

Pennsylvania's New Power of Attorney Law: What You Should Know

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February, 2015



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On July 2, 2014, Governor Corbett signed into law House Bill 1429 (the "Act"), which amended the portions of Pennsylvania's Probate, Estates and Fiduciaries Code (the "PEF Code") that regulate durable general powers of attorney ("POA") documents. Portions of the Act were made effective immediately upon the Governor's signature while other provisions of the Act became effective January 1, 2015.

By executing a POA document, a person (the "principal") designates and appoints an agent (the "agent") to act on behalf of the principal if the principal is unable (as a result of some physical or mental disability) or unwilling (as a result of advanced age) to manage his or her own financial affairs. Anyone who has executed a POA prior to January 1, 2015 should understand the changes made by the Act to determine if his or her POA should be revised to comply with the provisions of the Act. What follows is a brief summary of some of the most significant changes that were implemented with the passage of the new law:

- **Signature and Notary Requirement:** Two unrelated adult witnesses are now required to witness the principal's signature and sign the POA document. The signatures of the principal and unrelated witnesses must be acknowledged by a notary public. An agent designated in the POA, the notary public acknowledging the signatures or the attorney acknowledging the signatures in lieu of a notary cannot serve as a witness.
- **Material Modifications to NOTICE:** The language of the required notice on the first page of every POA document was amended to further advise the principal of an agent's duties to act: (1) within the principal's reasonable expectations, to the extent actually known by the agent; (2) in the principal's best interest; (3) in good faith; and (4) only within the scope of authority expressly granted to the agent by the principal in the POA document.
- **Updated Agent Duties:** The Act enhanced an agent's duties to include new mandatory duties that cannot be waived by the principal, such as those duties now listed in the notice described above. In addition, certain default duties are described in greater detail and include keeping a principal's assets separate from the agent's assets and keeping accurate and complete records of all actions taken by the agent on behalf of the principal.

- **“Hot” Powers:** Hot Powers include certain actions that an agent cannot take unless the agent is specifically authorized to do so by the principal in the POA document. For example, unless explicitly authorized in the POA document, an agent cannot make gifts, exercise a principal’s fiduciary powers, disclaim property, or create, amend or terminate an inter vivos trust (i.e., a trust established during one’s lifetime).
- **Gifts:** The Act also expanded an agent’s ability to make gifts on behalf of a principal to recipients beyond just the principal’s spouse or descendants. The default rule under the Act now permits an agent to make gifts “outright to or for the benefit of a person,” regardless of the relationship of the person to the principal. However, a POA document may still be drafted to limit an agent’s ability to make gifts on behalf of a principal to a class or group of recipients (i.e., the spouse and descendants of the principal or the principal may also include the spouses of his or her descendants). An agent may not make gifts to him or herself unless the POA explicitly provides the agent with the authority to do so, or the agent is the principal’s spouse or descendent.
- **Third Party Immunity and Liability:** The Act provides banks, brokerage firms and other financial institutions (each a “third party”), who rely on a POA document in good faith and without any direct knowledge that the POA document was not properly executed or that the actions of the agent were fraudulent, with immunity from liability. Before honoring a POA document or following the direction of an agent under a POA document, a third party may request additional information from the agent, including an agent’s certification under penalty of perjury or an opinion of counsel certifying that the agent is acting within the scope of authority granted by the principal in the POA. However, civil liability may be imposed against any third party that refuses to honor a POA document without proper justification.
- **Effect on Prior Executed POA Documents:** Unfortunately, the Act does not address its effect on the validity of POA documents that were signed prior to January 1, 2015, although common sense would suggest that prior-executed POA documents will continue to be interpreted and subject to the law in effect when the POA document was signed. It is anticipated that there will be a period of uncertainty (until additional legislation is enacted or all POA documents have been updated to comply with the new law) with respect to third party treatment of prior-executed POA documents.

About the Author: Mr. Fernandez focuses his practice on structuring and implementing estate and tax planning strategies for individuals and closely held businesses. His work includes assisting clients with all of the legal and tax aspects of the administration of decedent’s estates. If you have any questions about the Act, please contact Mr. Fernandez (afernandez@wispearl.com) or one of the other attorneys in Wisler Pearlstine’s Tax and Estate Planning Practice Groups.

*The Author is grateful for the assistance of Shanna Miles, JD Candidate May 2016 from Temple University’s Beasley School of Law, in the preparation of this article.

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