



# DRAFTING POWERS OF ATTORNEY AND HEALTH CARE POWERS OF ATTORNEY

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# DURABLE POWERS OF ATTORNEY

# Legislation Changes

- Act 95 – signed into law on 7/4/2014 with most provisions effective 1/1/2015
- Act 79 – signed into law on 7/8/2016 with effective date of 1/1/2017
- Act 103 – signed into law on October 4, 2016 with immediate effectiveness and retroactive provisions to 1/1/2015

# Act 95

- Sweeping changes to the Power of Attorney Act
- Addition of Hot Powers
- Updated Notice and Consent
- Execution of Document changes
- Addresses liability issues

# Act 79

- Moves gifting power from general grant of powers
- Adds Disclaimer language
- Adds new powers for operating a business and providing family maintenance and support
- Removes powers for health care

# Act 103

- Allows attorney acknowledgements, in lieu of a notary acknowledgement
- Clarifies the application of the statute, particularly execution requirements to commercial transactions

# POA - Basic Requirements

- Contains Notice – verbatim from statute
- Acknowledgement of Agents – substantially similar language to statutory language
- Reference to statutory powers under 5601.4(c) or listing of general powers of 5602
- Proper execution

# Optional Provisions

## Inclusion of Hot Powers:

- Create, amend, revoke or terminate an inter vivos trust
- Make a gift
- Create or change rights of survivorship.
- Create or change a beneficiary designation.
- Delegate authority granted under the power of attorney.
- Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.
- Exercise fiduciary powers that the principal has authority to delegate.
- Disclaim property, including a power of appointment.



# Agent Duties - Mandatory

- Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest.
- Act in good faith.
- Act only within the scope of authority granted in the power of attorney.

# Agent Duties – Required Unless Modified

- Act loyally for the principal's benefit.
- Keep the agent's funds separate from the principal's funds unless:
  - the funds were not kept separate as of the date of the execution of the power of attorney;  
or
  - the principal commingles the funds after the date of the execution of the power of attorney and the agent is the principal's spouse.

# Agent Duties – Required Unless Modified - continued

- Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest.
- Act with the care, competence and diligence ordinarily exercised by agents in similar circumstances.
- Keep a record of all receipts, disbursements and transactions made on behalf of the principal.

# Agent Duties – Required Unless Modified - continued

- Cooperate with a person who has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest

# Agent Duties – Required Unless Modified - continued

- Attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan 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

# Execution of POA

- Proper execution
  - Dated
  - Signature (or mark) of principal
  - Two witnesses (none of which are an agent or the notary)
  - Notary or Attorney acknowledgement (who cannot also serve as witness or be an agent)

# Acceptance and Reliance

- Genuineness. A person who in good faith accepts a power of attorney without actual knowledge that a signature or mark of any of the following are not genuine may, without liability, rely upon the genuineness of the signature or mark of:
  - The principal.
  - A person who signed the power of attorney on behalf of the principal and at the direction of the principal
  - A witness.
  - A notary public or other person authorized by law to take acknowledgments.

# Acceptance and Reliance – continued

- Immunity. A person who in good faith accepts a power of attorney without actual knowledge of any of the following may, without liability, rely upon the power of attorney as if the power of attorney and agent's authority were genuine, valid and still in effect and the agent had not exceeded and had properly exercised the authority that:
  - The power of attorney is void, invalid or terminated.
  - The purported agent's authority is void, invalid or terminated.
  - The agent is exceeding or improperly exercising the agent's authority



# Effectiveness

- Durable – unless otherwise provided, a power of attorney that meets the statutory requirements is effective immediately and will remain effective after the principal is incapacitated.
- Springing – if the power of attorney so provides, it can delay its effectiveness to a future date or triggered upon an event occurring – such as incapacity

# Other Considerations:

- Powers of attorney carry a significant amount of power and should not be boilerplate.
- Modifying powers but not duties
- Discuss and explain the Power with principal
- Provide Agent with Instruction/Information Sheet of duties

# HEALTH CARE POWERS OF ATTORNEY

# Requirements

- A health care power of attorney shall:
  - Identify the principal and appoint the health care agent.
  - Declare that the principal authorizes the health care agent to make health care decisions on behalf of the principal.

# Optional Provisions:

- Describe any limitations that the principal imposes upon the authority of the health care agent.
- Indicate the intent of the principal regarding the initiation, continuation, withholding or withdrawal of life-sustaining treatment.
- Indicate whether the principal wants tube feeding or any other artificial or invasive form of nutrition or hydration
- Disqualify an individual from acting as a health care representative, prohibit the appointment of a health care representative or provide for an order of priority of appointment of a health care representative pursuant to [section 5461\(d\)](#) (relating to decisions by health care representative).
- Nominate a guardian of the person of the principal as provided in [section 5460](#) (relating to relation of health care agent to court-appointed guardian and other agents).

# Optional Provisions:

- Contain other provisions as the principal may specify regarding the implementation of health care decisions and related actions by the health care agent or health care representative.
- Request that the health care agent or health care representative exercise his sole and absolute discretion to consult the principal's relative, cleric or physician should the health care agent or health care representative be uncertain of the principal's wishes or best interests

# Health Care Representative

An individual who may make a health care decision for another individual who is at least 18 years old (or meets other criteria) and does not have a health care power or does have a power of attorney, but the health care agent is not reasonably available or is unwilling to act, and no guardian of the person to make health care decisions has not been appointed for the individual.

# Health Care Representative – Order of Priority

- The spouse, unless an action for divorce is pending, and the adult children of the principal who are not the children of the spouse.
- An adult child.
- A parent.
- An adult brother or sister.
- An adult grandchild.
- An adult who has knowledge of the principal's preferences and values, including, but not limited to, religious and moral beliefs, to assess how the principal would make health care decisions.



# Power of Health Care Representative

The authority and the decision-making process of a health care representative shall be the same as provided for a health care agent.

# Living Wills

A living will may be in any written form expressing the wishes of a principal regarding the initiation, continuation, withholding or withdrawal of life-sustaining treatment and may include other specific directions, including, but not limited to, designation of a health care agent to make health care decisions for the principal if the principal is determined to be incompetent and to have an end-stage medical condition or is permanently unconscious

# Out of Hospital Do Not Resuscitate Order (OOH-DNR)

- Can be issued by an attending physician, upon the request of a patient who is at least 18 years of age, or the patient's surrogate if the surrogate is so authorized, and may issue a bracelet or necklace supplied by the department. The Order notifies emergency medical services providers of the patient's DNR status.

# Mental Health Declarations and Mental Health Powers of Attorney

- There are 2 components:
  - Mental Health Declaration
  - Mental Health Power of Attorney

# Mental Health Declaration

- Written instructions from a competent individual to family or physicians concerning mental health care, including, continuation or refusal of mental health treatment
- Statute requires individual to be 18 and not have been deemed incapacitated or severely mentally disabled
- Must be signed by person giving direction and witnessed by two individuals but cannot be a mental health provider
- Expires after two years – so needs to be renewed

# Mental Health Care Power of Attorney

- Similar in form and execution requirements to a health care power of attorney
- Appoints a mental health care agent
- Authorizes the mental health care agent to make mental health care decisions for the principal
- Should include directions to the agent as to principal's intent on initiation, continuation or refusal of mental health treatment

# Mental Health Care Power of Attorney

- Agent cannot be the principal's attending physician or other mental health care provider or their employee unless related by blood, marriage or adoption
- Agent can also not be an owner, operator or employee of a residential facility
- Agent can make mental health care decisions and exercise the rights regarding the principal's care and treatment

# Mental Health Care Power of Attorney

- The Agent cannot consent to electroconvulsive therapy or experimental procedures or research unless the power is specifically contained in the Power of Attorney
- The Mental Health Care Power of Attorney cannot empower an Agent to:
  - Relinquish parental rights
  - Consent to psychosurgery



# Donate Life PA Act

- SB 180 was enacted on October 23, 2018
- Becomes effective upon publication in PA Bulletin once certain other requirements are met
- Amends PEF Code Section 5471 and sections of Chapter 86 of the PEF Code.

# Donate Life PA Act

- Provide extensive provisions for Organ Donation and Anatomical Gifts
- Establishes a Donate Life PA Registry
- Full bill can be found at:

<https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2017&sessInd=0&billBody=S&billTyp=B&billNbr=0180&pn=2048>