

# TRUSTS & ESTATES

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## Not just a bill

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After unanimously passing both houses, a bill that revises the Power of Attorney Act, 755 ILCS 45/2-1, et seq. is awaiting the Governor's signature!

Two bills proposing to revise the Illinois Power of Attorney Act were introduced in the last legislative session. House Bill 4136 was developed by the ISBA Elder Law Section Council with input from the ISBA Trusts & Estates Section Council and House Bill 3886, in the format of the Uniform Power of Attorney Act, was proposed by American Association of Retired Persons ("AARP").

The present bill, HB 6477, is the result of negotiation with a variety of interested organizations and consolidates, with some give and take, the 23-year history of the Illinois Power of Attorney Act with the Uniform Power of Attorney Act.

The revisions are designed to minimize abuses of elderly, incapacitated and disabled persons by agents serving under powers of attorney.

Some of the revisions make the statutory forms more user-friendly, such as revising the Notice to the principal, while other revisions, such as the Notice to Agent in the Property Power of Attorney, are intended to visibly inform the agent about his or her duties under the Act.

The statutory forms will not be substantially altered. The statutory form of the Property Power of Attorney will consist of three (3) parts: (1) Notice to the principal on a separate page, (2) the form itself with separated notes to the principal, and (3) Notice to Agent.

Despite the provision for these separate parts, a form that is in substantial compliance with the statutory form should be deemed valid and honored and may be relied on by a third-party.

The bill also provides forms for an agent's or successor agent's Certification and Acceptance of Authority, which is intended to further induce the reliance of third parties, such as financial institutions and health care providers. The Acceptance of Authority

portion should alert an agent that his or her duties are triggered when he or she undertakes the position of agent.

In addition to revisions to the forms, the bill finally defines the parties (interested persons) that may bring legal action against the agent. Damages will now be recoverable against agents who act recklessly or in bad faith, to the detriment of the principal, including expended attorney fees and costs. These provisions do not limit other applicable remedy.

A somewhat controversial section of the bill recognizes that, at times, a principal does authorize co-agents to act under a non-statutory power of attorney and provide guidance on how co-agents may act in a manner that a third party may rely upon and accept.

The Health Care statutory form now provides separate sections for various powers that were somewhat buried in paragraph one of the prior form, such as access to medical records, disposition of remains and organ donation. There is a separate HIPAA authority that takes immediate effect to enable the agent to consult with a principal's physician to determine whether the principal is incapacitated.

The Health Care statutory form has also updated the second option for the withholding or removal of life sustaining treatment to be consistent with terms used in the Health Care Surrogate Act.

Some other highlights of the bill are:

- Provision that a power of attorney **does not revoke prior powers** of attorney unless the instruments specifically so states. The predecessor statutory form provides that it does revoke all prior like powers of attorney.
- Definition of the "interested parties" who may bring an action against an agent
- Venue for bringing actions is amended to make it more convenient for the principal
- Additional limits on who may witness the execution of a power of attorney
- The Notice to the principal would now contain a place for the principal to initial to indicate that he or she has read and understands the provision and effect of naming an agent to act on the principal's behalf

If signed by the Governor, the bill **will not take effect until July 1, 2011** in order to give financial institutions, health care providers and social services adequate time to educate their employees and the general public about the revisions.