



Important Changes Enacted to Pennsylvania's Power of Attorney Law

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The Pennsylvania General Assembly recently enacted amendments to the Probate, Estates and Fiduciaries Code that revise requirements for the acceptance and reliance on powers of attorney; enact recommendations to prevent the abuse of powers of attorney developed by the Pennsylvania Joint State Government Commission; and more closely align Pennsylvania law with the Uniform Power of Attorney Act.²

Provisions of the legislation revising requirements for the acceptance and reliance on powers of attorney address issues arising from the PA Supreme Court's decision in *Vine v. Commonwealth*.³ In *Vine*, the Court held that a third party accepting a power of attorney in good faith without knowledge of defects in its validity is not entitled to rely on the power of attorney, notwithstanding the danger that a refusal to accept a power of attorney without reasonable cause may result in civil liability for damages. The amendments provide expanded immunities from liability for the good faith acceptance of powers of attorney; provide clear guidance regarding actions that may be taken to resolve questions about validity of powers of attorney and the instructions of agents; establish explicit standards to determine when a person presented with instructions by an agent is not required to accept a power of attorney; and limit liability for the wrongful refusal to comply with the instructions of an agent.

In an effort to prevent the misuse of powers of attorney, the amendments restrict the ability of individuals to sign powers on behalf of a principal; require in most cases the execution of a power of attorney to be witnessed and acknowledged; expand the form of notice required to be given to principals advising of the potential consequences of executing powers of attorney; and

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² House Bill 1429, Printer's No 3708 (Approved as Act 95 of 2014 on July 3, 2014) (full text available at www.legis.state.pa.us).

³ *Teresa M. Vine v. Commonwealth of PA, State Employees' Retirement Board*, 9 A.3d 1150 (Pa. 2010).

modify the form of acknowledgment required of agents which describes the duties of agents to principals.

The legislation also incorporates into Pennsylvania law provisions of the Uniform Power of Attorney Act in effect in 15 other states which clearly define the duties of agents; designate actions that require a specific rather than general grants of authority; define the authority of agents to make gifts on behalf of a principal; authorize the use of copies of powers of attorney; better define the powers granted to agents by statutory short-form grants of authority; recognize the validity of powers of attorney executed under subject to the laws of other jurisdictions; and incorporate general principles of law and equity into the law governing powers of attorney.

The amendments relating to the *Vine* decision took effect immediately upon the Governor's signing of the legislation on July 3, 2014, and the remaining provisions of the legislation take effect January 1, 2015. Upon their effective date, the amendments generally apply to powers of attorney executed both before, on or after their effective date, except that the expanded immunities provided for the good faith acceptance of instructions from agents without actual knowledge of any deficiencies in powers of attorney or the claimed authority of agents apply retroactively.

Requirements for the Acceptance and Reliance on Powers of Attorney

Prior Pennsylvania law required that, "Any person who is given instructions by an agent in accordance with the terms of a power of attorney shall comply with the instructions," and imposed civil liability for damages upon a person "who without reasonable cause fails to comply with those instructions." To reduce the risk of exposure to claims an agent acted improperly, Pennsylvania law authorized a third party presented with a power of attorney to request and rely upon an affidavit from the agent that the power of attorney had not been terminated and that any contingencies to effectuate the power have occurred. In addition, the law provided that, "Any person who acts in good faith reliance on a power of attorney shall incur no liability as a result of acting in accordance with the instructions of the agent."⁴

Unlike the laws in effect in states that have adopted the Uniform Power of Attorney Act, prior Pennsylvania law did not expressly extend immunity for the good faith acceptance of the instructions of an agent to situations in which a power of attorney or an agent's authority is void, invalid or terminated. As a result, the State Supreme Court in *Vine* ruled that the immunity from liability for the good faith acceptance of instructions from an agent does not arise in circumstances in which a power of attorney is void or voidable, even though a person accepting instructions from an agent has no knowledge or reason to know the power of attorney is invalid.

The *Vine* decision presented persons asked by agents to take actions based upon powers of attorney with a difficult dilemma. Refusing to accept instructions from an agent in questionable circumstances, but without knowledge that a power of attorney is void or voidable, creates exposure to claims for damages for losses arising out of a failure to follow an agent's instructions. On the other hand, following the instructions of an agent, even in good faith and

⁴ 20 Pa.C.S. §§ 5606 & 5608.

without any basis to question the power of an agent, may expose a party to liability to the principal for disposing of the principal's assets in a manner not authorized by the principal. For financial institutions, these risks were compounded by federal regulations that prohibit financial institutions from obtaining or using health care information in making credit decisions, including to determine whether a principal was competent at the time a power of attorney was executed.⁵

The amendments recently made to the Probate, Estates and Fiduciaries Code address these issues by (1) expanding the immunities provided for good faith acceptance of powers of attorney without knowledge of deficiencies in the powers or in the exercise of an agent's authority; (2) clarifying the actions a third party may and may not take when presented with instructions by an agent acting under a power of attorney; (3) providing more specific standards to determine when a person presented with instructions by an agent is not required to accept a power of attorney; and (4) better defining the scope of liability of a person wrongfully refusing to comply with the instructions of an agent.

These amendments took effect on July 3, 2014, and apply to powers of attorney executed before, on or after their effective date, except that the amendments expanding immunities also apply retroactively to acts performed by agents and third parties taken before their effective date. Except for the expanded immunities (which expressly apply to judicial proceedings commenced prior to July 3, 2014), the amendments may not be applied to judicial proceedings related to powers of attorney commenced before their effective date if a court finds that "application of the amendments would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party."⁶

Each of these changes to current law is based upon provisions of the Uniform Power of Attorney Act approved by the Uniform Law Commission in 2006 and currently in effect in 15 states and the U.S. Virgin Islands and under consideration for enactment in Connecticut, Mississippi and Washington.⁷

1. Expanded Immunities

The amendments provide that a person who accepts a power of attorney without actual knowledge that the power of attorney is void, invalid or terminated; that the agent's authority is void, invalid or terminated; or that the agent is exceeding or improperly exercising authority, "may, without liability, rely upon the power of attorney as if the power of attorney and the agent's authority were genuine, valid and still in effect and that the agent had not exceeded and had properly exercised the authority [granted by the power]." A person who in good faith accepts a power of attorney without actual knowledge that a signature or mark of the principal, a person who signs a power on behalf of the principal, a witness, or a notary are not genuine, "may, without liability, rely in the genuineness of the signature or mark."

⁵ 12 C.F.R. § 41.30(e)(1)(i); 70 C.F.R. 60668-69 (November 11, 2006).

⁶ House Bill 1429, §9(2)(2) & (4) & § 10(1).

⁷ The Uniform Act is currently in effect in Alabama, Arkansas, Colorado, Hawaii, Idaho, Iowa, Maine, Montana, Nebraska, Nevada, New Mexico, Ohio, Virginia, West Virginia and Wisconsin. The full text of the Uniform Act is available at www.uniformlaws.org.

A person presented with a power of attorney may also request, and rely upon, without liability, a certification or affidavit regarding factual matters concerning the principal, agent or a power; an English translation of a power containing a language other than English; or an opinion of counsel relating to whether the agent is acting within the scope of authority granted.⁸ Unlike current law that authorizes a person presented with a power of attorney to request an affidavit that the power of attorney has not been terminated and is in effect, a certification of factual matters may relate to “any factual matter concerning the principal, agent or power of attorney.”

Notwithstanding their broad scope, the expanded immunities in themselves cannot validate a forged instrument conveying an interest in real property; make a forged instrument effective to give constructive notice of a conveyance; or limit the liability of an insurer, indemnitor or guarantor of contractual obligations to indemnify, hold harmless or defend a person who accepts or relies on a power of attorney.

As used in the amendments, the term “good faith” means “honesty in fact,” and does not require the observance of commercial standards of fair dealing.⁹ A person who conducts activities through employees is considered to be without actual knowledge of facts if the employee conducting the transaction is without knowledge of the fact and does not act with “conscious disregard or willful ignorance regarding the existence of the fact[s].”¹⁰

The expanded immunities are equivalent to those provided by the Uniform Power of Attorney Act, but unlike the Uniform Act do not grant immunity to a person conducting transactions through employees if the employee acts in conscious disregard or willful ignorance of facts. The Uniform Act grants immunity to a person whose employees act without “actual knowledge” of facts. The Uniform Act also does not contain an express limitation on the applicability of immunities to the validation of forged instruments or with respect to the obligations of insurers, indemnitors or guarantors, but the Uniform Act is supplemented by other principles of law and equity not displaced by its provisions and preserves the availability of remedies under other applicable law.¹¹

Unlike the Uniform Act, the amendments also do not require a power of attorney to be notarized or acknowledged by a person authorized by law to take acknowledgments for the immunities to arise. With limited exceptions (discussed below), however, the amendments require all powers of attorney executed after January 1, 2015 to be notarized or acknowledged.

2. Actions That May Be Taken When Presented with a Power of Attorney

Under prior Pennsylvania law, if a person presented with instructions of an agent lacked “reasonable cause” to comply with the instructions of the agent, the person was subject to “civil liability for any damages resulting from non-compliance.” The only alternative under prior law

⁸ House Bill 1429, § 5 (amending 20 Pa.C.S. § 5608).

⁹ House Bill 1429, § 1 (amending 20 Pa.C.S. § 5601(f)).

¹⁰ House Bill 1429, § 6 (adding 20 Pa.C.S. § 5608.2).

¹¹ Uniform Power of Attorney Act, §§ 119, 121 & 123.

to acceptance or rejection of the instructions was to request that the agent provide an affidavit stating that the agent “did not have at the time of exercise of the power actual knowledge of the termination of the power by revocation, death or, if applicable, disability or incapacity or the filing of an action in divorce [which terminated a power] and that, if applicable, [any] specified future time or contingency [needed to effectuate the powers of the agent] has occurred.” The receipt of such an affidavit provided “conclusive proof of the non-revocation or non-termination of the power at that time and conclusive proof that [any] specified time or contingency has occurred.”¹² Without limiting or restricting the authority to request such an affidavit, the amendments provide additional alternative actions that a person may take when presented with a power of attorney, and specify the time frame in which such actions must be taken.

The amendments require a person, not later than seven business days after presentation of a power of attorney, to either accept the power, or request, without liability:

- An agent’s certification or affidavit concerning factual matters concerning, the principal, agent or power;
- An English translation of a power containing a language other than English; or
- An opinion of counsel relating to whether the agent is acting within the scope of the agent’s authority.

A request for an opinion of counsel must be in writing and explain the reason for the request. If a person requests a certification or opinion of counsel and acts on the instructions of an agent based on the information received, the person is not precluded thereafter from requesting a certification or opinion of counsel at a later time with respect to a further exercise of authority by the agent.¹³

An English translation or opinion of counsel must be provided at the principal’s expense, unless the request is made more than seven business days after presentation of the power of attorney. The seven business day limit does not apply to any subsequently provided revision or addition to a power of attorney, or to the exercise of a power not previously exercised by the agent in a prior translation.

If a person requests a certification, affidavit, translation or opinion of counsel, the person is required within five business days to accept the power of attorney after receipt of the certification, affidavit, translation or opinion of counsel, “unless the information provided . . . , provides a substantial basis for making a further request” for a certification, affidavit, translation or opinion of counsel. A person may not, however, require an additional or different form of power of attorney for authority granted in the power presented.

¹² 20 Pa.C.S. § 5606.

¹³ House Bill 1429, § 5 (adding 20 Pa.C.S. § 5608.1).

The requirement either to accept a power of attorney or to make a timely request for a certification, affidavit, translation or opinion of counsel does not apply to powers of attorney subject to the laws of jurisdiction other than Pennsylvania, or to a power prescribed by a government, or governmental subdivision, agency or instrumentality.

These provisions are equivalent to the Uniform Power of Attorney Act, but clarify that the acceptance of a power based on a certification, affidavit, translation or opinion of counsel does not bar the subsequent certification, affidavit, translation or opinion of counsel if a different power is exercised than in a prior transaction, changes are made to a power of attorney, or a “substantial basis” exists for a further request. The Uniform Act also does not exclude powers subject to the laws of other jurisdictions or prescribed by governments, their subdivisions, agencies or instrumentalities, from the requirement for acceptance or a timely request for a certification, affidavit, translation or opinion of counsel; and for timely action after the receipt of a certification, affidavit, translation or opinion of counsel.¹⁴ As further discussed below, however, the amendments do not restrict or prohibit the acceptance and reliance upon powers of attorney subject to the laws of other jurisdictions, and instead expand the recognition in Pennsylvania of powers of attorney subject to the laws of other jurisdictions. The immunities granted to persons who accept powers of attorney in good faith and without actual knowledge of any defects are also not limited to powers granted by principals under Pennsylvania law.

3. Rejection of a Power of Attorney

Under prior Pennsylvania law, the obligation to accept a power of attorney did not arise if a person had “reasonable cause” not to comply with the instructions of an agent, including “a good faith report made by a third party to a local protective service agency regarding abuse, neglect, exploitation or abandonment under the Older Adult Protective Services Act.” Except for circumstances relating to the termination of a power of attorney or conditions needed to effectuate a power, or the lack of notice signed by the principal or acknowledgment signed by the agent, no other examples of what constitutes “reasonable cause” are set forth in the statute. As a result, under the statutory construction doctrine of *ejusdem generis*, the term “reasonable cause” may not include dissimilar factual or legal matters.¹⁵ The amendments correct this deficiency in current law by recognizing a broader array of circumstances in which a person is not required to accept a power of attorney. A person is not required to accept a power of attorney or the instructions of an agent if:¹⁶

- The person is not otherwise required to engage in a transaction with the principal under the same circumstances.
- The power of attorney has not been properly executed.

¹⁴ Uniform Power of Attorney Act, § 120 (Alternative A).

¹⁵ The rule of *ejusdem generis* provides that when general words in a statute are preceded or followed by specific examples, the general words are not to be construed in their broadest sense, but instead applied only to things of the same general class as those enumerated. See e.g., *McClellan v. Health Maintenance Organization of Pennsylvania*, 546 Pa. 463, 686 A.2d 801, 806 (Pa. 1996).

¹⁶ House Bill 1429, § 6 (adding 20 Pa.C.S. § 5608.1(b)).

- Engaging in a transaction would be inconsistent with any law or regulation.
- A request for a certification, affidavit, translation or opinion of counsel is refused.
- A person “in good faith believes that the power is not valid or the agent does not have the authority to perform the act requested,” regardless of whether a certification, affidavit, translation or opinion of counsel is provided.
- A person makes, or has actual knowledge that another person has made, a report to local protective services agency of suspected physical or financial abuse, neglect, exploitation or abandonment of the principal by the agent or someone acting for or with the agent.

These amendments are substantially equivalent to the Uniform Power of Attorney Act, but unlike the Uniform Act, the amendments are not limited only to notarized or acknowledged powers of attorney.¹⁷

4. Liability for Wrongful Rejection of a Power of Attorney

Under prior Pennsylvania law, absent “reasonable cause” not to comply with the instructions of an agent, a person who refused to comply with the instructions was subject to “civil liability for any damages resulting from non-compliance.” The scope of such liability, however, was not further defined.

The amendments provide that a person who refuses, in violation of the requirements for timely acceptance or rejection of a power of attorney, to accept a power of attorney is subject to civil liability “for pecuniary harm to the economic interests of the principal proximately caused by the refusal to comply with the instructions of the agent” and subject to a court order mandating acceptance of the power of attorney. As noted above, however, the requirements for timely acceptance of a power of attorney do not apply to powers subject to the laws of other jurisdictions or prescribed by governments or their agencies, subdivisions or instrumentalities.¹⁸

By limiting liability for any damages to pecuniary harm to the economic interests of the principal proximately caused by the refusal to comply with the instructions of the agent, the amendments will most likely exclude from liability any costs not incurred by the agent or principal as a result of the person’s refusal to comply with the instructions of the agent and any damages which could have been avoided by the exercise of reasonable diligence by the agent or principal, and preclude claims for the recovery of non-economic, special, or punitive damages.

These liability provisions differ from those of the Uniform Power of Attorney Act, which make a person who refuses to accept the instructions of an agent in violation of the law subject to a court

¹⁷ Uniform Power of Attorney Act, § 120(b) (Alternative A).

¹⁸ House Bill 1429 § 6 (adding 20 Pa.C.S. § 5601).

order compelling compliance and attorneys fees and costs, but which does not provide liability for any damages incurred by the principal.¹⁹

Measures to Prevent Misuse and Abuse of Powers of Attorney

Consistent with the recommendations of Pennsylvania’s Joint State Government Commission, the amendments make a variety of changes to the Probate, Estates and Fiduciaries Code to prevent the misuse and abuse of powers of attorney.²⁰ The amendments (1) restrict the ability of individuals to sign powers on behalf of the principal; (2) require in most cases the execution of a power of attorney to be witnessed and acknowledged; and (3) expand the form of notice required to be given to principals executing powers of attorney and the form of acknowledgment required of agents designated in powers of attorney. These amendments apply only to powers of attorney executed on or after January 1, 2015.²¹

1. Execution of a Power of Attorney on Behalf of the Principal

Prior Pennsylvania law provided that a power of attorney could be executed “by another on behalf of and at the direction of the principal.” The amendments provide that, effective January 1, 2015, a power of attorney may only be executed “by another individual on behalf of and at the direction of the principal if the principal is unable to sign, but specifically directs another individual to sign the power of attorney.”²² Neither the statute nor the report of the Joint State Government Commission provide any guidance regarding when a principal is “unable to sign” a power of attorney. As a result, it is uncertain whether another individual may sign a power on behalf of the principal only in the event a physical disability prevents the signing of the power by the principal, or whether practical considerations, such as the inability of a principal to be physically present to sign a power of attorney, may be taken into consideration.

These changes differ from the Uniform Power of Attorney Act, which does not require that another individual may sign a power of attorney on behalf of and at the direction of the principal only if the principal is “unable to sign,” but requires the power to be executed “in the principal’s conscious presence.” The commentary to the Uniform Act indicated that “conscious presence ... generally requires that the signing is sufficient if it takes place within the range of the senses -- usually sight or hearing -- of the [principal].” The absence of a conscious presence requirement in the revised Pennsylvania law may suggest that the inability of the principal to sign a power may be construed to include situations other than the physical disability of the principal.

¹⁹ Uniform Power of Attorney Act, § 120(c) (Alternative A).

²⁰ *Powers of Attorney: Proposed Amendments to the Probate, Estates and Fiduciaries Code, Report of the Advisory Committee on Decedents’ Estates Laws*, PA Joint State Government Commission, March 2010; *Powers of Attorney and Health Care Decision-Making, Report of the Advisory Committee on Decedents’ Estates Laws*, PA Joint State Government Commission, June 2011. The full text of each report is available at <http://jsg.legis.state.pa.us/publications>.

²¹ House Bill 1429, § 9(3) & § 10(3).

²² House Bill 1429, § 1 (amending 20 Pa.C.S. § 5601(b)(1)).

2. Witnesses and Notarization

Prior Pennsylvania law required two witnesses 18 years of age or older for the execution of a power of attorney “executed by a mark or by another individual.” The amendments expand the requirement for two witnesses to apply to all powers of attorney executed on or after January 1, 2015, and require the signature or mark of the principal or another person signing on behalf of the principal to be acknowledged before a notary public or other individual authorized to take acknowledgments. The amendments further provide that “the agent designated in the power of attorney or the notary public or other person authorized to take acknowledgments before whom the power of attorney is executed” may not serve as witnesses.²³

The requirements for two witnesses does not apply to powers of attorney signed by the principal, other than by mark, if the power is:

- Contained in an instrument used in a commercial transaction that creates an agency relationship;
- Coupled with an interest subject to the power, including a power given to or for the benefit of a creditor in connection with a loan or other credit transactions;
- Contained in the governing documents of a corporation, partnership, limited liability company or other legal entity by which a director, partner or member authorizes others to do things on behalf of the entity;
- Contained in a proxy or other delegation to exercise voting rights or management rights with respect to legal entity;
- Provides a warrant of attorney to confess judgment;
- Given to a dealer under the Pennsylvania Board of Vehicles Act when used in conjunction with the sale, purchase or transfer of a certificate of title for a motor vehicle;
- Created on a form prescribed by a Commonwealth agency, political subdivision or an authority or instrumentality of the Commonwealth or a political subdivision; or
- Applicable exclusively to health care or mental health decision-making.²⁴

Notwithstanding the exemptions from the requirement that the execution of powers of attorney must be witnessed by two individuals, effective January 1, 2015, all powers of attorney must be acknowledged before a notary public or other individual authorized to take acknowledgments. This requirement seems likely to create significant problems in a number of contexts and may necessitate further amendments to the legislation. To address this issue, recommendations have been made that such powers of attorney should, with limited exceptions, not be subject to most

²³ House Bill 1429, § 1 (amending 20 Pa.C.S. § 5601(b)(3)).

²⁴ House Bill 1429, § 1 (amending 20 Pa.C.S. § 5601(e.1) & (e.2)).

of the provisions of Chapter 56 of the Probate, Estates and Fiduciaries Code, but instead should be governed by the common law of agency or be exempt from the notarization or acknowledgment requirements.

To the extent a power of attorney executed on or after January 1, 2015, is not properly witnessed, and notarized or acknowledged, the amendments allow a third party presented with the power to refuse to comply with the instructions of the agent.²⁵ While the law does not require the rejection of a power of attorney not containing the signatures of two witnesses (when required), and a notarization or acknowledgment, the failure to satisfy these requirements may impair the applicability of the immunities provided for good faith acceptance of a power of attorney unless the defect can be satisfied by an affidavit, certification or opinion of counsel.

3. Notice and Acknowledgment Requirements

Prior Pennsylvania law provided that powers of attorney include a standard form of notice in capital letters at the beginning of the power of attorney signed by the principal acknowledging that (1) the designated agent is granted “broad powers,” which may include the ability to sell or dispose of property of the principal without advance notice or approval; (2) the execution of a power of attorney does not impose a duty on an agent to exercise the granted powers, but when exercised, the agent must use due care to act in the benefit of the principal in accordance with the terms of the power of attorney; (3) that the powers granted to an agent may continue to be exercised after the principal becomes incapacitated unless the powers are expressly limited or revoked; (4) the agent must keep his or her funds separate from those of the principal; (5) a court can take away the powers of an agent for not acting properly; and (6) the principal has read or had the power of attorney explained and been advised to ask a lawyer for advice if the principal does not understand anything about the power of attorney. In the absence of such a notice, the agent has “the burden of demonstrating that exercise of [authority granted by the power of attorney] is proper.”²⁶

Under prior law, a power of attorney does not grant an agent authority to act on behalf of the principal unless the agent executes and affixes to the power an acknowledgment substantially equivalent to a standard form stating that the agent must (1) exercise the powers for the benefit of the principal; (2) keep the assets of the principal separate from his or her assets; (3) exercise reasonable caution and prudence; and (4) keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.²⁷

Under prior law, the notice and acknowledgment requirements did not apply to any power of attorney “contained in an instrument used in a commercial transaction,” including (1) a power given to or for the benefit of a creditor in a loan transaction; (2) a power exclusively granted to facilitate the transfer of stocks, bonds and other assets; (3) a power contained in the governing documents of a corporation, partnership, limited liability company or other legal entity by which

²⁵ House Bill 1429, § 6 (adding 20 Pa.C.S. § 5608.1(b)(2)(i)).

²⁶ 20 Pa.C.S. 5601(c).

²⁷ 20 Pa.C.S. 5601(d).

a director, partner or member authorizes others to do things on behalf of the entity; (4) a warrant of attorney to confess judgment; or (5) a power given to a dealer under the Pennsylvania Board of Vehicles Act when used in conjunction with the sale, purchase or transfer of a certificate of title for a motor vehicle. The notice and acknowledgment requirements also did not apply to a power of attorney that exclusively provides for health care decision-making.²⁸

Effective January 1, 2015, the standard form of notice given to the principal is revised to delete the statement that the agent must keep his or her funds separate from those of the principal. This change was made because under both prior law and under the amendments, the requirement that funds be maintained separately can be expressly modified or waived in a power of attorney. The amendments also modify the notice requirements to advise the principal that:

- The agent must act in accordance with the principal’s “reasonable expectations to the extent actually known” and in the best interests of the principal in good faith and within the scope of the authority granted;
- The law permits a principal to grant the agent the authority to give away all of the principal’s property while the principal is alive or substantially change how the principal’s property is distributed after the principal’s death; and
- Before signing the power of attorney, the principal should seek the advice of an attorney to be sure the principal understands the power of attorney.

Effective January 1, 2015, the standard form of acknowledgment signed by the agent is modified to conform to the language of the notice signed by the principal and state that the agent must act in accordance with the principal’s “reasonable expectations to the extent actually known” and in the best interests of the principal in good faith and within the scope of the authority granted.

The exemptions from the notice and acknowledgment requirements are also expanded effective January 1, 2015, to conform to the exceptions to the requirement for two witnesses for the execution of a power of attorney as described above. The expanded exceptions apply to (1) any power coupled with an interest in the power granted; (2) a proxy or other delegation to exercise voting rights with respect to a legal entity; (3) a power created on a form prescribed by a Commonwealth agency, political subdivision, authority or instrumentality of the Commonwealth or a political subdivision; or (4) a power of attorney exclusively used for mental health care decision-making.

The amendments also authorize a third party to refuse to accept the instructions of an agent pursuant to a power of attorney not containing the required form of notice or acknowledgment.²⁹

²⁸ 20 Pa.C.S. 5601(e.1) & (e.2).

²⁹ House Bill 1429, § 6 (adding 20 Pa.C.S. § 5608.1(b)(2)(ii)).

Measures to More Closely Conform to the Uniform Power of Attorney Act

In order to more closely conform Pennsylvania law to the Uniform Power of Attorney Act, the amendments modify provisions of current law relating to (1) the duties of agents; (2) actions that require a specific and general grant of authority; (3) the authority of agents to make gifts on behalf of a principal; (4) the use of copies of powers of attorney; (5) the modification of statutory short-form grants of authority; (6) the power of an agent to engage in stock, bond and other securities transactions; (7) the power of an agent to engage in insurance and annuity transactions; (8) the validity of powers of attorney subject to the laws of other jurisdictions; and (9) the applicability of other general principals of law and equity.

1. Duties of Agents

Under prior Pennsylvania law, an agent acting under a power of attorney had a “fiduciary relationship with the principal,” which, in the absence of a specific contrary provision in a power of attorney, required the principal to exercise powers for the benefit of the principal; keep the assets of the principal separate from those of the agent; exercise “reasonable caution and prudence”; and keep a full record of all actions, receipts and disbursements on behalf of the principal. These duties under prior law, however, did not apply to any power of attorney “contained in an instrument used in a commercial transaction” exempt from the notice and acknowledgment requirements described above.³⁰

Because the scope of fiduciary duties applicable to powers of attorney is not well defined, the amendments adopt, subject to one significant modification, the statement of agents’ duties set forth in the Uniform Power of Attorney Act, which sets forth mandatory duties not subject to waiver or modification in a power of attorney; additional duties that may be expressly waived or modified; and set limits on the liabilities of agents.³¹

Mandatory duties, not subject to modification or waiver, are imposed on all agents to act (1) in accordance with the principal’s reasonable expectations to the extent actually known by the agent, and otherwise in the principal’s best interest; (2) in good faith; and (3) only within the scope of authority granted in the power of attorney.

Unless otherwise provided in a power of attorney, agents are also required to:

- Act loyally for the principal’s benefit.
- Keep the agent’s funds separate from the principal’s unless funds were not kept separate as of the date of execution of a power of attorney, or were commingled after the date of execution by a principal who is the spouse of the agent.

³⁰ 20 Pa.C.S. §§ 5601(e) & (e.1).

³¹ House Bill 1429, § 3 (adding 20 Pa.C.S. § 5601.3); Uniform Power of Attorney Act, § 114. While the law no longer characterizes the duties of an agent as “fiduciary,” the comment to § 114 of the Uniform Act explain that it is “well settled that an agent under a power of attorney is a fiduciary” and that the intent of the section is to clarify the nature and scope of an agent’s duties.

- Act to not create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest.
- Act with the care, competence and diligence ordinarily exercised by agents in similar circumstances.
- Cooperate with a person who has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known, and in the principal's best interest.
- Attempt to preserve the principal's estate plan to the extent actually known by the agent, if doing so is in the principal's best interest, based on all relevant factors.

The amendments also limit an agent's liability as follows:

- An agent that acts in good faith is not liable to a beneficiary of the principal's estate for failure to preserve the principal's estate plan.
- 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 agent's acts or has interests that conflict with those of the principal.
- Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.
- If an agent delegates authority to another person, the agent is not liable for an act, error of judgment or default of that person if the agent exercises care, competence and diligence in selecting and monitoring the person.

In determining the liability of an agent, the amendments provide that if the agent was selected by the principal because of special skills or expertise, or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence and diligence under the circumstances.

The amendments also provide that, except as otherwise provided by a power of attorney, an agent is not required to disclose receipts, disbursements or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, conservator, another fiduciary acting for the principal, governmental agency having authority to protect the welfare of the principal or, upon the death of the principal, the personal representative or successor in interest of the principal's estate. Where an agent is required to provide an accounting, however, the agent is required to comply with the request within 30 days, or provide a written explanation of why additional time is needed, in which case the agent must provide the accounting within not more than an additional 30 days.

These amendments take effect January 1, 2015, and apply to powers of attorney executed before, upon or after the effective date, and to judicial proceedings concerning a power of attorney

commenced before, on or after the effective date, but do not apply to the acts or omissions of agents before January 1, 2015, and do not apply to judicial proceedings in a manner that would substantially interfere with the proceedings or prejudice the rights of a party. Unlike prior law, however, which excluded powers of attorney contained in instruments used in commercial transactions from the general duties imposed on agents, the amendments contain no such limitation. While the amendments provide that all duties other than the mandatory duties may be expressly waived or modified, powers of attorney used in commercial transactions will need to be modified to do so, which may be problematic with respect to powers of attorney executed before the effective date of the legislation. To address this problem, suggestions have been made that future legislation exempt powers of attorney used for commercial transactions from most of the requirements of Chapter 56 of the Probate, Estates and Fiduciaries Code or at a minimum from the list of agent's duties.

The sole area in which the duties imposed on agents by the amendments differ from the Uniform Act is the limitation on commingling the funds of the agent and principal as described above, which was added to the legislation at the recommendation of the law enforcement community and the Pennsylvania Department of Public Welfare.

2. Actions that require a specific and general grant of authority

Under prior Pennsylvania law, the only areas in which a grant of authority to an agent is required to be specific as opposed to general involves the power to make gifts or to delegate authority to another person to act on behalf of the agent.³² The amendments adopt the requirements of the Uniform Power of Attorney Act with respect to actions that require a specific or general grant of authority, but apply only to powers of attorney executed on or after January 1, 2015.³³

The amendments require a specific grant of authority for an agent to:

- Create, amend, revoke or terminate an inter vivos trust in any manner other than as permitted using a “short form” that allows the designation of the power of an agent;
- Make a gift;
- Create or change rights of survivorship;
- Create or change a beneficiary designation;
- Delegate authority granted under the power of attorney;
- Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;
- Exercise fiduciary powers that the principal has authority to delegate; or

³² 20 Pa.C.S. §§ 5601.2 & 5602(b)(1.1).

³³ House Bill 1429, § 3 (adding 20 Pa.C.S. § 5601.4), § 9(4) & § 10(3).

- Disclaim property, including a power of appointment.

The amendments also provide that notwithstanding a specific grant of authority, an agent may not, unless expressly authorized, create in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer or otherwise, an interest in favor of the agent or an individual to whom the agent owes a legal obligation of support. Similarly, except as expressly authorized, a grant of authority to make gifts is limited to the power granted using a short-form designation of the power to make gifts that may be incorporated by reference in a power of attorney.

The amendments provide that a general grant of authority "to do all acts that a principal is authorized to perform," grants the agent only the authority that may be delegated using the short-form designations of authority that may be incorporated by reference in a power of attorney.

3. Gifts

Under prior Pennsylvania law, unless otherwise expressly provided by a power of attorney, the power of an agent to make gifts on behalf of the principal was limited to gifts (1) to the principal's spouse, children, or a spouse of the principal's children; (2) that in an aggregate do not exceed the annual exclusion permitted for Federal gift tax purposes; (3) for tuition and medical care to any permissible donee to the extent excluded from the Federal gift tax as a qualified transfer; or (4) with the consent of the principal's spouse, that do not exceed the aggregate annual Federal gift tax exclusions for both spouses. Under prior law gifts could be made outright or in trust; to a minor under the Pennsylvania Uniform Transfers to minors act or pursuant to a court order; and the agent was not required to treat donees equally or proportionally and could entirely exclude any permissible donee; and was not required to follow the same pattern as used in making prior gifts. When making gifts, prior law provided that "an agent and the donee of a gift shall be liable as equity and justice may require to the extent that, as determined by a court, a gift made by the agent is inconsistent with prudent estate planning or financial management for the principal or with the known or probable intent of the principal with respect to the disposition of the estate," but provided an exemption from liability to any transfer agent, depository or other third party for "the proper discharge of the agent's duty."³⁴

The amendments repeal the provisions of prior law relating to gifts, and substitute the provisions of the Uniform Power of Attorney Act.³⁵ While the provisions of the Uniform Act are generally the same as prior Pennsylvania law, they modify prior law by eliminating the prohibition against making gifts to persons other than permissible donees without express authority; and changing the standards under which an agent may be found to have violated a duty to the principal when making gifts.

The amendments replace the requirements that an agent engage in "prudent estate planning or financial management for the principal" and in a manner consistent "with the known or probable intent of the principal with respect to the disposition of the estate," with requirements that the

³⁴ 20 Pa.C.S. §§ 5601.2 & 5603(a).

³⁵ House Bill 1429, § 2 (repealing 20 Pa.C.S. § 5601.2) and § 4 (amending 20 Pa.C.S. § 5603(a)).

principal “attempt to preserve the principal’s estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal’s best interest.” In evaluating whether gifts are in the best interest of the principal, an agent is required to consider “all relevant factors,” including the value and nature of the principal’s property; the principal’s foreseeable obligations and need for maintenance; the minimization of taxes, including income, estate, inheritance, and generation-skipping transfer and gift taxes; eligibility of the principal for benefits, programs or assistance available under law or regulation; and the principal’s personal history of making gifts.

In addition, as noted above, an agent that acts in good faith is not liable to a beneficiary of the principal’s estate for failure to preserve the principal’s estate plan; and all third parties are granted broad immunities under general principles of law in lieu of the special immunities provided to transfer agents, depositories and other third parties with respect to the discharge of an agent’s duties with respect to gifts.

These amendments apply only to powers of attorney executed on or after January 1, 2015.³⁶

4. Copies

In the same manner as provided by the Uniform Power of Attorney Act, the amendments provide that a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original, except for purposes of filing or recording with the Orphans’ Court of the Office for the Recording of Deeds.³⁷ The amendments also provide that a power of attorney may be in either written or electronic form, and that an electronic power of attorney may be recorded without being reduced to tangible form to the extent authorized under the Uniform Real Property Recording Act.³⁸ The amendments take effect January 1, 2015, but apply to powers of attorney executed before, on or after the effective date.³⁹

The Uniform Real Property Electronic Recording Act authorizes, but does not require, counties to accept electronic documents for recording pursuant to standards established by the Pennsylvania Electronic Recording Commission.⁴⁰ As a result, the ability to file or record a power of attorney electronically may vary from county-to-county.

5. Modification of Short-Form Powers of Attorney

Prior law provides that a principal, by using various standard phrases in a short-form power of attorney, such as the power “to make limited gifts,” “authorize medical or surgical procedures,”

³⁶ House Bill 1429, § 9(3) & § 10(3).

³⁷ House Bill 1429, § 4 (adding subsection (d) to 20 Pa.C.S. § 5602); Uniform Power of Attorney Act, § 106(d).

³⁸ House Bill 1429, § 4 (amending 20 Pa.C.S. § 5602(c)).

³⁹ House Bill 1429, § 9(1) & § 10(3).

⁴⁰ 21 P.S. § 483.1 et seq.

or “engage in stock and bond transactions,” may authorize an agent to do any of the acts that the statute associates with the use of these phrases.

For powers of attorney executed on or after January 1, 2015, the amendments provide (in the same manner as provided by the Uniform Power of Attorney Act) that when using these standard phrases in a short-form power of attorney, the power of attorney may modify the standard scope of authority granted to an agent using these phrases.⁴¹ For example, although the law provides that a “power to borrow money” means the power to “borrow money and pledge or mortgage any properties that the principal owns as a security therefor,” a principle in a power of attorney could provide that the power to borrow money also includes borrowing money secured by property owned by another person, or by a guarantee provided by another person, with their consent.

The amendments allowing the amendment of a short-form power of attorney take effect January 1, 2015.⁴²

6. Stock, Bond and Other Securities Transactions

Prior Pennsylvania law provided that a grant of authority to engage in stock, bond and other securities transactions in a short-form power of attorney grants an agent, in addition to other types of authority, the power to “join in any merger, reorganization, voting-trust plan or other concerted action of security holders and make payments in connection therewith.” The amendments clarify that these powers also grant the agent the power to join in any “consolidation, dissolution [or] liquidation.”⁴³

These amendments take effect January 1, 2015, and apply only to powers of attorney executed on or after their effective date,⁴⁴ but notwithstanding this limitation, the power granted by current law to exercise “all powers with respect to stocks, bonds and securities that the principal could if present” may include these powers in existing powers of attorney.⁴⁵

7. Insurance and Annuity Transactions

Prior Pennsylvania law provided that a grant of authority to engage in insurance transactions, included the authority to engage in transactions involving “life, accident, health, disability or liability insurance.” In a manner similar to the Uniform Power of Attorney Act, the amendments expand this power to also relate to annuity transactions, but provide that the power to engage in

⁴¹ House Bill 1429, § 4 (adding subsection (a.1) to 20 Pa.C.S. § 5602 and amending 20 Pa.C.S. § 5603(v)); Uniform Power of Attorney Act, § 202(c).

⁴² House Bill 1429, § 10(3).

⁴³ House Bill 1429, § 4 (amending 20 Pa.C.S. § 5603(k). These amendments do not reflect provisions of the Uniform Power of Attorney Act, but instead were based on the recommendation of the Pennsylvania Joint State Government Commission.

⁴⁴ House Bill 1429, § 9(3) & § 10(3).

⁴⁵ 20 Pa.C.S. § 5603(k)(8).

insurance and annuity transactions does not include the power to create or change beneficiary designations unless expressly granted by a power of attorney.

These amendments take effect January 1, 2015, and apply only to powers of attorney executed on or after their effective date.⁴⁶ Because annuities are treated as a form of life insurance for regulatory purposes,⁴⁷ however, and under prior law the power to engage in insurance transactions was defined as “including, but not limited to, life, accident, health, disability or liability insurance,” a power to engage in insurance transactions executed before January 1, 2014, should be construed as including the power to engage in annuity transactions.⁴⁸

8. Validity of Powers of Attorney

Prior Pennsylvania law provided that a power of attorney executed in another jurisdiction in accordance with the laws of that jurisdiction was considered valid in Pennsylvania “except to the extent the power ... would allow an agent to make a decision inconsistent with the laws of [Pennsylvania].” Because these provisions created a burdensome requirement to compare the laws of other jurisdictions to the laws of Pennsylvania, and evaluate the extent of their consistency, the amendments recognize without any such restrictions powers of attorney subject to the laws of another jurisdiction if valid under the laws of that jurisdiction. The amendments also provide that a power of attorney is subject to the laws of the jurisdiction as indicated in the power, or in the absence of any such indication, the laws of the jurisdiction in which the power of attorney was executed.⁴⁹

While these amendments validate powers of attorney subject to the laws of other jurisdictions for purposes of Pennsylvania law, as previously discussed, persons are not required to accept instructions from agents acting under such powers of attorney and are not subject to claims for damages for failing to accept such instructions.

These amendments took effect on July 3, 2014, and apply to powers of attorney executed before, on or after their effective date. The amendments are consistent with the provisions of the Uniform Power of Attorney Act.⁵⁰

9. Principals of Law and Equity

Based on equivalent provisions of the Uniform Power of Attorney Act, the amendments provide that statutory provisions relating to powers of attorney are supplemented by the principles of law

⁴⁶ House Bill 1429, § 9(3) & § 10(3).

⁴⁷ Within Part IV of Title 31 of the PA Code, which regulates life insurance, Chapters 81, 85, 89 (§ 89.62), 90 (§§ 90c.20 & 90c.24), 90E and 90H all address issues relating to annuity contracts.

⁴⁸ *Steele v. Statesman Insurance Company*, 530 Pa. 190, 193, 607 A.2d 742, 743 (1992) (applying the principle of *ejusdem generis* to the interpretation of contracts). See *supra* note 15.

⁴⁹ House Bill 1429, § 7 (amending 20 Pa.C.S. § 5611).

⁵⁰ House Bill 1429, § 9(1) & § 10(1); Uniform Power of Attorney Act, § 106.

and equity unless displaced by the statutory law.⁵¹ These principles of law and equity include the common law of agency and the law relating to the equitable jurisdiction of courts. These amendments took effect on July 3, 2014, and apply to powers of attorney executed before, on or after their effective date.⁵²

Future Changes to the Decedents, Estates and Fiduciary Code Relating to Powers of Attorney

This legislation most likely represents the first wave of several changes likely to be made to Pennsylvania's power of attorney law. Further minor refinements to the provisions of this legislation are anticipated to be enacted in the near future by Senate Bill 621, Printer's No. 2111, which passed the State Senate on June 10, 2014; a more extensive set of technical amendments is under discussion for possible introduction next year; and a Pennsylvania Supreme Court Task Force on Elder Abuse is anticipated to make additional recommendations for changes to existing law later this year, which may be under consideration in the 2015 session of the General Assembly.

⁵¹ House Bill 1429, § 8 (adding 20 Pa.C.S. § 5612); Uniform Power of Attorney Act, § 121.

⁵² House Bill 1429, § 9(1) & § 10(1).