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THE NEW ILLINOIS POWER OF ATTORNEY FOR HEALTHCARE

An amendment to the Illinois Power of Attorney Act is headed to the Governor's desk to be signed into law. It contains some important modifications for both estate planning attorneys and those executing powers of attorney enabling their agents to make health care decisions on their behalf.

Some of the highlights (or lowlights depending on your view of the re-write) are as follows:

Definitions expanded.

The re-write clarifies definitions, including who may and may not serve as a witness. It specifically spells out that witnesses must be 18- already required under law, but goes along with the general principals of the amended text which are primarily concerned with making the statute and statutory short form more easily understood by ordinary people. It also expands the language prohibiting an attending physician as witness to other medical professionals including advanced practice nurses, physician assistants, dentists, podiatric physicians and optometrists and mental health care providers. The inclusion of physician assistants and advanced care nurses, like nurse practitioners makes sense to me, though I struggle to understand when a dentist may be in a position to diagnose an incapacity leading to being classified as an interested witness for purposes of this form.

Simplification of meeting the statutory power of attorney for healthcare classification.

Previously the statute required that, in order to be deemed to be a statutory form POAHC, a power of attorney must be in a "substantially the form proscribed in the statute." The amended text scraps this entire mess and simply states that a POAHC may be in any form and be deemed statutory so long as it includes the notice to the individual signing contained in the statute. The obvious hope is that POAs that don't meet the statutory form verbatim (for example, those drafted by an attorney that include an extra agent power or two, but otherwise mirror the statutory text) won't receive unnecessary scrutiny leading to unnecessary delays in treatment.

Addition of a FAQ section for individuals considering the form.

The most substantial change to the statute is the inclusion of a new Notice to the individual signing the form as well as a frequently asked questions section written in plain English. The section addresses issues such as:

> What are the things that I want my health care agent to know?
>
> What is most important to you in your life?
>
> How important is it to avoid pain and suffering?

If you had to choose, is it more important to you to live as long as possible, or to avoid prolonged suffering or disability?

Would you rather be at home or in a hospital for the last days or weeks of your life?

What kind of decisions can my agent make?

Who should I choose to be my health care agent?

Modified Statutory Form.

The statutory form itself is also re-written in simpler language than the previous version. A common critique amongst Illinois attorneys familiar with the previous form as well as POA drafting techniques I the new form's selection of language dealing with courses of treatment related to removal or withholding of life-sustaining treatment when the patient has an incurable condition or is in an irreversible vegetative state. The language is written in terms that, many argue, leads an individual executing the form towards discontinuing treatment rather than, for example, remaining on life support after an accident leaving him or her in a coma.

Choice 1 reads, "The quality of my life is more important than the length of my life. If I am unconscious and my attending physician believes, in accordance with reasonable medical standards, that I will not wake up or recover my ability to think, communicate with my family and friends, and experience my surroundings, I do not want treatments to prolong my life or delay my death, but I do want treatment or care to make me comfortable and to relieve me of pain."

Choice 2 reads, "Staying alive is more important to me, no matter how sick I am, how much I am suffering, the cost of the procedures, or how unlikely my chances for recovery are. I want my life to be prolonged to the greatest extent possible in accordance with reasonable medical standards>"

It doesn't take an English professor to realize that one choice is so biasedly written as to raise the question of why "choices" were even included in the first place. For whatever reason, the drafters of the new form had a tremendous inclination towards pointing people towards cutting off life-sustaining treatment. Numerous commentators have noted the new law's push away from a patient-centered focus to one focused on the power of an agent to act. Perhaps, then it should come as no surprise that the state Elder Law Section Counsel is vehemently opposed to the modifications. It notes that the law offers much less protection to seniors than the previous version (which already went through a substantive rewrite three years ago).

The lack of nuance in the language dealing with end-of-life care is a prime example. After all, when faced with the choice to not be able to *think* or *communicate with family and friends* (for some reason, other communication or individuals are not addressed, which is almost comical), or *experience surroundings,* compared to staying alive *no matter how sick, how much [one[is suffering, or how expensive the procedures* even when there are unlikely chances of recovery (read: absolutely no hope to recover)it's irrational to ask who in their right mind wouldn't choose the former. But, that biased language tilted dramatically towards removal of life-sustaining treatment defeats the purpose of giving an individual

a choice in the first place. The drafters might as well have said we're going to make life-sustaining treatment illegal; you'll thank us later (because evidently, according to the drafters, communicating with me or you would still be possible even though they couldn't communicate with family and friends).

It remains to be seen how the amendments and new form will be received, but based on the commentary already out there, I'd say the drafters failed miserably when they undertook to unnecessarily modify such an important statute- one that seemed to be in an acceptable form upon its substantial re-write just three years ago.

You can read the amended statute in full here.

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