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HB6477 – SUMMARY AND QUESTIONS AMENDMENT TO THE POWER OF ATTORNEY ACT 755 ILCS 45/2-1 et. seq

1. **Status:** Passed by both houses of General Assembly. Bill has not yet arrived at Governor's Office (as of May 17, 2010). Re-writes the entire act, except for the enactment clause.
2. **Effective Date:** July 1, 2011. Makes it clear that the changes to the statute made by the 96th General Assembly do not affect the legality of prior instruments.
 - *Many questions. Should we start using the new forms now? Why not?*
 - *What do we do about existing POAs. Now, don't have to change them. But, are the changes better for the client?*
 - *Strictly from the marketing perspective, it might be a good idea to contact clients to come in to the office for counseling about updating their POA.*
3. **"Incapacitated":** Principal in under a legal disability as defined in §11-2(a) of the Probate Act. Also if (i) physician licensed to practice medicine in all of its branches has examined the principal and has determined that the principal **lacks decision making capacity**, that the physician has made a written determination within 90 days of such examination and the written record has been delivered to the agent.
 - *This definition is very helpful.*
4. **Revocation.** Execution of a power of attorney does not revoke an existing one. (Note, however, the statutory form does revoke all existing powers of attorney.
 - *Many firms do not use a non-statutory form. Need to be very careful here.*
5. **Agent's Duties:** Deletes "due care" standard and inserts "agent shall act **in good faith for the benefit of the principal using due care, competence and diligence**". States that an agent that has accepted an appointment shall act in accordance with the principal's expectation to the extent actually known and otherwise in the principal's best interests.

6. **Recordkeeping Required of Agent - Expanded Protections Against Elder Abuse.**

Agent shall keep a record of receipts, disbursements and significant actions taken under the agent and shall provide a copy (expansion of existing law): to the principal, guardian, another fiduciary acting on behalf of the principal and after the death of the principal, the personal representative or successors in interest of the principal's estate. Also, a representative of a provider agency as defined in the Elder Abuse and Neglect Act (acting in the course of assessment under a complaint or elder abuse or neglect under that act), a representative of the State Long Term Care Ombudsman (acting pursuant to an investigation of a nursing home resident) or a representative of the Inspector General of the Department of Human Services (acting in the course of an assessment of a complaint of financial exploitation of an adult with disabilities). Provisions for agent's failure to provide information. Liability of agent to restore value of property and to reimburse principal or successors for **attorney's fees and costs** paid on agent's behalf.

7. **Agent's Certification and Acceptance of Authority.** Any person relying on a power together with the agent's certification and acceptance of authority (a form provided in the statute) will be fully protected. The certification and acceptance is a statement made under penalty of perjury.

8. **Legal Proceeding.** If agent has not acted for the benefit of the principal or is harmed the principal, agent will be subject to reimbursement of attorneys' fees and costs in defending a proceeding. If the agent has caused substantial harm, court may assess attorneys' fees and costs against the agent. Action may be brought by broad array of persons including principal, guardian, other fiduciary, parent, descendant, spouse, presumptive heir-at-law, beneficiary of any property, beneficiary of a trust, provider agency under Elder Abuse and Neglect Act, governmental agency who has regulatory authority to protect the welfare of the principal or *the principal's caregiver or another person who demonstrates sufficient interest in the principal's welfare.*

Venue is the county where the Illinois guardian was appointed or, if no guardian, where the principal resides **or owns real property**

- This provision might **discourage individuals from acting as agent** under a POA.
- Risk of 20/20 hindsight.

9. **Successor Agents.** Principal may grant authority (delegate) to a successor agent or another individual to appoint a successor agent.

- Successor Agent's Certification and Acceptance of Authority states, "...I certify that to the best of my knowledge, the principal had the capacity to execute the power of attorney..." *Can most successor agents really make this certification - under penalty of perjury?*

10. **Co-Agents.** Affirmatively states that co-agents (acting together) are not permitted . the statutory powers of attorney for health care and for property. Statute provides authority for co-agents under non-statutory powers. Where there are co-agents, they must act by majority consent. If one or more agents is unavailable and it is necessary to act to avoid irreparable

injury to the principal, the other agent(s) may act. An agent is not liable if the agent does not act, unless concealing a breach of fiduciary duty. An agent who acts in good faith reliance on the representations of a co-agent concerning the unavailability of a co-agent or the need for action to avoid irreparably injury is fully protected as though dealt directly with all agents. Provides for a form for co-agents certification and acceptance of authority in the event one or more agents is not available.

- *At first glance, one would worry about “fully protected” in the context of second guessing “not acting in the best interests of the principal” or “causing substantial harm”. There might be a built in bias not to act due to the potential for personal liability in this act. It is going to depend upon how the courts construe it. This will not likely be known for several years, at least.*

11. **POA executed in another state & pre-existing POAs.** Liberal provisions to make POA executed in another state valid in Illinois. Valid and enforceable created and complied with:

- a) The law of the state or country where executed;
- b) The laws of the State of Illinois;
- c) The law of the state or country where the principal is domiciled, has a place of abode or business or is a national;
- d) The law of the state or country where the agent is domiciled or has a place of business.

Provides that POA executed in Illinois before 7/1/2011 is valid and enforceable in Illinois if it complies with Illinois law as it existed at the time of execution.

12. **Statutory Short Form Power of Attorney for Property.** Has three components

- a) Notice to Individual Signing Power of Attorney (separate sheet, 14 point type).
The notice requires the initials of the principal.
- b) Statutory Short Form Power of Attorney
- c) Notice to Agent

Provides that all prior POAs are revoked. **Gives the principal the option of allowing the agent to delegate** discretionary decision making. Option for reasonable compensation for agent. DPAP allows for immediate or springing power. Option to add a second witness as required by some states.

Witness may not be principal’s attending physician or mental health service provider or a relative of the physician or provider, owner, operator or relative of a health care facility in which the principal is a patient or resident, *a parent, sibling, descendant or any spouse of such parent, sibling or descendant of either the principal or any agent or successor agent* whether by blood, marriage or adoption.

13. **Statutory Short Form Power of Attorney for Health Care.**

- a) Defines “incurable or irreversible medical condition”
- b) Defines “permanent unconsciousness”
- c) Defines “terminal condition”
- d) Names agent as personal representative for HIPAA purposes
- e) Agent has power to release HIPAA information to third parties
- f) **Includes authorization to release information to physicians, health care professionals, hospitals, and broadly other health care plans including insurance companies, MIB and other health care clearinghouses.** Intended to be a broad grant.
- g) Limits who may not act as a witness to a POA for health care
 - i. Attending physician or mental health services provider of the principal or a relative of the physician or provider. (*Who is a relative?*)
 - ii. Owner or operator of a health care facility in which principal is a patient or resident
 - iii. A parent, sibling or descendant, or the spouse of a parent, sibling or descendant, of either the principal or any agent or successor agent.
 - iv. An agent or successor agent
 - v. Any corporate director or executive of a health care facility in which the principal is a patient or a resident. **However, other employees of the facility may act as a witness.**
- h) The notice to the individual signing the POA must be initialed.
- i) Choices with respect to life sustaining treatment:
 - i. First option language is the same
 - ii. Second option is changed. “I want my life prolonged....unless in the opinion of my attending physician, in accordance with reasonable medical standards at the time of reference, in a state of “permanent unconsciousness” or suffer from an “incurable or irreversible condition” or “terminal condition”. If and when I am in any of those states, I want life sustaining treatment to be withheld or discontinued.”
 - iii. Third option is modified, “I want my life prolonged to the greatest extent possible **in accordance with reasonable medical standards. . . .**”