WHY YOU NEED A POWER OF ATTORNEY

By Sean D. Curran, Esq.

If you become incapacitated and can no longer manage your financial affairs, you should have a Power of Attorney (POA) so that some other person you trust has the authority to act on your behalf for the many financial transactions necessary to maintain your assets and financial good standing. However, you should not wait until you become incapacitated to execute a POA because it may be too late. If you become mentally incapacitated and do not have a POA, the court may appoint a guardian over your affairs. Your court-appointed guardian may not be the person you would have chosen, especially if there is a dispute among your family members. A guardian has whatever powers the court gives them. This may be very different than the powers you would want them to have.

A POA gives you, the "principal," better control over your future where you decide who will be your "agent," the person authorized to act for you, in the event of an accident or illness. You define the powers and authority your agent will have. Many of these powers are practical and are concerned with routine day to day financial activities. POAs permit your agent to manage your money and property. The agent can pay bills, make investments, and even sell your property if necessary. A skillfully prepared POA with asset protection authority can protect your family's financial security in the event of your incapacity. It is an extremely important and relatively inexpensive document. However, great consideration needs to be given as to who will be given the powers and under what terms because it can be the vehicle for inappropriate use of assets by an unlawful agent. Nevertheless, every responsible adult should have a POA.

Effective January 1, 2015, Pennsylvania updated the POA law (Act 95) which has several significant changes. Act 95 tries to strike a balance which gives you the ability to give your agent the powers you desire him or her to have, but which also helps prevent, detect, and prosecute abuse by the agent. For instance, Act 95 imposes duties to keep the agent's and

principal's funds separate, to keep a record of all receipts, disbursements and transactions made on behalf of the principal, and to attempt to preserve the principal's estate plan. However, if you do not want these duties imposed on your agent, these duties may be waived or released by the principal in the POA document.

The principal signs a notice form that contains state mandated information about the significance of the POA. The updated language in the notice warns the principal that a grant of broad authority may allow the agent to give away the principal's property while the principal is alive or change how the principal's property is distributed at death.

The agent signs an acknowledgment form accepting the duties that go with acting as an agent and agreeing to act in conformity with the principal's expectations, in good faith and only within the scope of the authority granted in the document. The agent acknowledgement must be in conformity with Act 95's new language. An agent has no authority to act until he or she has signed this acknowledgment and it is affixed to the POA document.

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Before Act 95, there was no requirement that a POA be notarized or even witnessed. Beginning with documents signed on or after January 1, 2015, a POA must be notarized and have two qualified witnesses, which means that they are above the age of 18 and cannot be the notary or the agent. This permits the POA to be recorded if desired.

The law also attempts to reduce the potential for financial abuse by prohibiting your agent from taking certain actions unless they are specially authorized in your POA. These "hot powers" include actions that have the potential to dissipate your property or change your estate plan — like making a gift on your behalf or changing a beneficiary designation on an insurance policy or IRA. If you want your agent to have any of these powers, the authority must be set out in your POA document. Many of these powers are practical to have as we age and are concerned about sheltering our assets from long term care costs.

A POA is useful only if it will be accepted by the financial institution or other third party to whom it is delivered. So, the law includes provisions that can penalize a third party for refusing to accept your POA as well as to protect you from abuse by permitting those third parties to question a POA when they have a suspicion that something is amiss, or your agent is acting beyond the granted powers. If the agent has fully complied with the requirements of the law, a third party that refuses to comply with the proper instructions of the agent is subject to liability for financial harm caused to the principal by the refusal and to a court order mandating acceptance of the POA.

Act 95 does not require that you get a new POA, but it makes sense to have your current document reviewed by a lawyer who is familiar with the new law. Legally, pre-2015 POAs remain valid. Practically, your old POA may not be the best document for you or your agent. You may want to update your POA so that it will be more likely accepted by your bank and other financial institutions without questions. POAs can vary in terms of scope and complexity. Some financial powers of attorney are very simple and may not contain the necessary powers to achieve desired results. If you have not recently updated your power of attorney, now may be a good time to visit your elder law attorney for a review.

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