

2016 CHANGES TO THE PENNSYLVANIA POWER-OF-ATTORNEY LAW

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Consumer Financial Services Alert

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On October 4, 2016, Governor Tom Wolf signed into law technical corrections to the Pennsylvania power-of-attorney law designed to address deficiencies in the law included in amendments previously enacted in 2014.[1] In addition, changes to the power-of-attorney law were also included in omnibus amendments to Pennsylvania Probate, Estates and Fiduciaries Code made earlier in the year based primarily on the recommendations of the Pennsylvania Bar Association and the Pennsylvania Association of Elder Law Attorneys.[2]

The technical amendments (1) provide that a commercial power of attorney does not require a notarization or other acknowledgment; (2) exclude an agent designated by a commercial power of attorney from the statutory duties imposed upon agents under other types of powers of attorney; (3) allow a power of attorney to be acknowledged by a lawyer if the lawyer subsequently certifies to a notary public or another officer authorized to administer oaths that the attorney witnessed the execution of the power of attorney; and (4) expand the definition of what constitutes a commercial power of attorney.

The changes to the power-of-attorney law included in the omnibus PEF Code amendments (1) grant a court the power to assess costs on any party in a proceeding that requires an agent to provide an accounting of the agent's activities on behalf of a principal; (2) change the relationship between guardians and agents designated in powers of attorney; (3) clarify the choice of law to be used in interpreting powers of attorney; (4) establish rules governing venue and jurisdiction in proceedings involving powers of attorney; (5) modify the list of standard terms that may be used in a power of attorney to grant a default set of powers to an agent; (6) clarify that the power to disclaim interests in property must be expressly provided by a power of attorney; and (7) provide that the power to disclaim interests in property must always be exercised in a manner consistent with the principal's estate plan, to the extent known by the agent and in the principal's best interest.

CORRECTING DEFICIENCIES IN 2014 LEGISLATION

In 2014 extensive changes were made to the Pennsylvania power-of-attorney law (Act 95 of 2014) that revised requirements for the acceptance and reliance on powers of attorney; enacted recommendations to prevent the abuse of powers of attorney developed by the Pennsylvania Joint State Government Commission; and more closely aligned Pennsylvania law with the Uniform Power of Attorney Act.[3] While these amendments made significant and beneficial changes to prior law, they also included a few drafting errors that occurred during last-minute efforts to enact the law prior to the adjournment of the legislative session. The legislation signed into law on October 4, 2016 (Act 103 of 2016) rectifies these errors and also corrects some other long-standing deficiencies in prior law.

1. Notarization or Acknowledgment of Commercial Powers

For powers of attorney executed on or after January 1, 2015, Act 95 of 2014 generally required all powers of attorney to be witnessed by two individuals and to be notarized or otherwise acknowledged, but provided that the same individual who witnesses the execution of a power of attorney may not also notarize or acknowledge a power of attorney. Commercial powers of attorney were excluded from the requirement to obtain the signatures of two witnesses, but were inadvertently made subject to the notarization or acknowledgment requirement.

In order to simplify the execution of commercial powers of attorney, Act 103 of 2016 exempts commercial powers of attorney from notarization or acknowledgment requirements.

2. Duties Imposed on Agents

Effective July 1, 2015, Act 95 of 2014 made all powers of attorney, regardless of whether they were executed before or after the effective date of Act 95, subject to the list of duties imposed upon agents by the Uniform Power of Attorney Act. Unfortunately, Act 95, unlike the Uniform Power of Attorney Act (which does not apply to commercial powers of attorney), made these duties applicable to all types of powers of attorney.

Because the standard duties imposed on agents include a non-waivable obligation to act in the best interests of the principal, Act 95 was problematic for many commercial powers of attorney, especially those that authorized an agent to enforce a security agreement or to execute a confession of judgment against the principal. Act 103 addresses this problem by expressly making commercial powers of attorney exempt from the standard list of duties imposed on agents.

3. Lawyer Acknowledgments

Act 95 potentially excluded powers of attorney from the documents the Judicial Code (42 Pa.C.S. § 327(a)) allows a Pennsylvania lawyer to acknowledge when the lawyer subsequently certifies to a notary or other notarial officer that the lawyer witnessed the execution of the document. Act 95 had this impact because it required the signing of a power of attorney (other than a commercial power of attorney) by or on behalf of the principal to be witnessed by two individuals, but provided that "a witness shall not be the individual who signed the power of attorney on behalf of and at the direction of the principal, the agent designated in the power of attorney, or the notary public or other person authorized by law to take acknowledgments before whom the power of attorney is acknowledged."

Act 103 provides that a lawyer may acknowledge the execution of a power of attorney provided the lawyer taking the acknowledgment "does not act as one of the two witnesses required by [20 Pa.C.S. § 5601(b)(3)(ii)]." Act 103 also makes immediately effective the standard form provided in Pennsylvania's version of the Uniform Law on Notarial Acts used for execution of an acknowledgment by a lawyer. These provisions were necessary because other provisions of the Uniform Law on Notarial Acts have not yet taken effect because of delays by the Department of State in publishing new regulations governing the training of notaries.

4. Definition of Commercial Powers of Attorney

Act 103 also expanded the types of commercial powers of attorney exempt from general requirements that a power of attorney be notarized or acknowledged; the principal sign a standard form notice warning of the broad powers; an agent upon accepting a power sign a standard form acknowledging his or her duties; and that agents are subject to the statutorily designated duties. Under prior law, the exemption provided for powers of attorney executed on behalf of for-profit or nonprofit associations was available only for powers of attorney "contained in the governing documents" of the organization, or which provided a voting proxy.

Act 103 expands the definition of what constitutes a commercial power of attorney to include any power of attorney "authorized by the law that governs the internal affairs of a legal entity," or "by which a director, shareholder, partner, member or manager authorizes others to do things on behalf of the entity." As a result, such powers of attorney are not required to have two witnesses, be notarized or acknowledged, and include the standard forms required to be signed by principals and agents, and are exempt from the standard duties imposed on other types of powers of attorney.

5. Effective Date

Act 103 took effect on October 4, 2016 and applies retroactively to the effective date of Act 95 of 2014, i.e., January 2, 2015. As a result, the deficiencies included in Act 95 are not only corrected prospectively, but also retroactively.

2016 OMNIBUS PEF CODE AMENDMENTS (ACT 79 OF 2016)

Act 79 included several modifications to the Pennsylvania power-of-attorney law that had been originally recommended by the Decedents Estates Advisory Committee to the Pennsylvania Joint State Government Commission. The power-of-attorney amendments, however, expanded upon the original Advisory Committee recommendations with additional amendments suggested by the Pennsylvania Bar Association and the Pennsylvania Association of Elder Law Attorneys.

1. Costs of Accounting

Pennsylvania law provides that an agent may be directed by the court to file an account regarding actions taken under a power of attorney in the office of the clerk in the county where the principal resides and may file an account at any other time.

Act 79 provides that the court may assess the costs of the accounting proceeding as it deems appropriate, including the costs of preparing and filing the account. These amendments give the court greater power to sanction the mismanagement of the affairs of a principal and should discourage frivolous requests for accounts or the unnecessary filing of accounts.

2. Relationship Between Guardians and Agents

Prior to enactment of Act 79, Pennsylvania law provided that upon appointment of a guardian, the guardian had the same power to revoke or amend a power of attorney that the principal would have had if not incapacitated.

Rather than providing a guardian the power to revoke or amend a power of attorney, Act 79 requires a court issuing a guardianship order to determine whether and to what extent an incapacitated person's durable power of attorney or healthcare power of attorney remains in effect.

3. Choice of Law in Interpreting Powers of Attorney

Act 79 provides that the meaning and effect of a power of attorney are determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney is executed. These amendments conform to the choice-of-law rules to determine the meaning and effect of a power of attorney provided by the Uniform Power of Attorney Act.

4. Jurisdiction and Venue

New provisions were added to the power-of-attorney law by Act 79 that provide that venue of any matter pertaining to the exercise of a power by an agent acting under a power of attorney is in the county in which the principal is domiciled or is a resident of a long-term care facility.

Act 79 also provides that a court having jurisdiction over a matter pertaining to the exercise of a power by an agent, may decline to exercise jurisdiction at any time if the court determines that a court of another county or state is a more appropriate forum. Upon declining to exercise jurisdiction, the court may either dismiss the proceeding or stay a proceeding upon condition that a proceeding is promptly commenced in another county or state, or it may impose other conditions it deems appropriate.

5. Default Powers of Agents

In order to simplify requirements for the preparation of powers of attorney, Pennsylvania law, in a manner very similar to the Uniform Power of Attorney Act, since 1982 has allowed powers of attorney to incorporate through the use of designated short phrases various specific types of powers that are typically included in powers of attorney. The statute then defines and describes each of the powers keyed to these short phrases and provides that such definitions will apply unless the power of attorney specifically provides otherwise. Act 79 adds some new short phrases with corresponding default definitions, and deletes from existing law some short phrases and default definitions that were previously included in Pennsylvania law.

Act 79 added to prior law short phrases to designate when a power of attorney grants to the agent a power to "operate a business or entity" or "provide for personal or family maintenance," and provides definitions of the default powers granted when these phrases, or their equivalent, are used (which definitions will apply unless varied by the terms of a power of attorney). In both of these cases, the default powers granted are an abbreviated and shorter form than those specified by the Uniform Power of Attorney Act. As a result, care needs to be exercised when relying on the default powers provided by these short phrases.

Act 79 deleted from prior law the short phrases and accompanying default definitions for the power to:

- "make limited gifts;"
- "authorize admission to medical, nursing, residential or other similar facilities and to enter into agreement for care [of the principal];"
- "authorize medical or surgical procedures;" and
- "make anatomical gifts."

While the use of the short phrase to authorize the power to "make limited gifts" and the definition of the default scope of this power were deleted from prior law, the restrictions on the power to make gifts formerly included within the definition have now been incorporated into provisions of the law specifying the types of powers that must be expressly granted to an agent. As a result, no substantive change is made to the prior law, but instead the law is reorganized in a manner intended to make it clearer and less confusing.[4]

Act 79 now provides that the power to make limited gifts is limited to the powers described in the prior definition of the term, unless otherwise specifically authorized by a power of attorney. This reorganization of the law, therefore, also appears to have little substantive impact, and again appears to have been added to the law to promote clarity.

Although Act 79 deleted from the power-of-attorney law short phrases and default definitions to authorize admission to healthcare facilities, enter into healthcare agreements, and to authorize medical or surgical procedures, Act 79 also transferred to the Pennsylvania healthcare power-of-attorney law largely equivalent provisions. As a result, the impact of this transfer of law was to relegate issues relating to meaning of healthcare powers to other law, but not to exclude these topics from being addressed in general powers of attorney. As a result, these changes appear to have little practical substantive impact, and instead appear to have been designed to improve the clarity of Pennsylvania law.

Likewise, the deletion of a short phrase and default definition relating to the power to make anatomical gifts appears to have little substantive impact, because the extent of these powers is well defined in the Anatomical Gift Act.

6. Disclaimers of Interests

Act 79 provides that unless otherwise specified in a power of attorney, the power to disclaim an interest in property is limited to the interests that may be disclaimed under provisions of the PEF Code generally covering disclaimers.^[5] As such, Act 79 does not change prior law, but instead incorporates into the law generally dealing with powers of attorney the restrictions otherwise applicable to disclaimers.

Act 79 also provides that when exercising the power to disclaim an interest, an agent must "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 based on all relevant factors" in the same manner as is generally specified in provisions of the law defining the general duties of agents that apply unless otherwise provided by a power of attorney.^[6] Unlike under prior law, however, the duty to preserve the principal's estate plan when exercising the power to disclaim interests in property may not be modified by the terms of a power of attorney.

Notes:

[1] The act of October 4, 2016 (P.L. __, No. 103) (House Bill 665, Printer's No. 1187). The full text of this bill and the others discussed in this article is available at www.legis.state.pa.us.

[2] The act of July 8, 2016 (P.L. 497, No. 79) (Senate Bill 1104, Printer's No. 1896).

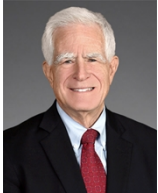
[3] The act of July 2, 2014 (P.L. 885, No. 95) (House Bill 1429, Printer's No. 3708). A detailed summary and explanation of this legislation is available at "Important Changes Enacted to Pennsylvania's Power of Attorney Law," July 26, 2014, available at www.klgates.com (at the "Stay Informed" tab).

[4] Previously, section 5602(a)(1) allowed a principal by using the phrase "to make limited gifts" to empower an agent to exercise the powers defined by section 5603(a.1), and section 5601.4(d) provided that, "unless the power of attorney otherwise provides, a grant of authority to make a gift is subject to section 5603(a.1)." As revised by Act 79, section 5601.1(d) now provides that unless the power of attorney otherwise provides, "the power to make limited gifts or other language in a power of attorney granting general authority with respect to gifts" authorizes the agent only to exercise the same powers previously included within the definition of the power to make limited gifts by section 5603(a.1), but which are now included within the text of section 5601.4(d).

[5] 20 Pa.C.S. § 6103.1 and Ch. 62.

[6] 20 Pa.C.S. § 5601.3(b)(6).

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