



## Julian Gray and Frank Petrich's Elder Law: New power of attorney law reminds us to check our estate plans

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We often tell clients that no matter how elaborate one's estate plan, the power of attorney is probably the most powerful document you will sign. It's like a loaded gun; it can be used for good (yours) or evil (against you).

Before we expand upon that point, let's first confirm that we all know what a power of attorney is — and is not. In Pennsylvania, like most jurisdictions, a person is able to appoint another person (s) or entity to act on her behalf in the event she is unable to act on her own, typically due to the onset of a sudden or gradual disability.

The document known as a power of attorney (or often referred to as a general durable power of attorney) is created by statute and authorizes a very wide variety of actions by the agent (the person given the responsibility to perform the actions) depending on the desires of the principal (the creator of the power).

As an aside, we like to use a "rule of three" wherein the principal names at least two successive agents to the primary agent in the event the first agent is unable to act.

However, the lack of court oversight and the broad powers authorized in a power of attorney have led to some abuse of these powers by agents.

Thus, various organizations, legislators and the courts continuously strive to protect the rights of disabled people. So, when the Pennsylvania power of attorney statute is amended, it's big news.

After three years of negotiations by various interested parties (banks, retirement plan administrators, financial institutions, and the Pennsylvania Elder Law bar among others), on July 2, Gov. Tom Corbett signed House Bill 1429 into law as Act 95 of 2014.

While space does not permit an exhaustive review of the broad changes to the law, it should be noted that while some may perceive legal documents such as a power of attorney to be “boilerplate” in their construction, the new law clearly shows the legislature’s intent to have these documents drafted with a specific purpose behind the provisions that the principal wishes to give an agent.

Certain actions that one might think should be inherent in the grant of authority must now be specifically mentioned in the document, such as: the right to create or change a beneficiary designation, make a gift, waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan, create or change rights of survivorship, as well as others.

In addition, the new law more clearly defines the formalities required for signing, witnessing and notarizing the power of attorney. In the past, there has been some confusion over an agent’s liability for actions on behalf of the principal. So, the new law provides some clarity on agent liability as well as the duties of the agent in carrying out actions that are “in accordance with the principal’s reasonable expectations to the extent actually known by the agent and, otherwise, in the principal’s best interest.” This includes a duty to preserve the principal’s estate plan including, among other things, qualifying the principal’s eligibility for benefits such a medical assistance and/or VA benefits.

Previously, banks and other financial institutions have grappled with decisions over the balance between honoring the power of attorney and exposure for liability when caught up in the nefarious activities of a rogue agent. So, the new law provides some guidance to achieve a more equitable balance for third parties (including immunity) if involved in the transactions conducted by an agent.

Some provisions of the new statute took effect immediately and the balance will take effect on Jan. 1.

The last time we recall such sweeping changes to the power of attorney statute was in 1999 (Act 39 of 1999) when new notices became requirements and the topic of “gifting” was addressed.

We feel the changes under the new Act 95 are just as significant and caution those who have either never prepared a power of attorney or have not thought about the provisions of their existing document for a while to become familiar with the statute. In particular, one of the biggest problems we see with “boilerplate” provisions of documents are that they fail to even address the issues relating to disability and gifting that were addressed back in 1999!

Therefore, the bottom line is that our purpose here is to create awareness that changes have occurred and more are on the horizon. Now is an excellent opportunity to consider an estate plan review with your attorney and if you are elderly or have a disability, call this to your attorney’s attention and have a discussion about the specific provisions you need and want in your power of attorney.

And remember the olde Danish proverb: “I named you as my agent because I trust you, and be aware that the law is even more on my side; just sayin’.”