

Department of Legislative Services
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FISCAL AND POLICY NOTE
Revised

Senate Bill 87

(Senator Kelley, *et al.*)

Judicial Proceedings

Judiciary

Maryland Uniform Power of Attorney Act - Loretta's Law

This bill establishes the Maryland Uniform Power of Attorney Act.

Fiscal Summary

State Effect: It is uncertain what effect the bill might have on the number of cases filed relating to powers of attorney; therefore, any effect on the workload of the Judiciary cannot be reliably estimated.

Local Effect: See above.

Small Business Effect: None.

Analysis

Bill Summary:

Definition and Creation of a Power of Attorney

Under the bill, a power of attorney is defined as a writing or other record that grants authority to an agent to act in the place of the individual granting the authority (principal). The bill does not apply to powers of attorney to the extent the power is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction. The bill also does not apply to a power of attorney to make health care decisions, a proxy or other delegation to exercise voting rights or management rights with respect to an entity, or a power of

attorney created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.

A power of attorney created under the bill is durable, meaning it is not terminated by the incapacity of the principal, unless the power of attorney expressly provides otherwise. A power of attorney must be signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name. A signature on a power of attorney is presumed to be genuine if acknowledged in front of a notary public or other individual authorized by law to take acknowledgements.

When a Power of Attorney Becomes Effective

A power of attorney is effective when it is executed, unless the principal provides in the power of attorney that it becomes effective at a future date or on the occurrence of a future event or contingency. If a power of attorney becomes effective on the occurrence of a future event or contingency, the principal may authorize a person or persons to determine when the event or contingency has occurred. If a power of attorney becomes effective upon a principal's incapacity and the principal has not authorized a person to determine whether the principal is incapacitated (or the designated person is unable or unwilling to make the determination), the determination may be made by two licensed physicians or one licensed physician and one psychologist, or if the principal is missing, detained or incarcerated in a penal system, or outside of the United States and unable to return, the determination may be made by an attorney at law, a judge, or an appropriate government official.

A person the principal has authorized to determine that the principal is incapacitated may, in accordance with federal law, obtain access to the principal's health care information and communicate with the principal's health care provider.

In addition to a principal being missing, detained or incarcerated in a penal system, or outside of the United States and unable to return, "incapacity" is also defined under the bill as meeting the grounds required for the appointment of a guardian of the property of a disabled person as defined under § 13-201 of the Estates and Trusts Article (see Current Law).

Unless a power of attorney provides otherwise, a person accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent or by another assertion or conduct indicating acceptance.

Appointment of a Guardian

In a power of attorney, a principal may nominate a guardian of the principal's estate or person for consideration by a court if protective proceedings for the principal's estate or person begin after the execution of the power of attorney. Except for good cause shown or disqualification, the court must appoint a guardian in accordance with the principal's most recent nomination. If a guardian or other fiduciary charged with the management of some or all of the principal's property is appointed after the execution of a power of attorney, the agent is accountable to the guardian or fiduciary as well as the principal, the power of attorney is not terminated, and the agent's authority continues unless it is limited, suspended, or terminated by the court.

Authority of an Agent

Under the bill, an agent may do the following only if the power of attorney expressly grants authority and exercise of the authority is not otherwise prohibited by another agreement or instrument:

- 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; or
- exercise fiduciary powers that the principal has authority to delegate.

Unless the power of attorney provides otherwise, a grant of authority to make a gift is subject to specified requirements including that the dollar amount of each gift not exceed the annual federal gift tax exclusion and that a gift only be made if it is consistent with the principal's objectives, if actually known by the agent, or if unknown, consistent with the principal's best interest based on all relevant factors.

Notwithstanding a grant of authority to do one of the above acts, unless the power of attorney provides otherwise, an agent who is not an ancestor, spouse, or descendant of the principal, may not create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

The bill specifies various actions that an agent may take under specific grants of authority or a general grant of authority in a power of attorney with regard to the principal's real property; tangible personal property; stocks and bonds; commodities and options; banks and other financial institutions; operation of an entity or business; insurance and annuities; estates, trusts, and other beneficial interests; claims and litigation; personal and family maintenance; benefits from governmental programs or civil or military service; retirement plans; and taxes.

A grant of authority can be exercised with respect to property a principal has when a power of attorney is executed or acquires later, whether or not the property is located in the State and whether or not the authority is exercised or the power of attorney is executed in the State.

An act performed by an agent in accordance with a power of attorney has the same effect, and inures to the benefit of and binds the principal and the principal's successors in interest, as if the principal had performed the act.

Statutory Form Power of Attorney

The bill provides a statutory form power of attorney that may be used to create a power of attorney that has the meaning and effect prescribed in the bill and allows for incorporation by reference of the various statutory grants of authority contained in the bill.

Acceptance of an Acknowledged Power of Attorney

A person that in good faith accepts an acknowledged power of attorney without actual knowledge that the signature is not genuine may rely on the presumption that the signature is genuine. In addition, a person that in good faith accepts an acknowledged power of attorney without actual knowledge that a power of attorney or a purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority, may rely on the power of attorney.

The bill also provides sanctions for refusal to accept acknowledged powers of attorney that are either substantially in the form of the statutory form power of attorney provided in the bill or that meet the federal requirements for a military power of attorney. Under the bill, a person who refuses to accept an acknowledged statutory form power of attorney, with specified exceptions, is subject to a court order mandating acceptance and liability for reasonable attorney's fees and costs incurred in an action or proceeding that confirms the validity or mandates acceptance of the power of attorney.

Duties of an Agent

Notwithstanding provisions of a power of attorney, an agent that has accepted appointment must: • act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest; • act in good faith; and • act only within the scope of authority granted in the power of attorney.

Unless provided otherwise in a power of attorney, an agent that has accepted appointment must: • act loyally for the principal's benefit; • act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest; • act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances; • keep a record of all receipts, disbursements, and transactions made on behalf of the principal; • cooperate with a person that has authority to make health care decisions for the principal; and • attempt to preserve 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.

Liability of Agent

An agent that violates the bill: • is liable to the principal or the principal's successors in interest for the amount required to restore the value of the principal's property to what it would have been if the violation had not occurred; and • must reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.

An agent that acts in good faith is not liable to a beneficiary of a principal's estate plan for failure to preserve the plan, and absent a breach of duty to the principal, an agent is not liable for a decline in the principal's property value. In addition, an agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal. If an agent is selected by the principal because of special skills or expertise possessed by the agent, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

An agent that delegates authority (under a specific grant of authority in the power of attorney to do so) to another person or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person.

A power of attorney may relieve an agent of liability for breach of duty, but not for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal. A power of attorney may not relieve an agent of liability for breach of duty if such relief was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

Termination

A power of attorney terminates when: • the principal dies; • the principal becomes incapacitated, if the power of attorney is not durable; • the principal revokes the power of attorney; • the power of attorney provides that it terminates; • the purpose of the power of attorney is accomplished; or • the principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

An agent's authority terminates when: • the principal revokes the authority; • the agent dies, becomes incapacitated, or resigns; • an action is filed for the dissolution or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney provides otherwise; or • the power of attorney terminates.

Termination of an agent's authority or a power of attorney is not effective with respect to acts in good faith by the agent or another person who does not have actual knowledge of the termination. The principal and the principal's successors in interest are bound by those acts, unless the acts were otherwise invalid or unenforceable.

The execution of a power of attorney does not revoke a previous power of attorney executed by the principal unless it provides that the previous power of attorney is revoked or that all other powers of attorney are revoked.

Agent Resignation

Unless a power of attorney provides for a different method, an agent may resign by giving notice to the principal, or, if the principal is incapacitated, to the guardian (if one has been appointed) and a co-agent or successor agent. If there is no guardian or other agents, notice may be given to the principal's caregiver, another person reasonably believed by the agent to have sufficient interest in the principal's welfare, or a governmental agency with authority to protect the welfare of the principal.

Multiple Agents

A principal may designate two or more persons to act as co-agents, and unless the power of attorney provides otherwise, the agents may exercise their authority independently. A principal may also designate one or more successor agents or grant authority to an agent or other person to designate a successor agent. Unless a power of attorney provides otherwise, a successor agent has the same power as the original agent and may not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.

An agent is not liable for a breach of fiduciary duty by another agent, including a predecessor agent, that the agent did not participate in or conceal. If an agent has actual knowledge of a breach or imminent breach of fiduciary duty by another agent, the agent must notify the principal and, if the principal is incapacitated, take any action reasonably appropriate under the circumstances to safeguard the principal's best interest. An agent that fails to do so is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken action.

Compensation

Unless the power of attorney provides otherwise, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and compensation that is reasonable under the circumstances.

Disclosure of Records

Unless otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless it is ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency with the authority to protect the welfare of the principal, or, on the death of the principal, by the personal representative or successor in interest of the principal's estate.

Judicial Relief

The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief: • the principal or agent; • a guardian, conservator, or other fiduciary acting for the principal; • a person authorized to make health care decisions for the principal; • the principal's spouse, parent, or descendant; • an individual who would qualify as a presumptive heir of the principal; • a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate; • a governmental agency with regulatory authority to protect the welfare of the principal; • the principal's caregiver or another person who demonstrates sufficient interest in the principal's welfare; and • a person asked to accept a power of attorney. The court must dismiss the petition on motion by the principal unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

Applicable Law and Portability

A power of attorney executed in the State on or after October 1, 2008 is effective if executed in accordance with the bill. A power of attorney executed prior to October 1, 2008 is valid if the execution complied with State law at the time of the execution.

The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney, or, in the absence of an indication, by the laws of the jurisdiction where the power of attorney was executed.

A power of attorney executed in another state is valid in Maryland, if, at the time of its execution, the execution complied with: • the law of the applicable jurisdiction that determines the meaning and effect of the power of attorney; or • the requirements for a military power of attorney in accordance with federal law.

Applicability of the Bill

Except as otherwise provided in the bill, the bill applies to a power of attorney created before, on, or after October 1, 2008, and a judicial proceeding concerning a power of attorney commenced on or after October 1, 2008. The bill also applies to a judicial proceeding concerning a power of attorney commenced before October 1, 2008, unless the court finds that application of a provision of the bill would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case the superseded law applies. An action taken before October 1, 2008 is not affected by the bill.

The bill does not supersede other laws applicable to financial institutions or other entities. Those laws control if inconsistent with the bill.

Current Law: With the exception of an instrument or portion of an instrument that is an advance directive appointing a health care agent under the Health – General Article of the Annotated Code (which is governed by that Article), when a principal designates another person as an attorney in fact or agent by a power of attorney in writing, it is a durable power of attorney unless otherwise provided by its terms.

An action taken by an attorney in fact or agent pursuant to the power of attorney during a period of disability, incompetence, or uncertainty as to whether the principal is dead or alive has the same effect and inures to the benefit of and binds the principal as if the principal were alive, competent, and not disabled.

If a guardian is appointed for a principal, the attorney in fact or agent accounts to the guardian rather than the principal. The guardian has the same power the principal would have if not for the principal's disability or incompetence to revoke, suspend, or terminate all or any part of the power of attorney or agency.

The death, disability, or incompetence of a principal who has executed a power of attorney in writing does not revoke or terminate the agency as to the attorney in fact, agent, or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney or agency. In the absence of fraud, an affidavit executed by the attorney in fact or agent, stating that the attorney in fact or agent did not have actual knowledge of the revocation or termination of the power of attorney is conclusive proof of the nonrevocation or nontermination of the power at that time. Any action taken binds the principal and the principal's heirs, legatees, and personal representatives unless it is otherwise invalid or unenforceable.

Under § 13-201 of the Estates and Trusts Article, a guardian of a disabled person's property must be appointed if the court determines that a person is unable to manage his property and affairs effectively because of physical or mental disability, disease, habitual drunkenness, addiction to drugs, imprisonment, compulsory hospitalization, confinement, detention by a foreign power, or disappearance, and the person has or may be entitled to property or benefits which require management.

Background: The Maryland Uniform Power of Attorney Act is a modified version of the 2006 Uniform Power of Attorney Act drafted, approved, and recommended for enactment in all states by the National Conference of Commissioners on Uniform State Laws. According to NCCUSL, the Act enhances the usefulness of durable powers of attorney while protecting the principal, the agent, and those who deal with the agent.

A Uniform Durable Power of Attorney Act drafted by NCCUSL in 1979 and amended in 1987, was enacted in 43 states, the District of Columbia, and the U.S. Virgin Islands. According to NCCUSL, the 2006 UPOAA was necessary because states had incorporated numerous nonuniform provisions, causing divergence and confusion. The 2006 Model Act was drafted based on a national review of state power of attorney legislation, a national survey sent to state bar associations and other pertinent organizations, and input from various other sources. According to NCCUSL, the 2006 Model Act serves as a codification of state legislative trends and collective best practices.

According to NCCUSL, a durable power of attorney was originally viewed as an inexpensive method of surrogate decision making for people of modest means, but is now widely used for incapacity planning and convenience.

Prior to 2000, under Maryland law, a power of attorney had to contain certain language in order for it to be durable. Chapter 619 of 1997, which took effect January 1, 2000, changed State law, making a power of attorney durable unless it provides otherwise.

State and Local Expenditures: The bill could affect the number of cases brought relating to powers of attorney, possibly as a result of the bill's provisions allowing a wide group of individuals/entities to petition a court to construe a power of attorney or review an agent's conduct or the bill's provisions relating to acceptance of an "acknowledged statutory form power of attorney." However, on the whole, whether the bill would lead to an increase or decrease in cases, and to what extent, cannot be reliably estimated. The effect on the Judiciary's workload, therefore, cannot be reliably estimated.

Additional Information

Prior Introductions: SB 185 of 2007, a similar bill, received an unfavorable report from the Senate Judicial Proceedings Committee. House Bill 961 of 2007, also a similar bill, received a hearing in the House Judiciary Committee, but was later withdrawn. Unlike this bill, SB 185 and HB 961 of 2007 did not include Section 120 of the Uniform Act (Section 17-119 in this bill), which provides for sanctions for specified refusals to accept an acknowledged statutory form power of attorney.

Cross File: HB 412 (Delegate Dumais) – Judiciary.

Information Source(s): Judiciary (Administrative Office of the Courts), Maryland State Bar Association (Estate and Trust Law Section), Department of Legislative Services

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