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Trusts and Estates

Key Provisions of the New Power of Attorney Law: Act 95

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The statutory provisions governing powers of attorney in Pennsylvania, which can be found under Chapter 56 of the Probate, Estates and Fiduciaries Code (20 Pa. C.S. Sections 5601-5612), have recently changed. This came about by the passage of HB 1429, which was signed by then-Gov. Tom Corbett on July 2, 2014, as Act 95 of 2014. While some of the provisions became effective immediately upon the passage of Act 95, many of the changes did not take effect until Jan. 1. Now that all of the changes implemented by Act 95 have taken effect, we thought it would be helpful to highlight some of the key provisions:

- **Execution of power of attorney.** Under prior law, a power of attorney was generally not required to be witnessed or notarized to be legally effective, even though the widespread practice was to do so. Under the new law, all powers of attorney must now be acknowledged before a notary public (or another individual authorized by law to take acknowledgments) and witnessed by two individuals. One of the most significant changes is that the agent cannot be one of the witnesses.

Up until this point, it has been common practice, when overseeing the execution of a set of estate planning documents, for a lawyer to have spouses serve as witnesses for one another's documents, while also serving as the first agent under the power of attorney. However, now, when spouses name each other as agents in their powers of attorney, they will not be able to serve as witnesses. The oddity of this requirement is that, under Pennsylvania law, the spouse can still serve as a witness to the other spouse's will, even if the spouse is named as executor and primary beneficiary. In a large office setting, the requirement of two independent witnesses shouldn't pose much of a problem, but, in smaller offices, and when overseeing the execution of documents in a client's home, it can become an additional challenge.

- **Notice.** The notice in all capital letters at the beginning of the power of attorney that the principal signs pursuant to Section 5601(c) has been modified. The statement in the notice that the agent "must keep your funds separate from your agent's funds" has now been deleted. A new statement has been added pertaining to the agent's duties to act in accordance with the principal's "reasonable expectation" and "best interests." Another new

statement warns the principal of the broad authority that may be granted to the agent, including the power to give away the principal's property or change how it is distributed at death. Last, the principal is specifically advised to seek an attorney's advice before signing the document. It should be noted that the failure to sign a notice does not affect the validity of the power of attorney; however, it does change the burden of proof on challenges to the authority of the agent. Accordingly, to reduce the burden on a client's agent in trying to satisfy the needs of the client, and best ensure that a client's objectives will be met, the notice should be included in all powers of attorney.

- **Acknowledgment of agent.** Before an agent may act under a power of attorney, the agent is required to sign an acknowledgment form. Act 95 has made several changes to the content of the acknowledgment. One such change is a more expanded summary of the duties of an agent. Another change is to eliminate certain statements previously required relating to keeping assets of the principal separate, exercising reasonable caution and prudence and keeping records of transactions. In some cases, practitioners may decide to include some of the old provisions that have been deleted, but, if any modifications are made, consideration should be given to the fact that the law requires that the new acknowledgment be "substantially" in the form provided by the statute.

- **Hot powers.** The new law requires that certain powers must be expressly granted in the power of attorney to be effective for an agent. These "hot powers," as set forth under Section 5601.4, include: the power to 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; and disclaim an interest in property (including a power of appointment). An agent is deemed to have been granted each of the other powers set forth in the power of attorney statute with the blanket language granting the agent the authority to do "all acts that a principal is authorized to perform."

- **Gifting/estate planning.** The power of an agent to make gifts has been modified by Act 95. Under the old law, the power of an agent to make "limited gifts" only allowed gifts to the principal's spouse, descendants and spouses of descendants. The new law does not limit these gifts by the relationship of the donee. However, under the law, an agent may only make gifts to herself or himself or engage in estate planning transactions for her or his benefit if the agent is the principal's ancestor, descendant or spouse, unless there is an express provision in the power of attorney permitting transactions for the agent's benefit. Accordingly, in cases where the principal is an unmarried client with no children or parents (or otherwise has a nontraditional estate plan benefiting immediate family), it is important to review and possibly tailor the power of attorney to permit the agent to exercise certain powers for the agent's own benefit.

Under Section 5601.3(b)(6), there are new guidelines relating to preserving 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. These factors include the value and nature of the principal's property, the principal's foreseeable obligations and need for maintenance, the minimization of taxes, including income, estate, inheritance, generation-skipping transfer and gift taxes, and eligibility for a benefit, program or assistance

under a statute or regulation. These estate planning guidelines may be waived or modified by the principal in the power of attorney document.

- **Agent's duties and liabilities.** Act 95 restates the duties of agents and sets forth limitations on an agent's liability. Under new Section 5601.3(a), an agent has the duty to act in accordance with the principal's reasonable expectations and in the principal's best interest, in good faith, and only within the scope of authority granted in the power of attorney. Those duties are mandatory and cannot be waived by the principal. On the other hand, there are other duties that may be modified or waived by the principal, including (but not limited to) the duties to: (1) keep a record of all receipts, disbursements and transactions, (2) keep assets separate, (3) not create a conflict of interest and (4) preserve the principal's estate plan.

Act 95 also provides limitations on an agent's liability if the agent acts in good faith. An agent who benefits from a transaction or has a conflict of interest is not automatically liable if she or he acts with care, competence and diligence for the best interest of the principal.

- **Standing.** New Section 5601.3(d) limits those who have standing to compel an accounting of an agent's actions under the power of attorney. Under the new law, except as otherwise provided in the power of attorney, an agent is not required to provide an accounting of her or his actions as agent unless ordered by a court or requested to account by the principal, a guardian, conservator or other fiduciary acting for the principal, governmental agency with the authority to protect the principal's welfare or personal representatives of the principal's estate upon death. Thus, under this section, even a spouse, parent or child may not have standing to compel the agent to render an accounting. In some cases, it may be appropriate to modify this limitation by expressly providing in the power of attorney who has standing to compel an accounting, such as a principal's children or other trusted persons.

- **Liability of third parties.** The liability of third parties relying in good faith on powers of attorney has been limited as a response to the reasoning and holding of the state Supreme Court in *Vine v. Commonwealth of Pennsylvania, State Employees' Retirement Board*, 607 Pa. 648, 9 A.3d 1150 (2010). In that case, a third party was held liable for permitting an agent to act under a power of attorney that was properly executed but was later determined to be void due to the principal's incapacity at the time of execution. The new statute provides immunity to third parties for good-faith reliance upon a power of attorney even if it is later found to be void or revoked, as long as there was no actual knowledge by the third party to that effect.

In addition, the statute provides mechanisms that third parties may use prior to accepting a power of attorney in case there are concerns about the validity of the document. This includes requesting an agent's certification or an attorney's opinion as to whether the agent is acting within the scope of the authority granted in the power of attorney. The statute also helpfully specifies that a third party cannot require different or additional forms of power of attorney. Hopefully this new provision will eliminate (or at least reduce the incidents of) financial institutions arbitrarily requiring that principals sign their proprietary power of attorney forms before respecting an agent's authority on behalf of the principal under an otherwise valid power of attorney.

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