2016 WILL BRING SOME UPDATES TO THE ILLINOIS POWER OF ATTORNEY ACT

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The leaves are just beginning to fall outside, but we're already seeing changes to the Illinois Power of Attorney Act that will become effective on January 1, 2016. The changes are relatively minor compared to some of the most recent statutory restructuring that has occurred over the past few years. But, they are important nevertheless. For those that are bold enough to draft and execute their own statutory short form powers of attorney or maybe even an entirely customized HCPOA, the changes carry implications from document execution and who may witness a principal's signature, to the powers that are granted via the statutory form and how a determination of mental capacity can be made.

Some Small Changes are coming to the Illinois Power of Attorney Act on January 1, 2016

1) Powers of attorney now may not be witnessed by the principal's psychologist.

Valid health care powers of attorney in Illinois require the signature of an individual who witnessed the principal's signing of the document. Previously the statute prohibited any attending physician, advanced practice nurse, physician assistant (finally added in 2015), dentist, podiatric physician, optometrist or mental health service provider of the principal, or a relative of any of those professionals, from serving as a witness. Effective January 1, 2016, the term "mental health service provider" will be replaced with "psychologist."

2) The appointment of successor agents is moved to a more intuitive section of the statutory short form.

This change isn't substantive, but it corrects an incomprehensible flaw of the 2015 statutory short form rewrite. In the 2015 version, the section of the document which could be used to appoint a successor health care agent who could act in the event the primary agent was unwilling or unable to do so was located all the way at the end of the document, *even after the principal's signature as well as the witness attestation clause and witness signature section!* I haven't studied the legislative history of the 2015 changes in any depth, so I don't know whether there was any rational basis for drafting the form in that manner or if it was simply an oversight. What I do know, is that the positioning of the "Successor Agent Appointment" section will make more sense in 2016, as it will be moved to the position directly below the "Primary Agent Appointment". I assume that it will drastically minimize the chance that third-party providers or disgruntled family members will question whether the successor agent designation was made appropriately.

3) The statutory short form HCPOA adds an option to permit an agent access to medical records in order to make decisions.

My critiques of the complete HCPOA rewrite in 2015 are well documented. I remain skeptical that the language used to indicate when an agent may be authorized to act increases the clarity of when an

agent shall be permitted to step in. Nevertheless, it's what we've got if we use the statutory short form. So, it is at least a small victory that, beginning in 2016, the new statutory short form contains a check-the-box option that permits an agent to access medical records of the principal beginning on the date of document execution in order to remain knowledgeable about the principal's current medical situation. The logic, I assume, is that, an agent that has been well educated about an agents healthcare history prior to being required to act will be better suited to make an informed healthcare decision on the principal's behalf, should the need arise.

4) Agents may now pursue applications for government benefits in the event an administrator or executor is not appointed.

Typically, a power of attorney terminates upon the death of the principal. At that point, an appointed agent no longer has any legal authority to act- at least in his or her capacity as an agent. However, oftentimes, a principal will die without a will or loved ones may be confused as to the appropriate legal procedures that must be followed to wrap up the principal's affairs via the probate process. If there are items needing attention- like applications with required response times, then the family can often find itself in a bind. The 2016 statutory amendment provides a bit of relief by expressly authorizing a health care agent to continue to pursue any applications for government benefits if the application was made during the life of the principal.

5) The definition of "decisional capacity" is now included in the statutory short form.

Previous versions of the statutory short form power of attorney did not include any specific definition of capacity, and rightfully so. The term can carry various connotations in different contexts. Frequent debates arise about whether capacity is a legal or medical determination in the context of agent authorization to act. It frequently confuses doctors and lawyers alike, so it's no wonder that the drafters of the 2015 HCPOA rewrite decided to leave the term absent. However, I'd argue that they did more harm than good, as they instead decided to frame the determination of when an agent should be able to act in terms of "making decisions for oneself." That creates the risk that patient decisions may be dangerously susceptible to a medical provider or family member's assumption that a patient is no longer able to act in their best interests because they make a medical decision that may seem contrary to the logical opinion of others. The 2016 amendment will carry forward the definition of "decisional capacity" written into the Illinois Health Care Surrogate Act. So, now a medical provider is only permitted to make a determination that a patient cannot make decisions for himself or herself if "means the ability to understand and appreciate the nature and consequences of a decision regarding medical treatment or forgoing life-sustaining treatment and the ability to reach and communicate an informed decision in the matter as determined by the attending physician." Not perfect, but a drastic improvement over the elementary language used previously to address such a complex and important determination.

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