

HOUSE BILL REPORT

ESSB 5635

As Reported by House Committee On:
Judiciary

Title: An act relating to the uniform power of attorney act.

Brief Description: Enacting the uniform power of attorney act.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Pedersen and O'Ban; by request of Uniform Law Commission).

Brief History:

Committee Activity:

Judiciary: 2/18/16, 2/26/16 [DPA].

**Brief Summary of Engrossed Substitute Bill
(As Amended by Committee)**

- Enacts the Uniform Power of Attorney Act, which governs creation, termination, scope of authority, fiduciary duties, and related matters regarding powers of attorney.
- Repeals current law provisions regarding powers of attorney.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 13 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Goodman, Haler, Hansen, Kirby, Klippert, Kuderer, Muri, Orwall and Stokesbary.

Staff: Omeara Harrington (786-7136).

Background:

Power of Attorney.

A power of attorney is a grant of authority by a person (the principal) to another person (the "attorney-in-fact") to act on his or her behalf. Powers of attorney may vary widely in terms

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of the scope of authority granted to the attorney-in-fact and the circumstances under which the authority may be exercised.

Creation and Durability.

A power of attorney is created by the principal's execution of a written document granting an attorney-in-fact the power to act on the principal's behalf. A power of attorney can be written to take effect immediately, or at some time in the future. Powers of attorney are presumed to terminate upon the incapacity of the principal, unless the power of attorney is made "durable" through words demonstrating the principal's intent that the authority continues even in the event of the principal's incapacity or disability.

Scope of Powers.

An attorney-in-fact has only the powers granted by the principal. Examples of what an attorney-in-fact may be authorized to do on a principal's behalf include: providing informed consent for health care decisions regarding the principal or the principal's minor children; making purchases or selling property; managing the principal's business; making banking transactions; and engaging in litigation.

Even if a power of attorney grants the attorney-in-fact all powers the principal has, the attorney-in-fact may not make, alter, or revoke the principal's will. Unless specifically designated by the principal, the attorney-in-fact may not take certain specified actions, including making changes to the principal's beneficiary designations, encumbering the principal's real property with a joint tenancy with right of survivorship designation or similar arrangement, altering community property agreements, or making gifts of the principal's property.

Reliance on Powers of Attorney by Third Parties.

A person acting without negligence and in good faith in reasonable reliance on a power of attorney is protected from liability related to the reliance. The relying party is presumed to have acted in good faith and without negligence if he or she is presented with an acknowledged affidavit affirming the validity of the power of attorney and confirms the identity of the attorney-in-fact.

Termination.

Power of attorney terminates at the time of the principal's death, or incapacity if the power of attorney is non-durable, and may also be revoked by the principal at any time. In some circumstances, a power of attorney may be terminated by court order.

Appointment of a guardian for the principal does not automatically terminate a power of attorney, but a guardian may revoke or terminate all or any part of the power of attorney. Power of attorney is revoked if the attorney-in-fact is the principal's spouse or registered domestic partner and a decree of dissolution or legal separation is entered.

The actions of an attorney-in-fact who acts in good faith and within his or her powers on a principal's behalf without actual knowledge that the principal has died, or, in the case of a non-durable power of attorney, as become incapacitated, are binding.

The Uniform Power of Attorney Act.

The National Conference of Commissioners on Uniform State Laws (Commissioners) develops and proposes laws in subject matters where it believes uniformity between states is desirable. In 2006 the Commissioners approved the Uniform Power of Attorney Act, which has been enacted in at least 18 states.

Summary of Amended Bill:

The Uniform Power of Attorney Act, as adapted for Washington, is enacted, and existing statutory provisions related to powers of attorney are repealed.

Creation and Durability.

Formal requirements are set forth for executing a power of attorney. A power of attorney must be signed and dated by the principal, and the signature must be acknowledged by a notary or attested by two competent witnesses who are not care providers or relatives of the principal. An "agent" (formerly referred to as an "attorney-in-fact") accepts appointment under the power of attorney by performing duties as an agent or otherwise indicating acceptance. A principal may designate co-agents in a power of attorney, who, unless otherwise designated, exercise authority jointly.

Consistent with current law provisions, the authority conferred under a power of attorney terminates upon the incapacity of the principal unless expressly made durable.

Scope of Powers.

Categorical grants of authority are established. The principal may grant authority for all described actions under any identified category by general reference to the category. Alternatively, the principal may grant the agent authority to do all acts that the principal could do, in which case the agent holds authority in all categories. Authorized actions are described for the categories of:

- real property and tangible personal property;
- stocks, bonds, and financial instruments;
- banking and other financial services;
- operation of a business or entity;
- insurance and annuities;
- estates, trusts, and other beneficial interests;
- claims and litigation;
- personal and family maintenance;
- benefits from governmental programs or civil or military services;
- retirement plans;
- taxes;
- gifts;
- health care matters; and
- matters related to care of the principal's minor children.

Certain actions may not be implied by a general grant of authority and require a specific grant of authority by the principal, including, but not limited to: creating or terminating a trust; making gifts; changing beneficiary designations; delegating authority; creating or

amending community property agreements; making health care decisions for the principal; or giving informed consent for health care on the principal's behalf.

Fiduciary Duties and Agent Liability.

Specific fiduciary duties of agents are identified. Regardless of contrary provisions in the power of attorney document, agents must act: in accordance with the principal's reasonable expectations to the extent known, and otherwise in the principal's best interest; in good faith; and within the scope of granted authority. Other fiduciary duties are presumed but may be waived by the principal. These duties include: acting with loyalty and avoiding conflicts of interest; acting with the care and diligence exercised by similarly situated agents; keeping accurate records; cooperating with health care decision makers; and attempting to preserve the principal's estate plan.

Agents are subject to liability for violating the statutory provisions regarding powers of attorney and for failing to notify the principal when the agent has knowledge of a breach or imminent breach of fiduciary duty by another agent. An agent who permissively delegates authority or engages another person on the principal's behalf is not liable for that person's actions as long as the person was carefully selected and monitored; however, the agent may be liable for certain discretionary acts.

Reliance on Powers of Attorney by Third Parties.

A person who, in good faith, accepts an acknowledged power of attorney, without actual knowledge that it is invalid, may rely upon the power of attorney. A person asked to accept a power of attorney may request and rely upon an agent's certification of the validity of the power of attorney or a provided English translation of a power of attorney document that is in another language.

A person must accept a power of attorney, or a request a certification or translation, within seven business days of the presentation of the power of attorney. The power of attorney must be accepted within five business days of receipt of requested certification or translation. If a person refuses a power of attorney in violation of the statutory requirements, a court may order acceptance and impose reasonable costs and attorneys' fees.

Termination.

An agent's authority under a power of attorney terminates if: the principal becomes incapacitated (unless the power of attorney is durable) or dies; the power of attorney terminates by its own terms; the principal revokes the authority; or the agent dies, becomes incapacitated, or resigns.

Appointment of a guardian of the principal's estate or other fiduciary charged with managing all of the principal's property terminates the power of attorney unless the court continues the agent's authority. If a court grants only a limited guardianship or partial management of property, the power of attorney is only terminated or modified to the extent ordered by the court.

A power of attorney held by a spouse or domestic partner terminates upon filing for dissolution, annulment, or separation (rather than upon decree of dissolution or legal

separation). The power of attorney is reinstated if the action is dismissed at the parties' consent or is withdrawn.

Termination of an agent's authority or of a power of attorney is not effective as to the agent or another person who, without knowledge of the termination, acts in good faith in accordance with the power of attorney. Actions taken under these circumstances bind the principal.

Amended Bill Compared to Engrossed Substitute Bill:

All provisions of the underlying bill are retained.

Technical corrections are made for internal consistency: (1) the requirements for a spouse-agent's certification of authority are modified to reflect the underlying presumption in the bill that powers of attorney are revoked upon a dissolution filing, rather than only upon final decree; and (2) amendatory sections are modified to reflect the default presumption in the bill that powers of attorney are non-durable.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Amended Bill: The bill takes effect on January 1, 2017.

Staff Summary of Public Testimony:

(In support) This bill has been on a very long journey. It was worked on for several years before adoption by the Uniform Law Commission, and the state bar worked on it for several more years. Issues raised in prior years have been worked out. A couple of changes in the bill are particularly important. The formalities about execution of a power of attorney are a dramatic improvement and will reduce the likelihood of abuse. The requirement of a notary or witnesses makes it less likely that someone would be unwittingly signing a power of attorney document. Also important is that now there is a critical mass of states with this legislation. This consistency facilitates commerce. For example, bankers will know what authorized powers are.

The current power of attorney statute was passed in 1974. The concept of a durable power of attorney came up in the 1960s as a way to deal with disability care in an economical way. Now all kinds of people use powers of attorney because they save time and money and allow people to avoid going to court for a guardian. Powers of attorney are extremely useful, but the reason they are cheap and easy is that they are relatively unregulated. This bill is longer than current law because it provides structure. These are powerful documents, and there have been problems with abuse and with third parties not knowing what to do with them. It is a tremendous advantage to have a uniform law in this respect, because powers of attorney travel with people, and this way the power of attorney can be recognized in other places. The bill gap fills and provides commerce benefits.

(Opposed) None.

Persons Testifying: Senator Pederson, prime sponsor; and Karen Boxx, Washington State Bar Association Elder Law Section.

Persons Signed In To Testify But Not Testifying: None.