressing section 114:

[T]he specter of the agent making gifts to himself or herself raises special concerns that [are] highlighted by other sections of the [Nebraska UPOAA]. [For example, t]here is a difference in degree when comparing a situation in which the agent personally benefits in a contract involving self-dealing with a situation in which the agent personally benefits by receiving a gift of the principal's property. It would seem that subsection (4) [of § 30-4014], when considered in the context of other sections of the [Nebraska UPOAA], although referring to an agent "benefitting" from a

255. UNIF. POWER OF ATT'Y ACT § 201(b) (2016).

256. *Cisneros*, 294 Neb. at 96, 881 N.W.2d at 887.

257. *Id.*

258. *Id.* at 96-97, 881 N.W.2d at 887-88.

259. *Id.* at 97, 881 N.W.2d at 888.

260. *Id.*

261. *Id.* (quoting NEB. REV. STAT. § 30-4014(4), which is identical to UNIF. POWER OF ATT'Y ACT § 114(d) (2016)).

relationship with the principal, strikes a proper balance between different types of self-dealing transactions under which the agent “benefits.”²⁶²

The court agreed “with the foregoing reading of the Nebraska UPOAA.”²⁶³ The agent’s “action of depositing the proceeds of the CD into a checking account with right of survivorship he co-owned with [the principal] is a situation in which [the agent] personally benefited by receiving a gift of [the principal’s] property and is the type of self-dealing prohibited by the Nebraska UPOAA and not permitted under the power of attorney in question.”²⁶⁴

Lastly, the agent argued that the principal had ratified the collection of the CD and its deposit into the joint checking account. As an initial matter, the court determined that ratification of an act beyond the scope of the power of attorney remains available after the adoption of the NUPOAA, but that “the party asserting ratification must make a strong showing.”²⁶⁵ And, the court added, “because [the agent’s] authority was required to be in a writing pursuant to [section 201(b)], a ratification by [the principal] was required to be in a writing.”²⁶⁶

The agent’s affidavits regarding ratification described actions of the principal other than writings.²⁶⁷ Consequently, the court concluded, “We determine as a matter of law that [the agent] failed to present evidence of a material issue of fact as to whether [the principal] ratified [the agent’s] actions, and thus, we determine that the district court did not err when it granted summary judgment in favor of [the CD’s POD beneficiary].”²⁶⁸

In *Cisneros*, the issue was not the hot power under UPOAA section 201(a)(4) to create or change a beneficiary designation, but the broader disallowance in section 201(b) against a non-relative agent creating “an interest in the principal’s property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise” in the agent or an agent’s dependent. The instrument did not expressly authorize the transfer to the non-relative agent, and it was set aside.

262. *Cisneros*, 294 Neb. at 98, 881 N.W.2d at 888–89 (citing Ronald R. Volkmer, *Nebraska’s Real Property Transfer on Death Act and Power of Attorney Act: A New Era Begins*, 46 CREIGHTON L. REV. 499, 547 (2013)).

263. *Id.* at 98, 881 N.W.2d at 889.

264. *Id.*

265. *Id.* at 100, 881 N.W.2d at 889–90.

266. *Id.* at 102, 881 N.W.2d at 891.

267. *Id.* at 102–03, 881 N.W.2d at 891.

268. *Cisneros*, 294 Neb. at 103, 881 N.W.2d at 891.

B. Campbell v. Lieb

In *Campbell v. Lieb*,²⁶⁹ the plaintiff, a caretaker of the principal and beneficiary under a real property transfer-on-death deed executed by the principal, sued the agent, a son of the principal who had acted under a power-of-attorney instrument to revoke all prior transfer-on-death deeds of the principal, specifically including the deed naming the plaintiff.²⁷⁰ The agent testified that he revoked the transfer-on-death deed because he wanted to preserve his father's estate and assets, and because he anticipated "extensive nursing home expenses."²⁷¹ The principal died five months after the revocation.²⁷²

In an action tried without a jury, the trial court granted the agent's motion to dismiss after the plaintiff's presentation of evidence, concluding that the transfer-on-death deed properly was revoked by the agent.²⁷³ The Court of Appeals of New Mexico affirmed.²⁷⁴

The appellate court noted that UPOAA section 114(b)(6) requires an agent to "attempt to preserve the principal's estate plan if preserving the estate is consistent with the principal's best interests based on factors that include 'the principal's foreseeable obligations and need for maintenance[,]' and if otherwise done in accordance with Section [114(a)]."²⁷⁵ The court stated that the trial court had "announced its findings at the end of the hearing and concluded that the transfer on death deed was properly revoked based on Section [114(B)(6)(b)] of the UPAA and on [the agent's] testimony that his decision to revoke the deed was based on the need to preserve [the principal's] estate for his foreseeable obligations and maintenance."²⁷⁶

That statement by the trial court is puzzling. Removing a beneficiary designation never can "preserve an estate" or "enhance an agent's ability to maintain a principal."

If the agent needed to sell the real property subject to the transfer-on-death deed, he could do so without first revoking the beneficiary designation. That is, the deed to the purchaser itself would revoke the beneficiary designation.²⁷⁷ This situation is akin to a bank account with a pay-on-death designation. An agent for the principal can withdraw or expend funds, terminating the beneficiary designation for the withdrawn funds and leaving the

269. No. A-1-CA-35487, 2018 N.M. App. Unpub. LEXIS 296 (2018).

270. *Id.* at *1-2.

271. *Id.* at *2.

272. *Id.*

273. *Id.* at *3.

274. *Id.* at *1.

275. *Campbell*, 2018 N.M. App. Unpub. LEXIS 296 at *6 (quoting N.M. STAT. ANN. §45-5B-114(B)(6)(b) (West 2021)).

276. *Id.* at *8.

277. N.M. STAT. ANN. §45-6-411(A)(3)(a) (West 2021) (A transfer on death deed can be revoked by a deed "that revokes the deed or part of the deed expressly or by inconsistency.").

beneficiary designation intact for the remaining funds.²⁷⁸ Removing the beneficiary designation in a real property transfer-on-death deed, like removing the beneficiary designation in a bank account with a pay-on-death designation, does not create any advantage for the principal. The sole effect of revoking a pay-on-death designation is to disadvantage the designated beneficiary in favor of whoever would take the property absent the designation. And, that is a particular problem when, as here, the person who would take absent the beneficiary designation is the agent.

After the puzzling statement—that revocation of the beneficiary designation benefitted the principal—the court then quoted the power-of-attorney instrument and noted that it “expressly included[ed] the authority to execute deeds, and to sell, transfer, and convey [the principal’s] real property,”²⁷⁹ and concluded that “[r]evoking the transfer on death deed falls squarely within the permitted authority described in the power of attorney.”²⁸⁰

That confuses power and duty. Of course, the agent had the power to execute the deed; the operative question is whether he exercised it consistently with his fiduciary duty. If the agent lacked power, the case is easily decided; no further inquiry is needed.

The court then quoted trial testimony from the agent (1) that the agent wanted to maintain some assets to replace what he and his brother “were going to have to come up with out of our own pocket;”²⁸¹ (2) that arrangements were made to attempt to qualify his father for Medicaid; (3) that plaintiff had been fairly compensated for her work; and (4) that the agent “did not take into consideration the value of the property upon revocation because he had ‘plenty of wealth of [his] own’ and was therefore unconcerned about whatever amount he could potentially inherit.”²⁸² The court concluded, “Based on the provisions of the power of attorney, the testimony concerning the reasons for the revocation of the deed, [the agent’s] disinterest in his inheritance and [plaintiff’s] failure to present evidence that the attorney-in-fact’s actions were inconsistent with [the principal’s] best interests, we find no error in the [trial] court’s decision”²⁸³

It is not at all clear why this was not a hot-power case. The agent here executed an instrument “revoking ‘all prior transfer on death deeds.’”²⁸⁴ That unambiguously fits within the UPOAA hot power to “create or change a

278. See UNIF. PROB. CODE § 6-211 (amended 2019).

279. *Campbell*, 2018 N.M. App. Unpub. LEXIS 296, at *9–10.

280. *Id.* at *10.

281. *Id.* at *12.

282. *Id.*

283. *Id.* at *12–13.

284. *Id.* at *2.

beneficiary designation.”²⁸⁵ The only authority in the instrument mentioned by the court was “the authority to manage all of [the principal’s] affairs, expressly including the authority to execute deeds, and to sell, transfer, and convey [the principal’s] real property.”²⁸⁶ That is not an “express grant” of a power to “create or change a beneficiary designation.”

C. Estate of Speakman

In *Estate of Speakman*,²⁸⁷ the defendant agent converted non-probate property to probate property yet was not the beneficiary of either. Plaintiff was the transfer-on-death (“TOD”) beneficiary of a bank account and half beneficiary of the principal’s estate.²⁸⁸ During the principal’s illness, the agent “removed \$50,000 from the TOD account for anticipated future health care and nursing home expenses and placed those funds in [an account in the principal’s name alone].”²⁸⁹ Next, the agent sold the principal’s house and deposited the proceeds in a bank account in the principal’s name alone. Thereafter, the agent withdrew the balance of the TOD account “because the account was ‘losing money.’”²⁹⁰ Plaintiff, the TOD beneficiary, objected to the agent’s accounting as personal representative of the estate.²⁹¹

“[Plaintiff] argued that the money withdrawn from the TOD account was improperly removed and comingled [sic] with probate property.”²⁹² Plaintiff also contended that “the TOD account . . . should have remained TOD property and transferred to her as the beneficiary.”²⁹³ The trial court held a hearing and “found that the money withdrawn from the TOD account was probate property and therefore subject to distribution under the terms of the will.”²⁹⁴

The Court of Appeals of Ohio reversed.²⁹⁵ It first noted “that there is no allegation that [the agents] acted out of self-interest in the transfer of the funds from the TOD account.”²⁹⁶ However, the court found that the trial court had not addressed whether the agent complied with Ohio’s version of section 114(b)(6) of the UPOAA,²⁹⁷ that requires the agent “‘attempt to preserve the

285. N.M. STAT. ANN. § 45-5B-201(a)(4) (identical to UNIF. POWER OF ATT’Y ACT § 201(a)(4) (2016)).

286. *Campbell*, 2018 N.M. App. Unpub. LEXIS 296, at *9–10.

287. 2017-Ohio-7808 (Ohio Ct. App.).

288. *Id.* at ¶ 13.

289. *Id.* at ¶ 28.

290. *Id.* at ¶ 7.

291. *Id.* at ¶ 8.

292. *Id.*

293. *Speakman*, 2017-Ohio-7808, at ¶ 8.

294. *Id.*

295. *Id.* at ¶¶ 27–28.

296. *Id.* at ¶ 27.

297. *Id.* (citing OHIO REV. CODE ANN. § 1337.34(A)(4) (West 2020)).

principal's estate plan to the extent actually known by the agent if preserving the plan is consistent with the principal's best interest."²⁹⁸ Consequently, the court remanded for the trial court "to determine whether [the agent] acted consistently with [Ohio's version of section 114(b)(6)] in the withdrawal of the TOD funds."²⁹⁹

Speakman succinctly demonstrates the hot-power-overlap problem in the UPOAA. There, the agent transferred funds from a TOD account to a solely owned account. That effectively removed the beneficiary designation from the TOD account. Consider, had the agent simply removed the TOD designation from the TOD account, that unambiguously would require express grant of the hot power to "[c]reate or change a beneficiary designation."³⁰⁰ How is it that the two-step process—withdraw from TOD account and then deposit into solely owned account—does not require the beneficiary-designation hot power when it achieves the same result?

If we decide that the agent in *Speakman* needed express grant of the beneficiary-designation hot power, the case ends quickly. Without that power, the transaction is rescinded. There is no need "to determine whether [the agent] acted consistently with [Ohio's version of section 114(b)(6)] in the withdrawal of the TOD funds."³⁰¹

VII. OTHER SELF-INTERESTED AGENT TRANSACTIONS

A. *Norvell v. Norvell*

In *Norvell v. Norvell*,³⁰² one brother sued two of his brothers, who had acted as co-agents for their mother under a power-of-attorney instrument. One of the agent brothers sold the mother's lake house to the other agent brother.³⁰³ The plaintiff brother filed a complaint alleging, among other matters, that the "purchase price . . . paid for the lake house was less than one-third of the appraised value of the property [and] that the sale of the lake house . . . , to the extent the sale constituted a gift, was prohibited by the Alabama Uniform Power of Attorney Act."³⁰⁴

298. *Id.* at ¶ 27 (quoting OHIO REV. CODE ANN. § 1337.34(A)(4) (West 2020)).

299. *Speakman*, 2017-Ohio-7808, at ¶ 28.

300. OHIO REV. CODE ANN. § 1337.42(A)(4) (West 2020). Section 1337.42(A)(4) is identical to section 201(a)(4) of the UPOAA. Note as well, had the transfer been in the other direction, from a solely owned account to a TOD account, that unambiguously would require the beneficiary-designation hot power of subsection (a)(4).

301. *Speakman*, 2017-Ohio-7808, at ¶ 28.

302. 275 So. 3d 497 (Ala. 2018).

303. *Id.* at 499.

304. *Id.* at 500.

The trial court entered summary judgment on all of the plaintiff's claims without stating its reasons.³⁰⁵ Interestingly, under Alabama law, "[b]ecause the [trial] court did not state the ground or grounds upon which it based the summary judgment," the Supreme Court of Alabama "presume[d] the [trial] court relied on each of the grounds asserted by the defendants in their summary-judgment motion."³⁰⁶

With respect to the breach-of-fiduciary-duty claims, "[t]he only ground the defendants asserted as a basis for a summary judgment on those claims was [the plaintiff's] alleged lack of standing."³⁰⁷ Consequently, the Supreme Court of Alabama "presume[d] the [trial] court entered the summary judgment as to those claims on that ground."³⁰⁸ In its opinion, the Supreme Court of Alabama forcefully reminded the bench and bar that it "has now repeatedly 'cautioned [that standing] is generally relevant only in public-law cases."³⁰⁹ The court concluded as follows:

Thus, because the concept of standing is generally inapplicable in a private-law case such as this and because [the plaintiff's] alleged lack of "standing" was the only ground the defendants asserted in support of a summary judgment on [the plaintiff's] declaratory-judgment, breach-of-fiduciary-duty, and conspiracy claims, the defendants failed to carry their burden of making a prima facie showing that they were entitled to a judgment as a matter of law on those claims.³¹⁰

The court noted that the defendants' arguments raised a "'real-party-in-interest problem' or a 'cause-of-action problem,' not a 'standing problem.'"³¹¹ The court did not address any aspect of the Alabama Uniform Power of Attorney Act, other than that the plaintiff had cited section 116(a)(4) to the trial court.³¹² That provision unambiguously states that "the principal's descendant[s]" "may petition a court . . . to review the agent's conduct."³¹³

305. *Id.* at 501 n.33.

306. *Id.* at 502 (citing *Ramson v. Brittin*, 62 So. 3d 1035, 1038 (Ala. Civ. App. 2010)). That rule of appellate procedure makes a trial court's job easier and an appellate court's much harder.

307. *Id.* at 503.

308. *Norvell*, 275 So. 3d at 503 (citing *Terry v. Life Ins. Co. of Georgia*, 551 So. 2d 385, 385 (Ala. 1989)).

309. *Id.* at 505 (citing *Gardens at Glenlakes Prop. Owners Ass'n, Inc. v. Baldwin Cnty. Sewer Serv., LLC*, 225 So. 3d 47, 53 (Ala. 2016)).

310. *Id.*

311. *Id.*

312. *Id.* at 501 (quoting ALA. CODE § 26-1A-116(a) (2012)).

313. ALA. CODE § 26-1A-116(a) (2012); *see also* UNIF. POWER OF ATT'Y ACT § 116(a) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L., 2016).

B. *Ibru v. Ibru*³¹⁴

In *Ibru v. Ibru*, a brother sought to enjoin his sister from exercising her powers under two power-of-attorney instruments purportedly executed by their father.³¹⁵ The plaintiff alleged that the father was not competent when he signed the instruments and that the sister had “fraudulently” used those instruments “to gain access to [their father’s] assets.”³¹⁶ The father died intestate during the litigation, and the plaintiff amended his complaint to seek a constructive trust for the father’s remaining assets in the forum jurisdiction (Maryland) and an accounting by his sister for her actions as agent.³¹⁷ The trial court granted the agent’s motion to dismiss, finding “that ‘standing issues’ precluded the court from considering [the brother’s] petition for relief.”³¹⁸ The trial court also awarded attorney’s fees to the defendant agent.³¹⁹

The Court of Special Appeals of Maryland stated that it “review[s] *de novo* a [trial] court’s determinations of its own subject matter jurisdiction and a party’s standing.”³²⁰ The court then reversed the trial court, concluding that “[b]ecause [the plaintiff] is a descendant of [the principal], we hold that [the plaintiff] has standing under [Maryland’s version of UPOAA § 116(a)(4)] to petition the court to review [the agent’s] actions as an agent and construe the validity of the Powers of Attorney that were purportedly executed in Maryland and, by their terms, governed by Maryland law.”³²¹ The court also reversed the award of attorney’s fees because the trial court “provided no reasoning” for the award.³²²

VIII. CONCLUSION

The menu-based approach to agent powers under the UPOAA, and particularly its requirement for expressly granted hot powers, has received uneven application in the trial and appellate courts. Two modes of analytical error appear. First, some courts fail to apply the plain text of the donative hot-powers requirements. Second, some courts fail to apply donative hot-powers

314. 239 Md. App. 17, 194 A.3d 424 (2018).

315. *Id.* at 22, 194 A.3d at 427.

316. *Id.*

317. *Id.*

318. *Id.* at 22, 194 A.3d at 428.

319. *Id.*

320. *Ibru*, 239 Md. App. at 32–33, 194 A.3d at 433–34.

321. *Id.* at 46, 194 A.3d at 441–42 (citing MD. CODE ANN., EST. & TRUSTS § 17-103(a)(4), which is identical to UNIF. POWER OF ATT’Y ACT § 116(a)(4): “(a) [t]he following persons may petition a court to construe a power of attorney or review the agent’s conduct, and grant appropriate relief: . . . (4) the principal’s spouse, parent, or descendant . . .”).

322. *Id.* at 49, 194 A.3d at 443–44.

requirements to transactions functionally equivalent to donative-hot-powers transactions.

By failing to apply the plain text of the donative hot-powers requirements, courts engage in unnecessary analysis. The Delaware Court of Chancery in *Degroat v. Papa* unnecessarily analyzed the fairness of dozens of agent-gift transactions. The agent lacked authority to make gifts, so the gifts were invalid. The real issue in that case was ratification. The Court of Appeals of Ohio in *Estate of Speakman* ignored the requirement that the power to change a beneficiary designation must be expressly granted. The court remanded to determine whether the agent's change of a beneficiary designation was consistent with the principal's estate plan, but that analysis is unnecessary if the agent lacked that donative hot power. The New Mexico Court of Appeals in *Campbell v. Lieb* similarly ignored the beneficiary-change hot-powers requirement and permitted an agent to remove a beneficiary designation that resulted in that property transferring to the agent after his principal's death.

In the second analytical-error mode, agents engage in transactions that functionally are equivalent to donative-hot-powers transactions, but courts fail to require express grant of hot powers. The Delaware Chancery Court in *Hodgson v. Gibson* expressly authorized an agent to sell property, specifically devised to his stepmother, to fund his father's care rather than expend property that would become the agent's upon his father's death. The Indiana Court of Appeals in *Miller v. Miller* permitted an agent to expend over \$900,000 of his principal's funds to maintain a residence that the agent owned. Neither case addressed whether the power to make a gift had been expressly granted.

Succinct attention to hot-powers requirements would simplify analysis. The process should begin with the requirement for the express grant of hot powers. When a hot power had not been granted, analysis would take the following form: "In this case, the agent made a gift, or created a trust, or changed a beneficiary designation, and that power was not expressly granted. Consequently, the transactions are invalid." That was the mode of analysis of the Supreme Court of Nebraska in *Cisneros v. Graham*, the Supreme Court of Virginia in *Davis v. Davis*, and the Supreme Court of Idaho in *Estate of Smith*. If the hot power expressly had been granted, the court should analyze whether the agent's acts fit within those express terms. That was the mode of analysis of the Supreme Court of Nebraska in *In re Estate of Adelung* and the Court of Appeals of Arkansas in *Liberty Bank of Arkansas v. Byrd*. Lastly, courts may be required to consider ratification, which is not addressed in the UPOAA, but was analyzed by the Delaware Court of Chancery in *Degroat v. Papa* and by the Supreme Court of Nebraska in *Cisneros v. Graham*.