



Get Ready for the New Illinois Power of Attorney Act

A sweeping rewrite of this important Act creates new statutory POA forms for healthcare and property that better protect principals, agents, and third parties.

By Mary D. Cascino

The Illinois Power of Attorney Act received a major rewrite last spring from the Illinois General Assembly. Effective next summer (July 1, 2011), Public Act 96-1195's twin goals are to make the forms more user friendly while providing more protection to the often-vulnerable principal from financial or physical abuse.

Here is a quick summary of some of the major changes wrought by the Act, which will be discussed more fully below.

- The Act elevates the agent's standard of care, requires more oversight of the agent's actions, and expands the remedies against an agent who abuses his or her fiduciary responsibilities.
- It provides a notice to an agent under the POA for property that describes his or her responsibilities.
- It provides default provisions for co-agents in a *nonstatutory* POA for property.
- It limits who may act as a witness to the execution of a POA to avoid con-

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flicts of interest.

- It incorporates into the POA for health care the latest changes in light of HIPAA and the new Disposition of Remains Act.

- It deletes use of the outdated medical term “irreversible coma” and replaces it with more medically accepted definitions used in the Health Care Surrogate Act.

Public Act 96-1195 was originally an initiative of the ISBA Elder Law Section Council that evolved into a yearlong discussion with the American Association of Retired Persons, the Illinois State Medical Society, the Illinois Hospital Association, the Illinois Credit Union League, the Uniform Law Conference, and various representatives of ISBA section councils.¹ This legislation, which passed both chambers unanimously, borrows from the Uniform Law Commission’s 2006 Uniform Power of Attorney Act and Illinois practitioners’ experience during the last 23 years with 1987 Illinois Act.

One of the major purposes and benefits of the revised Illinois Power of Attorney Act is to provide statutory forms of durable (lasting through the principal’s disability or incapacity) powers of attorney for property and health care that are more user-friendly for the general public. Use of these forms also encourages “reliants”—such as healthcare providers or financial institutions—to honor them because the reliants’ liability is limited if they do so.² Downloadable versions of the new forms are online at www.isba.org/resources/POAforms.

The POA statutory form

The new Act makes numerous substantive and formatting changes to the statutory short-form for property (SSF for property) to make it easier to read and understand. The new SSF for property contains three parts: (1) a separate notice to the principal in 14-point type, (2) the SSF itself, and (3) a notice to the agent.³

Notice to the principal. The notice paragraph of the current SSF will now become a separate sheet with its explanations to the principal in 14-point type. The current SSF’s explanations are in one cumbersome paragraph in ALL CAPS. The drafters believed that the current

format actually deterred principals from reading the notice paragraph instead of encouraging them to do so.⁴

In addition, the new notice includes a place for the principal to initial to help create evidence on whether the principal in fact read the notice. Note that the principal’s initials are not required for a POA to be valid.⁵

New statutory short form. The new SSF for property – and also the one for health care – now include in the first paragraph a revocation of all prior powers of attorney to avoid a principal from unwittingly naming two different agents in separate POAs with overlapping authority. The new Act also states that execution of a POA does not revoke previously executed powers of attorney unless the document specifically provides for revocation.⁶

The new Act also prohibits certain persons from acting as witnesses to the execution of a POA to avoid conflicts of interest. Those persons include the following:⁷

- the attending physician or mental health service-provider or a relative of the physician or provider;

- an owner, operator, or relative of an owner or operator of a healthcare facility in which the principal is a patient or resident;

- a parent, sibling, descendant, or any spouse of the parent, sibling or descendant of either the principal or any agent or successor agent under the POA, whether such relationship is by blood, marriage, or adoption; or

- an agent or successor agent under the POA.

In addition, the new SSF provides a space for a second witness to attest to the principal’s signature that may be required in other states, particularly, if the principal wishes to authorize the agent to buy or sell real estate. It also requires disclosure of the person who prepared or assisted the principal in completing this form. Current law requires disclosure of who prepared the form only if the agent

has the power to convey any interest in real estate.⁸

Notice to agent. The third part of the SSF for property is a separate notice to the agent describing his or her duties and responsibilities.⁹ The drafters believe that agents should be advised of these things because PA 96-1195 elevates the agent’s standard of care, requires more oversight of the agent’s actions, and expands the remedies against an agent who abuses his or her fiduciary responsibilities.¹⁰

Many agents are unaware of some of the more basic requirements of this position, such as keeping an accounting and

Can you use the new forms before the new Act’s July 1 effective date? If you think they’re in substantial compliance with the current Act – and I do – why not?

not comingling funds. The hope is that giving agents this detailed notice will reduce unintentional POA misuse. Because an agent still has no duty to exercise the powers granted under a POA, the notice serves to better inform the agent before he or she does so.

Under the new Act, the agent’s standard of care requires that he or she “act in good faith for the benefit of the principal using due care, competence and diligence”¹¹ instead of just exercising “due care.” It also requires that the agent act in accordance with the principal’s expectations to the extent actually known and

1. Special thanks to Jim Covington, ISBA’s Director of legislative affairs, for organizing and moderating the discussions.

2. 755 ILCS 45/3-3(b).

3. 755 ILCS 45/3-3(a).

4. 755 ILCS 45/3-3(c).

5. 755 ILCS 45/3-3(b).

6. 755 ILCS 45/3-3(d), ¶ 1.

7. See 755 ILCS 45/3-3(d), witness section.

8. 755 ILCS 45/3-3(d), last section.

9. 755 ILCS 45/3-3(e).

10. 755 ILCS 45/2-7(f); 755 ILCS 45/2-10(d) and (e); and 755 ILCS 45/3-3(e).

11. 755 ILCS 45/2-7(a).

otherwise in the principal's best interests.¹² (Common law holds agents to the highest standard and imposes fiduciary duties on the agent.)

The new Act also requires the agent to maintain an accounting of receipts and disbursements and significant actions at all times, not just when the principal is incapacitated.¹³ This is also explained to the agent in the notice to agent.

As a clarification, an explanatory note has been added to the SSF for property advising the agent that the power of attorney does not authorize him or her to appear in court or practice law unless he or she is a licensed attorney. The drafters heard from some judges that this was a problem in several courthouses.¹⁴

Two other changes further improve the SSF. First, the explanation of powers in section 3-4 is incorporated by reference into the SSF but does not require physical attachment of a copy of this section to the SSF.¹⁵ Second, section 45/3-4(o) of the Power of Attorney for Property has been revised to clarify that the catch-all power described as "All other property transactions" does not trump specific limitations of powers in subsections a-n in section 45/3-4 (a-n).

Other important revisions are in the notations in both the SSF for property and health care that reference "springing powers." The notations now add a suggested trigger for the springing power of "a written determination by your physician that you are incapacitated,"¹⁶ which does not require a legal determination of disability. Thus, the new form removes the current form's implication that the powers should take effect only on a court determination of the principal's disability, which is one effect the power of attorney concept sought to avoid.

Enforcing the new protections

Who can bring an action against an agent or even request an agent's records? Under the current Act that is unclear. The new Act defines and gives standing to do these things to a list of "interested parties."¹⁷ This change seeks to strike a balance by giving standing to those people or agencies charged with protecting the principal while preventing unmeritorious suits against agents who are acting appropriately.

If a court finds that the agent has not acted for the benefit of the principal, the court may assess reasonable costs and attorney's fees that cannot be reimbursed

by the principal's estate.¹⁸ Further, an agent who violates the Act is liable to the principal or the principal's successors for the amount required to restore the value of the property to what it would have been if no violation had occurred and reimburse the principal and his or her successors for attorney's fees and costs.

But the Act does not limit other legal or equitable remedies.¹⁹ As with the current act, an agent who fails to timely provide the named state agencies with records of receipts, disbursements, and significant actions may be required to pay the state's costs and fees and the court may grant other relief as appropriate.²⁰

The venue for bringing these kinds of actions is also amended to make it more convenient for the often-immobile principal. Venue will now be in the county (1) in which the guardian was appointed or, (2) if no Illinois guardian is appointed, then in the county in which the agent or principal resides or where the principal owns real property.²¹

What about nonstatutory POA forms?

Section 45/3-3(b) states that a power of attorney "shall also be deemed to be in *substantially the same format* if the explanatory language throughout the form...is distinguished in some way from the legal paragraphs in the form... even if the Notice paragraphs at the beginning are not on a separate sheet of paper or are not in 14-point type, or if the principal's initials do not appear in the acknowledgement at the end of the Notice paragraphs." (Emphasis added.)

The new Act recognizes nonstatutory POAs for property if (1) they are executed by the principal, (2) they designate the agent and include a statement of the agent's powers, (3) they are attested by at least one witness to the principal's signature (a new requirement), and (4) the principal has acknowledged his or her signature before a notary public (also new).²²

A nonstatutory health care power of attorney only requires items (1) and (2), while the SSF for health care still requires only one witness without a notary public.

Where does this leave us with a de-

layed effective date of July 1, 2011? It leaves us in good shape, actually. The delayed effective date is intended to give everyone an opportunity to prepare for these changes. Can you begin using the new forms before July 1, 2011? If you think the new forms are in *substantial compliance* with the current Act – and I think they are – why not?

Pre-existing POAs or from another jurisdiction

The new Act borrows a conflict-of-law provision from the uniform act²³ to do two things: (1) maximize reciprocity

Statutory forms do not allow co-agents, but – for nonstatutory property POAs only – the new Act addresses situations where principals have nonetheless appointed more than one agent.

in the enforcement of POAs from other jurisdictions and (2) ensure that pre-existing POAs executed in Illinois before July 1, 2011, remain valid and enforceable if they complied with Illinois law as it existed at the time of execution.²⁴ Other "saving clauses" are also added to protect pre-existing POAs and action taken under them.²⁵

Protections for reliants

The protections limiting the liability of healthcare providers and financial institutions that rely on a document purporting to establish an agency are key to the ready acceptance of the agency.

In addition to the current statutory

12. 755 ILCS 45/2-7(b).

13. 755 ILCS 45/2-7(c).

14. 755 ILCS 45/3-3(d), Note after ¶ 10.

15. 755 ILCS 45/3-3(d), ¶ 11.

16. 755 ILCS 45/3(d), ¶ 6 & 7 and 755 ILCS 45/4-10(d), ¶ 3 & 4.

17. 755 ILCS 45/2-10(f).

18. 755 ILCS 45/2-10(d).

19. 755 ILCS 45/2-7(f).

20. 755 ILCS 45/2-7(d).

21. 755 ILCS 45/2-10(h).

22. 755 ILCS 45/3-3(b).

23. 755 ILCS 45/2-10.6(a).

24. 755 ILCS 45/2-10.6(b).

25. 755 ILCS 45/2-11; 755 ILCS 45/3-5; 755 ILCS 45/4-12.

protections, the new Act creates a new statutory form entitled “Agent’s Certification and Acceptance of Authority” to provide to reliants that want additional assurance that the POA being presented to them is valid. It also provides a means for the agent to accept the position of agent undertaking the fiduciary responsibilities associated with the position, thus triggering the agent’s related duties.²⁶

Successor agents

The current Act allows a principal to designate one or more successor agents to act if an initial or predecessor agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. However, it provides no guidance on how to transfer the authority.

The new section provides that guidance.²⁷ If a reliant requests, the successor agent in a POA for property must furnish an affidavit or certification and acceptance of authority. It creates a statutory form for the successor agent to certify and accept authority, indicating why the predecessor agent is no longer acting.²⁸ The new Act immunizes any person who acts in good-faith reliance on the successor-agent’s representations regarding the predecessor-agent’s unavailability.²⁹

Under the new Act, a successor agent has the same authority as an initial agent unless the POA provides otherwise. A principal may grant authority to another person (including an initial or successor agent) to designate one or more successor agents.³⁰

The new Act immunizes an agent for another agent’s actions unless that agent participates in or conceals a breach of fiduciary duty committed by the other agent. It requires an agent who knows of a breach or imminent breach of fiduciary duty by another agent to notify the principal. If the principal is incapacitated, the agent must also take whatever actions reasonably appropriate to safeguard the principal’s best interests.³¹

Co-agents

A principal is prohibited from appointing co-agents in a SSF POA for property or health care, but the new Act institutes provisions governing situations where co-agents are appointed in *non-statutory* POAs for property only.³²

Co-agent provisions were added because people name co-agents despite the statement in the notice paragraph of the SSF that co-agents may not be named. One reason co-agencies are problematic

is that third parties hesitate to rely on the co-agency absent absolute clarity as to the relative powers and duties of the co-agents. This situation is made worse because co-agents sometimes do not agree on an action to take on behalf of their principal, and even when they do, they are not always available to act in concert.

This section, then, addresses these problems by setting forth a default legal framework for interpreting co-agent designations and by providing suitable protection of third parties who, in good faith, rely on co-agents.

Co-agents may act only with majority consent unless the POA provides otherwise. But majority consent is not required if prompt action is necessary to accomplish the purposes of the POA or to avoid irreparable injury to the principal’s interests and a co-agent is unavailable because of absence, illness, or other temporary incapacity.

A form is provided for a co-agent to certify such unavailability.³³ It also authorizes a remaining agent or co-agents to act for the principal if a vacancy occurs.³⁴

As with successor agents, co-agents are immunized from the actions of their co-agents except if they have knowledge of malfeasance.³⁵ The same immunities and responsibilities provided to successor agents and reliants are also provided to co-agents.³⁶

Health care POA statutory form

The SSF POA for healthcare is reformatted like the SSF for property to make it more readable and understandable. As with the SSF for property, the notice to the principal is on a separate page and provides a space for the principal to initial indicating he or she has read the notice.³⁷

The current SSF’s cumbersome first paragraph is now divided into digestible subsections for specific powers such as access to medical records, organ donation, disposition of remains, and HIPAA provisions as discussed below.

For HIPAA purposes, the agent has the right to serve as the principal’s “personal representative” to access the principal’s health information as soon as the principal signs the healthcare POA, even if the POA itself does not spring into effect until a later date or event.³⁸ This allows the agent to obtain a statement from the principal’s physician that the principal is disabled as defined in section 2-3(c) or incapacitated as defined in section 2-3(c-5). Without this new provision,

a physician may be unwilling to make such a statement, which could defeat the triggering provision of a springing power.

Another HIPAA-inspired change is the statement that a healthcare POA supersedes any prior agreement of the principal with healthcare providers regarding access to or disclosure of medical information. This is also reinforced in the first paragraph of the SSF for healthcare, which states that the principal is revoking all prior powers of attorney for healthcare previously executed by the principal.

The agent’s HIPAA authority expires only if the principal revokes the authority in writing and delivers it to the principal’s healthcare provider.³⁹ Therefore, it is important for the principal to provide a copy of any new healthcare POA revoking prior POAs for healthcare to his or her healthcare providers for their records.

Like in the POA for property, co-agents are prohibited in a POA for healthcare, except possibly in a nonstatutory form. Healthcare providers are fearful – understandably – of being caught between two or more co-agents who can’t agree on the tough decisions on behalf of a sick or dying principal. A principal can name successor agents in a POA for healthcare and should be encouraged to do so.

The new Act makes two other changes to the SSF for healthcare. First, it amends the form to allow the principal to decline to grant authority to make any anatomical gifts, which is particularly useful for principals whose religious beliefs do not allow such gifts.⁴⁰

Second, it incorporates recent improvements to the Disposition of Remains Act, 755 ILCS 65/1 et seq. The SSF for healthcare states that the agency is intended to be in substantial compliance with section 10 of the Disposition of Remains Act.⁴¹ If a principal wishes to name someone other than the healthcare agent, he or she should do so in a separate “Appointment of Agent to Control Disposition of Remains.”

26. 755 ILCS 45/2-8(b).

27. 755 ILCS 45/2-10.3.

28. 755 ILCS 45/2-10.3(c).

29. 755 ILCS 45/2-10.3(c).

30. 755 ILCS 45/2-10.3(a).

31. 755 ILCS 45/2-10.3(b).

32. 755 ILCS 45/2-10.5(a).

33. 755 ILCS 45/2-10.5(d).

34. 755 ILCS 45/2-10.5(b).

35. 755 ILCS 45/2-10.5(c).

36. 755 ILCS 45/2-10.5(d).

37. 755 ILCS 45/4-10(b).

38. 755 ILCS 45/4-10(b), ¶ 1D(iii).

39. Id.

40. 755 ILCS 45/4-10(b), ¶ 1B.

41. 755 ILCS 45/4-10(b), ¶ 1C.

The same persons who are prohibited from acting as a witness for a property POA are also prohibited from acting as a witness for a healthcare POA with one exception. For healthcare POAs, the prohibition against an owner, operator, or relative of an owner or operator of a healthcare facility extends to directors and executive officers of an operator that is a corporate entity but does not include other employees of the operator.⁴²

The new Act deletes the outdated reference to “irreversible coma” in the section that a principal uses to indicate his or her preferences regarding the withholding or removal of life-sustaining treatment.⁴³ It replaces “irreversible coma” with the more medically accepted definitions now used in the Health Care Surrogate Act, 755 ILCS 40/1 et seq: (1) incurable or irreversible condition, (2) permanent unconsciousness, and (3) ter-

minal condition.⁴⁴

In this same section, it also clarifies that the principal may direct that his or her life be prolonged to the greatest extent possible in accordance with reasonable medical standards and without regard to the principal’s condition, the chances that he or she may recover, or the cost of the procedures.⁴⁵

Summary

The stated purpose of the Power of Attorney Act is to recognize that each individual has the right to appoint an agent to deal with property or make personal and healthcare decisions for him or her, to insure that the agent is empowered to act even if the principal is incapacitated or disabled, and be sure that third-party reliant will honor the agent’s authority at all times by limiting a reliant’s liability.⁴⁶

The legislature found that it is in the public interest to provide standardized forms of powers of attorney for property and healthcare so the individual can design the power of attorney best suited to his or her needs in a simple fashion and be assured that the agent’s authority will be honored.⁴⁷

The purpose and intent of the original Power of Attorney Act remains. The revisions in the recently adopted statute further that intent and purpose while providing additional safeguards for principals, agents and third-party reliant and minimizing the potential for abuse. ■

42. 755 ILCS 45/4-5.1.

43. 755 ILCS 45/4-10(b), ¶ 2.

44. 755 ILCS 45/4-4(f)-(h).

45. 755 ILCS 45/4-10(b), ¶ 2.

46. 755 ILCS 45/2-1.

47. Id.

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