

Significant Changes in Pennsylvania's General Power of Attorney — What You Need to Know

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The new year is no longer “new,” the tax season is no longer “taxing,” we can now enjoy spring and reflect on its beginnings. One significant beginning is Pennsylvania’s new power of attorney law that took effect January 1, 2015, when House Bill 1429 was unanimously passed by the state House and Senate and signed into law by Governor Corbett on July 2, 2014, as Act 95.

A power of attorney (POA) is a legal document that permits an individual (principal) to appoint someone to serve as an agent on their behalf with powers to make financial and property transactions. Act 95 made broad modifications to former POA law with the intention of greater transparency to all parties: the principal, their agent and third parties. However, Act 95 does not affect POAs that are limited to health care choices. Further, for POAs executed prior to January 1, 2015, Act 95 did not invalidate those documents.

What we believe you need to know about Act 95 is summarized in this article. However, to gain an in-depth knowledge of the law, please visit the Pennsylvania General Assembly website (<http://bit.ly/1Owm1i6>).

Notice to Principal

Prior law and Act 95 require a first-page notice in capital letters on all POAs. The prior law notice was intended for the principal to understand the agent’s immense powers when acting on their behalf. Act 95 enhanced that message by adding two statements to the notice.

The first statement advises the principal of the agent’s specific fiduciary duty to act in accordance with the principal’s reasonable expectations. The second statement informs the principal that an agent now has the ability to give all of the principal’s property away while living, or change beneficiary designations on behalf of the principal. In essence, the Act 95 notice gives explicit examples of the immense powers held by the agent.

***Advice Note:** Throughout this article we advise the principal and agent of a POA to seek separate legal representation prior to executing a POA. Such advice was not regularly given to agents under the prior POA law. However, under Act 95, with the agent’s increased duties and liabilities, it now is ethically imperative to recommend independent counsel for agents.*





who's who

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We invite you to contact the newsletter's editor, Pamela Hans, at phans@andersonkill.com or (267) 216-2720 with your questions and/or concerns.

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Execution Requirements

Under prior law, few execution formalities existed. Act 95 now requires the principal's signature witnessed by two adults (age 18 or older) and notarized by a notary (or an individual authorized by law to take acknowledgments). The notary cannot act as a witness. A witness cannot be the appointed agent or an individual who signed the POA on behalf and at the direction of the principal. A POA may be signed by another person on behalf of the principal only if the principal is unable to sign, and if the principal specifically directs the other individual to sign.

Act 95 also clarifies that for all uses (except when filing or recording with the Orphans' Court or Register of Deeds), a copy of a POA has the same effect as an original. This becomes critical should the principal become incapacitated and is unable to execute another POA.

Acknowledgment by Agent

The "Acknowledgment by Agent" under Act 95 is expanded substantially to emphasize the responsibilities and importance of the agent's duties to the principal. The prior law's acknowledgment was considered overly general by the Pennsylvania legislature, which led to Act 95.

Advice Note: It is advised that the agent — prior to executing the acknowledgment — seek separate counsel to ensure understanding of the agent's duties.

Agent's Duties: Required vs. Optional

Act 95 added two categories of duties applicable to the principal's agent:

Mandatory

The principal is precluded from modifying or waiving three duties of the agent (which are also found in the acknowledgment), the agent must act:

1. in accordance with the principal's reasonable expectations to the extent actually known and, otherwise, in the principal's best interests;
2. in good faith; and
3. only within the scope of authority granted in the POA.

Optional

The principal may modify numerous agents' duties such as acting with loyalty, keeping separate funds, avoiding conflicts, acting with care, keeping good records, cooperating with health care surrogates, and attempting to maintain the principal's estate plan. Several but not all of the optional duties are included in the acknowledgment. That said, if the principal waives any optional duties also found in the acknowledgment, comparable changes should be made in the acknowledgment.

Advice Note: Both the principal and the agent should carefully review all mandatory and optional duties with their respective counsel, especially if the implications of a duty are unclear.



Principal's Authority to Grant Powers Specifically vs. Generally

Act 95 provides eight powers that will not be inferred from the principal's general grant of authority within a POA. These powers are referred to as "hot powers" because historically, agents have been known to abuse these powers. A notable example is an agent making unlimited gifts after the principal's incapacitation. To curb such abuse, an agent under Act 95's POA will not have authority to undertake any tasks relating to hot powers unless the principal gives express authority in the document. The hot powers summarized are:

- Creating or changing livings trusts
- Making gifts
- Creating or changing rights of survivorship titling
- Altering beneficiary designations
- Delegating authority
- Changing annuity and retirement beneficiary designations
- Exercising the fiduciary powers of the principal
- Disclaiming property

***Advice Note:** It is advised that the principal discuss hot powers with counsel to determine whether any hot powers should be present in the POA. Further, if hot powers are included, the agent should consult with independent counsel to understand their implications, prior to executing the acknowledgment.*

Limitations of Agent's Liabilities

Act 95 provides limitations to an agent's liability. However, since Act 95 is new, an agent should consult with independent counsel to understand the agent's protections, in the event of a later challenge. For example, under Act 95 an agent who acts in good faith would not be liable to a beneficiary of the principal's estate plan for the agent's failure to preserve the plan. However, this protection has not been tested in the courts and may prove devastating to an unsuspecting agent who was just trying to do the right thing.

Third Party's Reliance on the Power of Attorney

Act 95 now provides broad protections for banks and other third parties who in good faith accept a POA. For example, a person who in good faith accepts a POA without actual knowledge that a signature or mark is not genuine may, without liability, rely on the genuineness of the signature or mark. Prior to Act 95, such protections were not guaranteed.

We hope it is clear from this "need to know" summary that significant changes to Pennsylvania's POA were made in Act 95. Should you have any questions about your existing power of attorney or estate plan in general, or if you are in need of a new power of attorney or would like to develop an estate plan, please do not hesitate to contact Anderson Kill at (267) 216-2700.

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