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I HAVE THE POWER—OR DO I?

A Look at Pennsylvania's
New Power of Attorney Law

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I HAVE THE POWER — OR DO I?

A Look at Pennsylvania's New Power of Attorney Law

By Karyn L. Seace, Esquire

Act 95 of 2014 was signed into law on July 2, 2014. It makes sweeping changes to Pennsylvania's Power of Attorney Law. These changes affect everything from the language used to the execution of the document. Certain of these changes took effect immediately and others take effect on January 1, 2015. All Powers of Attorney executed on or before December 31, 2014, are grandfathered. The changes are voluminous and my effort below is only a thumb sketch. [Unless otherwise indicated, all sections refer to Title 20 of the Pennsylvania Consolidated Statutes.]

CHANGES IN EFFECT IMMEDIATELY:

The liability of parties who in good faith accept the Power of Attorney has been limited. There are new provisions involving the liability for a refusal to accept a Power of Attorney (§5608.1). A person shall either: (i) accept it; or (ii) not later than seven business days after presentment, request either an affidavit (§5606), or a certification [§5608(e)]. Not later than five business days after being provided with the affidavit or certification, a person must: (i) accept it; or (ii) provide a substantial basis for making a further request under

either §5606 or §5608(e). A person who wrongly refuses to accept the Power of Attorney is subject to: (i) civil liability for any proximately caused pecuniary harm to the economic interest of the Principal; or (ii) a court order mandating acceptance.

These are the only changes that took effect immediately.

CHANGES IN EFFECT ON JANUARY 1, 2015:

The following changes go into effect on January 1, 2015.

- **Changes to Execution Requirements**
Anyone can insert the date in the Power of Attorney [§5601(b)(1)].

Another individual may sign only if the Principal is unable to sign but "specifically" directs [§5601(b)(1)].

The execution of a Power of Attorney must now be acknowledged (non-agent: notary or other individual authorized) [§5601(b)(3)(i)] and witnessed by two additional individuals who are at least 18 years of age [§5601(b)(3)(ii)]. The "specifically directed signer" cannot

be a witness. The Agent cannot be a witness. The Notary Public (or other individual authorized) cannot be a witness [§5601(b)(3)(ii)].

- **Mandatory Language Changes to Notice to Principal [§5601(c)]**

The "NOTICE" must be in all caps. The sentence about the Agent keeping separate funds should be deleted entirely and in lieu thereof, the following language should be inserted:

- Your Agent must act in accordance with your reasonable expectations to the extent actually known by your Agent and, otherwise, in your best interest, act in good faith and act only within the scope of authority granted by you in the Power of Attorney.
- The law permits you, if you choose, to grant broad authority to an Agent under Power of Attorney, including the ability to give away all of your property while you are alive or to substantially change how your property is distributed at your death. Before signing this document, you should seek the advice of an attorney at law to make sure you understand it.

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- **Mandatory Language Changes to Acknowledgement of Agent [§5601(d)]**

The following language should be used in the Agent Acknowledgment:

I, _____, have read the attached power of attorney and am the person identified as the Agent for the Principal. I hereby acknowledge that when I act as Agent:

I shall act in accordance with the Principal's reasonable expectations to the extent actually known by me and, otherwise, in the Principal's best interest, act in good faith and act only within the scope of authority granted to me by the Principal in the Power of Attorney.

- **Witness Requirement Also Does Not Apply To, and Acknowledged Before Notary or Other, and Fiduciary Relationship Now Also Applies To: [§5601(e.1.1)]**

- (ii) A power must now be coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a loan or other credit transaction;
- (iv) A proxy or other delegation to exercise voting rights or management rights with respect to a legal entity; and
- (vii) A power created on a form prescribed by a Commonwealth agency, political subdivision or an authority or instrumentality of the Commonwealth or a political subdivision.

- **Limitation on Applicability in Health Care Power of Attorney [§5601(e.2)]**
Mental Health Care Power of Attorney has been added.

Acknowledgment before notary or other and Agent's duties do not apply; but, witness requirement does apply.

- **Definitions [§5601(f)]**
The phrase "good faith" has been added.

Gifts (§5601.2)

The provisions of §5601.2 have been repealed. The provisions for gifting are contained in §5603.

- **Agent's Duties (§5601.3)**

This section is entirely new. It essentially divides the duties into two types of categories: (a) those that cannot be modified or waived [(i) act within known reasonable expectations of the Principal and in the best interest of the Principal; (ii) act in good faith; and (iii) act within authority]; and (b) those that can be modified or waived (act loyally, separate funds, not create a conflict of interest, ordinary competence, record keeping, cooperate with HC POA, and preserve estate plan).

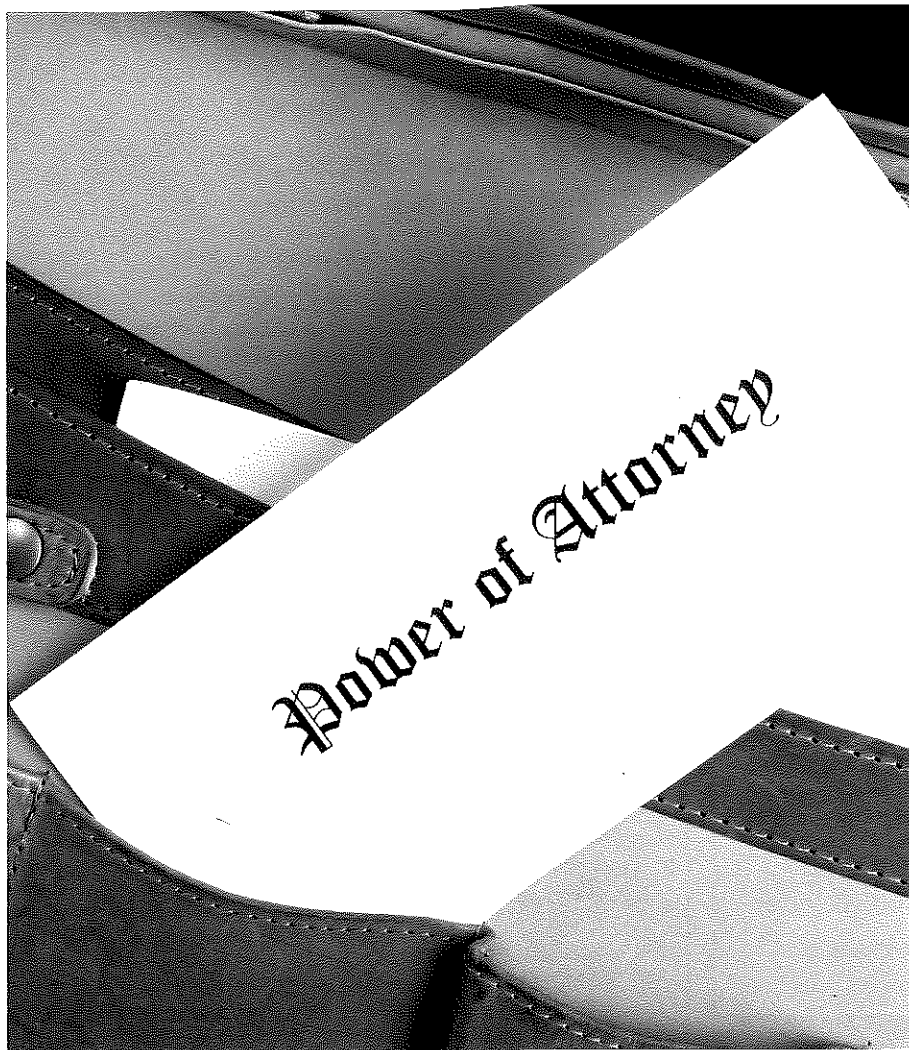
- **Non-liability of Agent [§5601.3(c)]**

The Agent is not liable if: acts in good faith; care, competence and diligence for best interest of Principal even if Agent also benefits even if conflict of interest; special skills will be considered in determining care, competence and diligence; if no breach of duty Agent is not liable for decline in property; if care, competence and diligence are used in delegating and monitoring person, Agent is not liable for error of judgment.

- **Disclosure [§5601.3(c)]**

The Agent only needs to disclose records, upon request, within 30 days (60 with substantiated reason) to the: Principal, guardian or other fiduciary, governmental agency protecting Principal, and

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personal representative (upon Principal's death); or upon court order.

• **Items That Require Specific Authority (§5601.4)**

The following "hot" items now require specific authority (and even then it only applies to certain Agents): (i) create/changes to: inter vivos trust, rights of survivorship, beneficiary designations; (ii) making gifts; (iii) delegation of authority/exercise of fiduciary powers; (iv) waiver of rights to be a beneficiary; and (v) disclaimers.

Attorneys are still able to incorporate by reference §5602(a), although there are some changes §5601.4(c).

If there are multiple provisions on the same subject, the broadest scope applies §5601.4(e).

The Power of Attorney controls property owned before it was executed as well as property acquired after it was executed, no matter the situs of the Principal or the property §5601.4(f).

• **Form of Power of Attorney §5602**

The power to engage in life insurance transactions includes annuities now §5602(a)(17). But there is no longer an automatic power of change beneficiaries.

• **Filing and Recording §5602(c)**

It must be an originally executed Power of Attorney now. There are provisions covering electronic formats.

• **Copy of Power of Attorney §5602(d)**

Copy has same effect as original in all things but recording.

• **Gifts [§5603(a.1)]**

The provisions of §5601.2 have been repealed. The Agent's ability to make gifts has been further limited. If you want someone other than a spouse, an ancestor or a descendant to be your Agent and to be able to make gifts, the power of attorney must specifically state that they can do so. Further, annual exclusion gifts can only be made: if consistent with Principal's known objectives; or, if unknown best interest of Principal based on: value of estate, foreseeable needs, tax savings, eligibility for benefits, and history of making gifts.

• **Liability as to Genuineness §5608(c)**

May rely on genuineness with immunity unless actual knowledge to the contrary.

• **Validity §5611**

Requirements for a military Power of Attorney have been added.

• **Principals of Law and Equity §5612**

Supplement this law.

OPINION

As I am sure all of my colleagues have concluded, some of these changes are good and some are really bad. It is my considered opinion that preparation of Powers of Attorney in the future is going to have to be seriously personalized to the needs of the client. I find this refreshing in a world where we can zoom around the internet and find legal documents!

The new execution requirements are sure to present problems for the solo's out there. ■

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