

Senior Living and Long Term Care Law Update

10/05/2016

New Uniform Power of Attorney Act, Effective January 1

Washington's new Uniform Power of Attorney Act (UPAA) will repeal and replace the current Power of Attorney Act, effective January 1, 2017. While an existing power of attorney document (POA) that was valid when executed will remain valid, all new POAs executed in Washington after January 1, will be valid only if they comply with the execution requirements of the new law. Below is a summary of some of the most significant provisions of the Washington UPAA from the perspective of long term care providers.

A. Execution Requirements and Requirements Governing the Use of POAs. Under the Washington UPAA, a POA must be signed and dated by the principal, and the signature must either: (a) be acknowledged before a notary or (b) be attested to by two or more disinterested witnesses. Home care providers, care providers at an adult family home or long-term care facility in which the principal resides, and individuals related to the principal by blood or marriage are not considered disinterested witnesses. Here are some other important rules about use of a POA:

- A POA must explicitly state in the document itself that is a "power of attorney" in order to be treated as such.
- Unless the document contains the words: "This power of attorney shall not be affected by the disability of the principal," or "This power of attorney shall become effective upon the disability of the principal," or "similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's incapacity," the agent's authority under a POA will terminate when the principal becomes incapacitated.
- Regardless of when a power of attorney was executed (i.e., either before or after January 1, 2017), a POA will be treated as immediately effective, unless it states otherwise and specifies when or what will trigger its effectiveness.
- Unless they are also the spouse, registered domestic partner, parent, or sibling of the principal, *none* of the following persons may act as an agent for the principal: any of the principal's physicians, the physician's employees, or the owners, administrators, or employees of the health care facility or long term care facility where the principal resides or receives care.
- A principal may designate co-agents, and such co-agents must exercise their authority jointly, not separately, unless the POA provides otherwise. However, a co-agent may delegate his or her authority to another co-agent.

- The duty of the agent is to act in accordance with the reasonable expectations of the principal to the extent actually known by the agent, to act in the principal's best interest and to act in good faith, loyally and with care, competence and diligence. A provision relieving the agent of certain liabilities will be enforced against the principal and the principal's successors, but a provision relieving the agent of liability for breach of duty committed dishonestly, with an improper motive, or with gross negligence to the purposes of the POA or the best interest of the principal will not be enforced. A provision relieving the agent of liability will not be enforced if it was inserted into the POA as the result of an abuse of a confidential or fiduciary relationship with the principal.
- An agent does not have authority to make health care decisions on behalf of the principal unless the POA explicitly grants the agent authority with respect to health care matters. A general grant of authority with respect to health care decisions is deemed to include authorization to act as the principal's personal representative under the Health Care Insurance Portability and Accountability Act (HIPAA). This means that a separate HIPAA waiver is not necessary for the agent to access the principal's health care information.
- Rights under Washington's Natural Death Act (Chapter 72.122 RCW) to decline life sustaining treatment may be exercised by an agent on behalf of the principal. However, rights under Washington's Death with Dignity Act (Chapter 70.245 RCW) may *not* be exercised through a POA.
- Like a guardian, an agent under a POA may *not* involuntarily commit the principal, and cannot consent to convulsive therapy, psychotherapy, or procedures that restrict the principal's physical freedom of movement, without further court authority.

B. Termination of a POA. Under the Washington UPAA, a POA terminates upon the happening of the following events:

- The principal dies;
- The principal becomes incapacitated, unless the power of attorney contains the durability language discussed above;
- The principal revokes the POA;
- The POA provides for its termination upon the happening of a certain event;
- The purpose of the POA is accomplished; or
- The principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns, and the POA does not provide for a successor agent.

The agent's authority under a POA terminates when:

- The principal revokes the agent's authority;
- The agent dies, becomes incapacitated, or resigns; or
- An action is filed for dissolution or annulment of the agent's marriage or state registered domestic partnership to the principal, or for their legal separation (unless the POA provides otherwise).

In addition, if a court appoints a guardian of the principal's estate or other fiduciary charged with management of *all* of the principal's property, then the POA is terminated, unless the court provides otherwise. Note, however, if a limited guardian or fiduciary is appointed, the POA will not be terminated or modified, except to the extent ordered by the court.

An existing POA is *not revoked or terminated* upon the execution of a new POA unless the new POA expressly revokes the prior POA.

C. Obligations Upon Presentation of a POA. The Washington UPAA provides that if you are asked to accept an acknowledged POA, you may, within seven days of its presentation, request an agent's certification, using a certification form that is part of the statute, and must accept the POA within five days of having received the statutory certification (or language translation, if necessary), unless you believe in good faith that the POA is not valid or that the agent is acting outside of his or her authority.

You may refuse to accept a POA if you make, or have actual knowledge that another person has made, a report to APS stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent. However, you may not insist on a certain form of POA, nor can you refuse to accept a POA simply because you believe it is too old. Wrongful refusal to accept a POA can result in the agent obtaining a court order requiring you to accept the POA, along with your being ordered to pay the agent's attorney's fees for having had to seek the court order.

You are protected when you reasonably rely on an acknowledged POA in good faith without actual knowledge that it is void, invalid or terminated or that it is being misused by the agent.

The information in this Legal Update addresses many of the major new statutory provisions under the UPAA, but it does not address all of the new law's sections and changes. This Legal Update is not a substitute for specific legal advice related to a specific situation.

For more information, please contact the Senior Living and Long Term Care Client Team at Lane Powell: lanepowellpc@lanepowell.com

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