

HOUSE BILL REPORT

HB 1135

As Reported by House Committee On:
Judiciary

Title: An act relating to powers of attorney.

Brief Description: Modifying power of attorney provisions.

Sponsors: Representatives Lantz, Esser and McDermott.

Brief History:

Committee Activity:

Judiciary: 1/30/01, 2/22/01 [DPS].

Brief Summary of Substitute Bill

- Revokes a power of attorney granted to a spouse if there has been a dissolution, legal separation, or invalidity of marriage.
- Establishes a process for a person to petition the court regarding the attorney in fact's actions.
- Establishes what constitutes a person acting in good faith and without negligence, for the purpose of liability, when relying on a power of attorney.
- Makes other changes to the power of attorney statutes.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives Carrell, Republican Co-Chair; Lantz, Democratic Co-Chair; Hurst, Democratic Vice Chair; Lambert, Republican Vice Chair; Boldt, Casada, Dickerson, Esser, Lovick and McDermott.

Staff: Trudes Hutcheson (786-7384).

Background:

A person (the principal) may authorize another person (the agent) to act in the principal's

place, either for some particular purpose or for the transaction of business in general. The authority is conferred by an instrument in writing called a power of attorney. Although the agent is called the attorney in fact– (AIF), the agent does not need to be a lawyer. The AIF has a fiduciary duty to act in the principal’s best interest.

A durable power of attorney authorizes an agent to act on behalf of the principal even if the principal becomes disabled or incapacitated. Unlike a guardianship proceeding that requires court hearings to determine if the person is incapacitated, a durable power of attorney may be created without court intervention.

The power of attorney may be revoked by: (a) the principal at anytime; (b) a court-appointed guardian; or (c) a court order. The power of attorney terminates automatically upon the principal’s death. However, the AIF’s exercise of power after death may be valid if done in good faith and without notice of the principal’s death.

The statutes limit certain powers of the AIF unless those powers are specifically granted in the power of attorney. For example, there are limitations on the AIF’s power to make gifts of the principal’s property. The other power that is limited unless specifically authorized is the power to make, amend, alter, or revoke estate planning documents. Those documents include: wills, codicils, life insurance beneficiary designations, and community property agreements. The principal may grant that authority to the AIF only by explicitly providing for that in the power of attorney.

A person acting without negligence and in good faith shall not incur liability for reasonably relying on a power of attorney. Unless the document that the person is relying on requires that it be filed for record to be effective, the person shall place reasonable reliance on it regardless of whether it is filed.

Summary of Substitute Bill:

Various changes are made to the power of attorney statutes.

Revocation of the power of attorney upon dissolution.

When a principal has appointed his or her spouse as the AIF, the power of attorney is revoked upon entry of a decree of dissolution, legal separation, or declaration of invalidity of marriage, unless the power of attorney or the decree provides otherwise.

Power of attorney regarding the principal’s will.

An AIF may not have the power to make, amend, alter, or revoke the principal’s wills or codicils, whether or not those powers are specifically provided for in the document.

Reasonable reliance on a power of attorney.

A person's reliance on the AIF is presumed to be without negligence and in good faith if:

- (a) the AIF presented the power of attorney to the person and requested the person to accept the AIF's authority;
- (b) the AIF presented to the person an acknowledged affidavit or declaration signed under penalty of perjury contemporaneously with presenting the power of attorney; and
- (c) the person accepting the power of attorney examined the document and confirmed the identity of the attorney in fact.

The presumption may be rebutted by clear and convincing evidence that the person knew or should have known that one or more of the material statements in the affidavit is untrue. The bill lists specific statements that the affidavit must include.

It shall not be found that an organization knew or should have known of circumstances that would revoke or terminate the power of attorney or limit or modify the authority of the AIF, unless the individual accepting the power of attorney on behalf of the organization knew or should have known of the circumstances.

Petition process regarding the AIF.

A petition process is created that allows interested persons to address matters involving the AIF's actions. Certain persons may file a petition requesting the court to:

- (a) determine whether the power of attorney is in effect or has terminated;
- (b) compel the AIF to submit an accounting or report of his or her acts if the AIF has failed to submit an accounting or report within 60 days of a written request from the person filing the petition;
- (c) ratify or approve past or proposed acts of the AIF;
- (d) order the AIF to exercise or refrain from exercising his or her authority in a particular manner or for a particular purpose;
- (e) modify the AIF's authority;
- (f) remove the AIF on a determination by the court that the AIF violated, or is unfit to perform, fiduciary duties and removal of the AIF is in the best interest of the principal;
- (g) approve the resignation of the AIF and approve the final accountings of the resigning AIF if submitted;
- (h) confirm the authority of the successor AIF;
- (i) compel a third person to honor the AIF's authority, provided that the principal could have compelled the third person in the same circumstances; and
- (j) order the AIF to furnish a bond in an appropriate amount.

Those who may file a petition include the AIF, the principal, the spouse, the guardian, or any other person who is interested in the principal's welfare, has a good faith belief that the court's intervention is necessary, and shows that the principal is incapacitated or otherwise unable to protect his or her own interests.

The principal may name in the power of attorney certain persons who may not bring a petition. The provision will be enforceable if the person named is not at the time of the filing of the petition the guardian, or if the principal was advised by an attorney at the time of creating the power of attorney. The provision excluding the person is enforceable unless the person named can establish that the principal was unduly influenced by another or under mistaken beliefs when excluding him or her from the petition process. The provision is also unenforceable if it names a government agency charged with protecting vulnerable adults.

In the petition process, the court may award reasonable attorneys fees and costs to any person participating in the proceedings from any other person participating or from the principal's assets as the court deems just. The court must consider whether the petition was filed without reasonable cause, and order costs and fees paid by the AIF individually only if the court determines that the AIF clearly violated his or her fiduciary duties or refused without justification to cooperate with the principal or the principal's guardian or personal representative. In a petition to compel a third party to accept a power of attorney, the court may order reasonable attorneys fees and costs to be paid by the third party only if the court determines that the third party did not have a good faith concern that the AIF's exercise of authority was improper.

To the extent possible, the dispute resolution procedures available for matters involving trust and estates also apply to the AIF petition process created in the bill.

Substitute Bill Compared to Original Bill:

The substitute bill removed the state from the list of persons who may petition the court for oversight without having to demonstrate certain criteria. The substitute bill makes unenforceable any provision the principal might create that prohibits a petition for oversight from a government agency charged with protecting vulnerable adults.

Appropriation: None.

Fiscal Note: Not Requested.

Effective Date of Substitute Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: The power of attorney statutes were passed in the 1970s and do not

offer much guidance. Some of the gaps in the law that this bill will help to fill is the revocation of the power of attorney upon dissolution. The dissolution provision brings the power of attorney statutes in line with several other statutes allowing for automatic revocation when there is a divorce. Banks are hesitant to accept power of attorney instruments, and this bill provides a process that they can rely on to determine if the power of attorney is valid. Currently, courts have no jurisdiction to deal with powers of attorney and no mechanism to compel a third party to accept a power of attorney and no oversight over the attorney in fact. Providing for a petition process for court oversight will help make an attorney in fact keep good records. The bill standardizes the affidavit procedure that is often used by banks already. The bill allows for oversight but still allows people to create powers of attorney without too much court intervention.

Testimony Against: None.

Testified: Karen Boxx, Washington State Bar Association; and Gary Gardner, Boeing Employees Credit Union.