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PA Makes Changes to Power of Attorney Laws



On July 8, 2016 the Governor signed Senate Bill 1104 (SB 1104) into law as Act 79. SB 1104 makes broad ranging amendments to Title 20 (Decedents, Estates and Fiduciaries) of the Pennsylvania Consolidated Statutes. Included are a number of changes to Pennsylvania laws regarding powers of attorney.

It is likely that another bill dealing with powers of attorney will also be enacted in the near future. House Bill 665 (HB 665) deals mainly with commercial powers of attorney and also addresses the subject of acknowledgments by lawyers.

Among the changes the two bills:



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- Make modifications regarding the authority of an agent under a power of attorney to make gifts and to disclaim interest in property;
 - Move some provisions related to health care powers from Chapter 56 to Chapter 54;
 - Clarify the relationship between agent and guardian and mandate that guardianship determinations address the extent to which an agent's authority remains in effect;
 - Exempt commercial powers of attorney from certain requirements (HB 665);
 - Address the subject of notarization of a power of attorney based on a lawyer's acknowledgment (HB 665);
 - Add Chapter 76 (Powers of Appointment) to the Probate Code and repeal the current provisions relating to powers of appointment;
 - Provide direction as to which procedures are to be used in determining title to a decedent's real estate interests;
 - Stipulate that by accepting appointment by the register of wills, the personal representative submits to the jurisdiction of the Orphans' Court of the county where letters testamentary or letters of administration are granted relating to the personal representative's duties;
 - Expand the provision on continuation of a business to include partnerships, limited liability companies or other entities and provide for the compensation of a personal representative managing, supervising or engaging in the operation of the entity or business;
 - Amend the Uniform Trust Act, Chapter 77 of the Probate Code, as it deals with representation of parties in interest relative to a judicial proceeding involving a trust matter; non-judicial resolution of a trust matter; certification of representation;
- Administrative Law (19)
 - > Adoption (1)
 - > Agricultural Law (1)
 - > Alternative Dispute Resolution (ADR) (1)
 - > Animal Law (1)
 - > Appellate Practice (12)
 - > Arbitration Agreements (2)
 - > auto insurance law (1)
 - > Auto Law (2)
 - > Banking (2)
 - > Bankruptcy (4)
 - > Civil Litigation (56)
 - > civil procedure (4)
 - > Constitutional Law (20)



division of trusts with court approval; resignation of a trustee; the duty to inform and report thereby allowing a current beneficiary to nominate a person to receive required notices; and limitations of actions against a trustee; and,

- Codify the Charitable Instruments Act of 1971 as Chapter 79 in the Probate Code and repeal Act 23 of 1971, known as the Charitable Instruments Act of 1971.

SB 1104 is based in large part on a Joint State Government Commission (JSGC) report issued on June 10, 2010 entitled “The Probate, Estates and Fiduciaries Code: Proposed Amendments to Title 20 of the Pennsylvania Consolidated Statutes.” The JSGC report contains the advisory committee’s official comments explaining some of the amendments contained in SB 1104. These comments may be used in determining legislative intent.

The above JSGC report did not address SB 1104’s changes to Chapters 54 and 56 regarding powers of attorney.

[The JSGC made recommendations regarding powers of attorneys in another report issued prior to the enactment of Act 95 in 2014: See: Powers of Attorney: Proposed Amendments to the Probate, Estates and Fiduciaries Code (March 2010).]

Many of the recent changes to Pennsylvania law on powers of attorney are based on the Uniform Power of Attorney Act which, along with its comments, may also be of interpretive assistance.

The power of attorney amendments in SB 1104, along with the changes in HB 665 regarding acknowledgment and exemption of commercial powers of attorney, can be viewed as technical corrections and clarifications to Act

- > Consumer Law (8)
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- > Family Law (35)



95. Many substantive power of attorney changes requested by interest groups were deferred to future legislation.

This brief overview is focused on the power of attorney (POA) changes to Chapters 54 and 56 that will result from the enactment of SB 1104 and HB 665. The reader is referred to the JSGC report for more detail on the changes that emanated from it (with the understanding that JSGC recommended provisions may have been modified during the legislative process).

Chapter 54 Changes

Chapter 54 deals with advance health care directives including health care powers of attorney. After Act 95, some provisions related to health care still remained in Chapter 56 which deals mainly with financial issues. SB 1104 cleans this up by moving those health care related provisions from Chapter 56 to Chapter 54. Perhaps more significantly, it modifies the law regarding the relationship between a guardian and a health care agent.

Section 5422 (Definitions)

Section 5422 is amended to move the following definitions to Chapter 54:

(4) Admission to a medical, nursing, residential or similar facility, or entering into agreements for the individual's care.



(5) Making anatomical gifts, or after the death of the individual, disposing of the remains or consenting to autopsies.

- > Forfeiture (1)
- > Gaming Law (1)
- > General (37)
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- > guardianship (2)
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- > Medical Malpractice (1)
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Section 5454. When health care power of attorney operative.

Section 5454(d) is amended to provide that a guardian may revoke a health care power of attorney only if authorized by the court. This provides consistency with the change made to Section 5460(a) as discussed below. Previously the law allowed a guardian to terminate a health care power of attorney without any court authorization.

Section 5456(a) Authority of health care agent.

This amendment makes it clear that a health care agent's authority will normally include the power to authorize admission to a medical, nursing, residential or similar facility, or to enter into agreements for the principal's care. (These are the powers that have been moved from Chapter 56 to Chapter 54).

Section 5460(a)

Section 5460(a) is amended to mandate that in issuing a guardianship order a court shall determine the extent to which any health care agent's authority to act remains in effect. A provision in prior law that authorized a guardian to revoke or amend a health care power of attorney has been deleted.

[Jeff's comment: Where appropriate a guardianship order should probably also address the authority of any representative appointed in a living will – Section 5447 refers to such representatives as health care agents. The

- > Municipal Law (29)
- > Oil & Gas Law (6)
- > Personal Injury (13)
- > Products Liability (2)
- > Professional Development (4)
- > Professional Licensing (1)
- > public access to court records (3)
- > Public Interest (1)
- > Public Utility Law (4)
- > Real Estate (15)
- > Real Property (6)
- > Right to Know Law (1)
- > School Law (10)
- > Tax Law (10)
- > Torts (4)



amended section 5460(a) does not directly address situations where a health care representative has been designated by the principal under Section 5461 or where a default health care representative has been acting under that section.]

Chapter 56 Changes

Chapter 56 of Title 20 deals with powers of attorney other than advance health care directives. Chapter 56 is changed by both bills.

Section 5601(b)(3). Execution

Section 5601(b)(3) of Title 20 is amended by both SB 1104 and HB 665.

The bills amend Section 5601(b)(3) to provide that a person who is signing a POA for a principal on behalf of and at the direction of the principal can no longer sign by mark.

HB 665 attempts to clarify the law regarding situations where a lawyer is the individual taking the acknowledgment of a POA. It addresses a perceived conflict between Chapter 56 and the notary law. The HB 665 amendment states that an attorney taking an acknowledgment of a POA does not have to be a subscribing witness to the document. To the contrary, the lawyer taking the acknowledgment may not then also act as one of the two required witnesses.

The notary law contains a short form (57 PA.C.S. § 316 (2.1)) for certification that could be read to imply that the lawyer who takes the acknowledgment must also be a subscribing witness to the document. HB 665 negates

- > Trademark (1)
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that implication and clarifies that the lawyer may acknowledge the POA document even though the lawyer is not one of the subscribing witnesses. In addition to the change in Section 5601(b)(3) HB 665 makes a conforming change to the short form in Section 316(2.1) of Title 57 which deletes the reference to the lawyer being a subscribing witness.

[Jeff's comment. The principal's signature must be acknowledged before a notary public or other individual authorized by law to take acknowledgments. Section 5601(b)(3)(i). An acknowledgment may be taken by a lawyer who is a member of the bar of the Supreme Court of Pennsylvania if the document is thereafter certified to an officer authorized to administer oaths. (See 42 PA.C.S. § 327(A)).

The principal's signature must also be witnessed by two individuals. Section 5601(b)(3)(ii) provides that a witness shall not be the notary public or other person authorized by law to take acknowledgments before whom the power of attorney is acknowledged.

The lawyer may not serve in the dual role of taking the acknowledgment and serving as a witness. If a notary is not available, the lawyer may take the acknowledgment (and then later certify), but may not also be one of the two required witnesses. Two other witnesses are required.

This prohibition may be inconvenient for lawyers. Prior to Act 95 lawyers would sometimes both witness and acknowledge the principal's signature (and have the document notarized at a later time). This was particularly helpful for lawyers in solo practice and where the POA was signed as part of a home or nursing home visit. It reduced the number of people who needed to be involved. But the law opts for protection of the principal

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over convenience for the lawyer. If the notary is not present and the lawyer is taking the acknowledgment, there must be two other qualified witnesses.

To qualify a witness must be (1) 18 years of age or older, (2) not be the individual who signed the power of attorney on behalf of and at the direction of the principal, (3) not be the agent designated in the power of attorney; (4) not be the notary public or other person authorized by law to take acknowledgments before whom the power of attorney is acknowledged. Note that it appears that in many situations a spouse or child of the principal could be qualified to serve as a witness. Query: must the witnesses be present when the principal signs the POA?

Section 5601(e). Limitations on Applicability Generally

Section 5601(e.1) exempts certain business oriented power of attorneys from the formalities required by Section 5601 subsections (b)(3), (c) and (d) and section 5601.3 (relating to agent's duties). This means that the POA requirements regarding execution, notice, and acknowledgment, and the provisions specifying an agent's duties do not apply.

Section 5601(e.1.1) of HB 665 clarifies and expands the exemption.

Section 5601(e.2) of HB 665 restates the exemption of health care and mental health care powers of attorney from the requirements of subsections (b)(3)(i), (c) and (d) and section 5601.3.

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Rules of Civil
Procedure

Rules of Criminal
Procedure

school district

school law

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The clarification and expansion of the Section 5601(e) exemptions apply retroactively to January 1, 2015.

Section 5601.4 (c), (d) and (e). Gifts

Section 5601.4 deals with the grant of powers that require a specific grant of authority. These are sometimes referred to as “hot powers.” This key section of the law (for elder law attorneys) sets out the limitations regarding an agent’s authority to make gifts.

Section 5601.4 (a) sets out the general rule:

5601.4 (a) General rule.—An agent under a power of attorney may do the following on behalf of the principal or with the principal’s property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject: . . .

(2) Make a gift. . .

Under Act 95, Section 5601.4(d) was one sentence which read:

(d) Gifts.—Unless the power of attorney otherwise provides, a grant of authority to make a gift is subject to section 5603(a.1) (relating to implementation of power of attorney).

SB 1104 creates a much expanded Section 5601.4(d). Under SB 1104 section 5601.4(d) now applies clearly to both limited and unlimited gifts. The amendment also adds clarifying language regarding disclaimers.

SB 1104 moves the provisions relating to limited gifts from Sections 5602 and 5603(a) to new section 5601.4 (d)(1). Section 5601.4(d)(1) states that unless the power

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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 act in accordance with the limits set out by the section. Those limitations are tied to the annual gift tax exclusion amount per donee.

Section 5601.4(d)(2) specifies that an agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors, including:



- (i) The value and nature of the principal's property.
- (ii) The principal's foreseeable obligations and need for maintenance.
- (iii) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer and gift taxes.
- (iv) Eligibility for a benefit, program or assistance under a statute or regulation.
- (v) The principal's personal history of making or joining in making gifts.

Section 5601.4(d)(3) states that the phrase "a gift for the benefit of a person" [the phrase is used in the limited gifts section – 5601.4(d)(1)] includes gifts to a trust, to a minor under UTMA, and to a tuition savings account or prepaid tuition plan. *[Jeff's comment: Note that a transfer to an ABLE account (Act 17 of 2016) is not specifically addressed.]*

5601.4 (d.1) deals with disclaimers. Section 5601.4(d.1) (1) provides a statutory interpretation for the grant of the power to disclaim; Section 5601.4(d.1)(2) makes the



disclaimer authority subject to the same standards that apply to other hot powers. *[Jeff's comment: Prior to Act 95 disclaimers were included under Sections 5602 and 5603 (short form powers). Act 95 moved disclaimers to the gift section 5601.4 where it became a "hot power" that requires an express grant of authority. The definition of disclaimers that formerly appeared in Section 5603 was deleted by Act 95. It was felt that a definition of the term was needed and thus SB 1104 re-creates a statutory definition in Section 5601(d).]*

SB 1104 amends sections 5601.4 (c) and (e) to incorporate references to the new section 5601.4 (d)(1) which deals with disclaimers.

Sections 5602 and 5603. Form of power of attorney.

Section 5602 sets out "short form" statutory powers that can be incorporated into a power of attorney and (unless otherwise provided) are defined in Section 5603.

The general rule remains the same as in Act 95:

5602(a) Specification of powers. – A principal may, by inclusion of the language quoted in any of the following paragraphs or by inclusion of other language showing a similar intent on the part of the principal, empower an agent to do any or all of the following . . . *[Jeff's comment: "language showing a similar intent" is a wide doorway – are the powers enumerated by Section 5602 (a) granted when there is a general grant of authority without any express reference to Section 5602? This question appears to be answered affirmatively by Section 5601.4: "(c) Scope of authority. – Subject to*



subsections (a), (b), (d), (d.1) and (e), if a power of attorney grants to an agent authority to do all acts that a principal is authorized to perform, the agent has all of the powers which may be incorporated by reference pursuant to section 5602(a).”]

SB 1104 deletes “limited gifting” from the short form powers listed in Sections 5602 and 5603 since “limited gifting” has been moved to Section 5601.4. Also deleted are the health care related powers that have been moved to Chapter 54: “To authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care”; “To authorize medical and surgical procedures”; and “To make an anatomical gift of all or part of my body.”

The terminology of Section 5603 (d) (“power to claim an elective share”) is slightly modified in regard to persons who are incapacitated.

Section 5603 (r) is expanded to clarify that the power to “handle interests in estates and trusts” includes the power to receive on behalf of the principal all notices and reports required by section 7780.3 (relating to duty to inform and report) or permitted by section 7785(a) (relating to limitation of action against trustee).

Two important statutory short powers are added to section 5602 and defined in section 5603:

(24) “To operate a business or entity.”

(25) “To provide for personal and family maintenance.”

The family maintenance provision seems particularly worthy of consideration by elder law attorneys who often concerned with the support and maintenance of a community spouse or disabled child. This short form power is defined in section 5603 as follows:



(u.3) Power to provide for personal and family maintenance.–

(1) A power “to provide for personal and family maintenance” shall mean that the agent may provide for the health, education, maintenance and support, in order to maintain the customary standard of living of the principal’s spouse and the following individuals, whether living when the power of attorney is executed or later born:

(i) The principal’s minor children.

(ii) Other individuals legally entitled to be supported by the principal.

(iii) The individuals whom the principal has customarily supported and intends to support.

(2) In acting under this subsection, the agent shall:

(i) Take into account the long-term needs of the principal.

(ii) Consider any independent means available to those individuals apart from the support provided by the principal.

(3) Authority with respect to personal and family maintenance is in addition to and not limited by authority that an agent may or may not have with respect to gifts under this chapter.

[Jeff’s Comment: It appears that a general grant of “authority to do all acts that a principal is authorized to perform” is sufficient to authorize an agent to provide for “personal and family maintenance.” See discussion above Section 5601.4(c)]



Section 5604 (c) Relation of agent to court-appointed guardian.

Prior law specified that if a principal was adjudicated an incapacitated person the guardian had the same power to revoke or amend the power of attorney that the principal would have had if he were not an incapacitated person. SB 1104 amends this section to delete the guardian's statutory power to revoke or amend a POA. Instead, it provides that in its guardianship order and determination of a person's incapacity, the court shall determine whether and the extent to which the incapacitated person's durable power of attorney remains in effect.

[Jeff's Comment: Lawyers will need to deal with the issue of the continuing effectiveness of a power of attorney in guardianship proceedings and proposed orders.]

Section 5610. Account.

SB 1104 adds a sentence to this section that states that when an agent files an account of his administration "[t]he court may assess the costs of the accounting proceeding as it deems appropriate, including the costs of preparing and filing the account."

Section 5613. Meaning and effect of power of attorney.

SB 1104 adds a new section to Chapter 56 that states that the meaning and effect of a power of attorney is



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.

Section 5614. Jurisdiction and venue.

This new section provides that venue of any matter pertaining to the exercise of a power by an agent acting under a power of attorney shall be in the county in which the principal is domiciled, a resident or residing in a long-term care facility.

A court having jurisdiction may decline to exercise jurisdiction if at any time it determines that a court of another county or state is a more appropriate forum. If a court declines to exercise jurisdiction, it shall either dismiss the proceeding or stay the proceeding upon condition that a proceeding be promptly commenced in another county or state. A court may impose any other condition that it deems appropriate.

Effective Date

SB 1104 specifies that nothing in this act shall be construed to limit the effectiveness of powers of attorney in effect prior to its effective date. With the following exceptions, the act takes effect and applies to all powers of attorney executed on or after January 1, 2017.

- The amendment or addition of 20 Pa.C.S. §§ 5603 (r) and (u.4), 5610, 5613 and 5614 shall apply to all powers of attorney executed before, on or after the effective date.



- The amendment or addition of 20 Pa.C.S. §§ 5603 (r) and (u.4), 5610, 5613 and 5614 shall apply to all powers of attorney executed before, on or after the effective date of this paragraph.
- Any provision in a power of attorney incorporating by reference a power under 20 PA C.S. § 5602(a)(8), (9) or (23) prior to the repeal of 20 Pa.C.S § 5602(a) (8), (9) or (23) shall be governed by the respective paragraph of § 5602(a) as if no repeal occurred.
- The amendment of 20 PA.C.S. § 5454(D) [a guardian may revoke a health care power of attorney only if authorized by the court] takes effect immediately.

When enacted, HB 665 will take effect immediately.

Author



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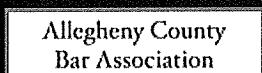
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