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Legislative Research Commission  
State Capitol  
700 Capital Avenue  
Frankfort, Kentucky 40601

Guardianship Guidance and Clarification – Amendments to [KRS 210.290](#); [KRS 387.510](#); [KRS 387.540](#); [KRS 387.570](#); [KRS 387.580](#); [KRS 387.590](#); [KRS 387.610](#); [KRS 387.660](#); [KRS 387.670](#); [KRS 387.680](#); [KRS 387.700](#); [KRS 387.710](#)

The objective of guardianship proceedings is to preserve individual dignity, respect, and independence of our aging and disabled Kentuckians who can no longer make certain decisions.<sup>6</sup> The importance of guardians is only continuing to grow given the rising number of disabled Kentuckians and the number of guardians neglecting their duties. Some examples of disabilities that might require guardianship intervention include a developmental disability, traumatic brain injury (TBI), or dementia. Not everyone with a disability is cognitively impaired and in need of a state guardian. Further, it was not the intent of the legislature that every disabled person has a guardian or conservator appointed.<sup>7</sup>

There are several types of guardianship, but the overall goal is to determine which civil rights the person can retain and which are necessary for a guardian to receive. Once guardianship is granted, a legal relationship exists between the guardian and the ward.<sup>8</sup> A "public" guardianship results when the courts appoint the Cabinet for Health and Family Services to serve as legal guardian instead of a private citizen (usually a family member) or professional organization.<sup>9</sup> The need for a public guardian is usually the result of: a lack of suitable family members or friends; a lack of resources to employ a private guardian; or a combination of the two.<sup>10</sup> The new amendments provide instruction

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<sup>6</sup> Department for Aging and Independent Living, Cabinet for Health and Family Services, *Kentucky State Guardianship*, [https://www.ardfky.org/sites/ardfky.org/files/Jessica%20Wayne%20-%20PPT%20\(KY%20State%20Guardianship\).pdf](https://www.ardfky.org/sites/ardfky.org/files/Jessica%20Wayne%20-%20PPT%20(KY%20State%20Guardianship).pdf), at 3 (last updated 2016).

<sup>7</sup> Legislative Research Commission note by chairman of the Guardianship subcommittee of the 1980-82 Interim Joint Committee on Judiciary Statutes, in a letter to the Deputy Director and Reviser of Statutes, dated 2-7-86.

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

primarily for the Cabinet for Health and Family Services, but also clarify certain aspects of private guardianship.

A path of less resistance could be executing a well-drafted power of attorney. Frequently, a power of attorney can avoid a guardianship proceeding by specifically granting an agent authority to take whatever steps necessary to allow the principal to continue on with everyday life. Powers of attorney and the recent legislative update regarding these documents will be discussed later in the article.

## I. THE BONES OF THE BILL

- A. Amend [KRS 210.290](#), relating to public guardianship, to specify when the Cabinet for Health and Family Services may be appointed as a resident's limited guardian, guardian, limited conservator, or conservator.

Prior language in KRS 210.290(2): Whenever a resident of the state is adjudged partially disabled or disabled and no other suitable person or entity is available and willing to act as limited guardian, guardian, limited conservator, or conservator, the cabinet, acting through its designated officer, may apply to the District Court of the county in which the adjudication is made for appointment as limited guardian, guardian, limited conservator, or conservator for such partially disabled or disabled person.

Amended language changes "may apply" to "may be appointed as the resident's limited guardian, guardian, limited conservator, or conservator."

- B. Amend [KRS 387.510](#) to provide that a guardian or limited guardian is to manage the personal affairs of a disabled person.

Prior language:

- "Guardian" means any individual, agency, or corporation appointed by the court to have full care, custody, and control of a disabled person and to manage his financial resources; and
- "Limited Guardian" means a guardian who possesses fewer than all of the legal powers and duties of a full guardian and whose powers and duties have been specifically enumerated by court order.

- C. Amend [KRS 387.540](#) to allow a physician's assistant to be part of an interdisciplinary evaluation team.

Prior to the amendment, the interdisciplinary team consisted of a physician, an advanced practice registered nurse, a psychologist, and a person licensed or certified as a social worker or an employee of the Cabinet for Health and Family Services who meets the qualifications of [KRS 335.080](#)(1)(a), (b), and (c) or [KRS 335.090](#)(1)(a), (b), and (c).

- D. Amend [KRS 387.570](#) and [387.580](#) to retain the right to a jury trial in a guardianship competency hearing if demanded by or on behalf of any party.

This amendment is more complicated in structure. The amendment removes "have a jury trial" from Section 387.570; however, this amendment does not remove all jury trial provisions. The new language continues to give the respondent the right to present evidence and to confront and cross-examine all witnesses. The limitation on the jury trial is structured as follows:

- (7) The hearing shall be a jury trial, unless:
- (a) The respondent if present, counsel for the respondent, and the attorney for the Commonwealth agree to a bench trial;
  - (b) No objection to a bench trial is made by an interested person or entity; and
  - (c) The interdisciplinary evaluation report prepared for the proceeding reflects a unanimous consensus of the persons preparing it that the respondent is disabled or partially disabled, the court has reviewed the report, and the court finds no cause to require a jury trial.

This issue of allowing for a guardianship without a jury trial has divided the elder law attorneys in Kentucky. On one hand, we routinely see instances where there is no need to put an individual through the (often times) humiliating trial process because nothing is contested. On the other hand, the result of a guardianship, if granted, is taking away basic rights afforded to us by the U.S. Constitution.

- E. Amend [KRS 387.590](#) to clarify that the same individual, agency, or corporation may be both a guardian and a conservator.
- F. Amend [KRS 387.610](#) to allow an advanced practice registered nurse or a physician assistant working within his or her scope of practice to verify a renewal petition for guardianship or conservatorship.
- G. Amend [KRS 387.660](#) to remove custody from a guardian's powers and duties.
- H. Amend [KRS 387.680](#) to clarify that a limited conservator or conservator may establish or place financial resources in a trust.

Prior statutory language clarified that the Cabinet may invest funds in bonds or other securities guaranteed by the United States, and may sell or exchange such securities in its discretion, but was silent as to trusts.

- I. Amend [KRS 387.670](#), [387.700](#), and [387.710](#) to conform.

For those curious about learning more about the Kentucky Guardianship, please visit [www.kyguardianship.org](http://www.kyguardianship.org) and download the KGA's Guardianship Manual.

## **II. WINGS**

This joint resolution recommended that the Cabinet for Health and Family Services and the Administrative Office of the Courts create a pilot Working Interdisciplinary Networks of Guardianship Stakeholders, or WINGS, to examine how Kentucky's adult guardianship is working and to identify needed changes. The statute states that WINGS is a "court-community partnership that drives changes affecting the ways courts and guardians practice."<sup>11</sup>

Although Kentucky is not the first state to suggest such a pilot, this initiative is revolutionary for Kentucky and has the potential to provide necessary improvement to the guardianship process and for the Kentuckians that rely on it. While several Kentuckians have been hard at work to improve the fragmented guardianship process, there is still a lot of work to do. The stakeholders will consist of family members who have been affected by guardianship, experienced elder law attorneys and other professionals who know the ins and outs of guardianship, how it is administered in differing counties, and where the major problems are.

The initiative is for two years, and proposed changes will be submitted January 1st of each year.

## **III. POWERS OF ATTORNEY: CHAPTER 457 ESTABLISHED**

### **A. Background**

Powers of attorney are vital tools that are designed to help individuals proactively plan for both short-term and long-term disability. These tools allow the individual (the "principal") to choose who they want to make decisions for them if they are unable, and decide the extent of power they want to voluntarily authorize if and when this disability arises. These documents are crucial to continued quality of life for our elderly and disabled Kentuckians. Because they are so vital, lawyers are frequently called upon to draft powers of attorney.

Somewhere along the way, however, Kentucky fell behind. Because our statutory law was so vague, often times general practice attorneys and online legal programs prepare one-page powers of attorney that do not meet Kentucky's specificity requirements or clients' needs. Similarly, Kentucky health care and financial businesses refused powers of attorney (even the well-drafted, highly specific ones) because there was no law limiting the liability those individuals accepting the power of attorney could sustain. The result was two-fold: 1) Your power of attorney is powerless, and; 2) You must go through the timely and stressful guardianship process.

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<sup>11</sup> 18 RS HJR 33, line 5.

In 2006, the Uniform Power of Attorney Act (the "UPOAA") was created to provide uniformity and enhance the usefulness of powers of attorney while protecting the principal, the agent, and those who deal with the agent.<sup>12</sup> The UPOAA has four articles: the first contains general provisions related to the substance and use of a power of attorney; the second provides default definitions for the various areas of authority that can be granted to an agent and expressly indicates which powers must have express language in order to be granted; the third article is a form designed for use by lawyers and lay people with a sample agent certification form; the fourth article has provisions relating to other law and powers of attorney enacted prior to the UPOAA.

This past session, Kentucky utilized the UPOAA's vision and tailored it to Kentucky's needs through this power of attorney statute. This chapter is aimed at providing guidance, balance, and instruction to the agent, the principal, the attorney drafting the document, and the institutions receiving these documents. The new law focused on tailoring the first and fourth articles.

#### B. Bones of the Bill

Does this statute affect all powers of attorney?

House Bill 11, or Kentucky's new Power of Attorney Act (the "Act"), does not apply to all kinds of powers of attorney. Section 3 specifically exempts the following powers (unless the power of attorney otherwise provides):

1. A power to the extent it 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;
2. A power to make health care decisions including but not limited to health care decisions outlined in [KRS 311.621](#) to [311.643](#);
3. Proxy or other delegation to exercise voting rights or management right with respect to an entity;
4. A power created on a form prescribed by a government or governmental subdivision, agency or instrumentality for a governmental purpose;
5. A power for reciprocal insurers;
6. A power given by a member of the United States Armed Forces, a person serving as a merchant seaman, or a person outside the

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<sup>12</sup> *Power of Attorney Summary*, The National Conference of Commissioners on Uniform State Laws, (<http://www.uniformlaws.org/ActSummary.aspx?title=Power%20of%20Attorney>), last updated 2018).

United States in connection with war activities as detailed in KRS Chapter 384; and

7. A power for the temporary delegation of parental rights.

This statute also does not affect powers of attorney that were drafted prior to the effective date.<sup>13</sup> Powers of attorney that were previously executed before the effective date of this Act are valid so long as its execution complied with the law of the state as it existed at the time of execution.<sup>14</sup>

C. Definitions and Procedures Clarified

Prior to HB 11, Kentucky law provided little to no guidance on specific definitions and procedures necessary to ensure a power of attorney's validity not just in the eyes of the law, but in the eyes of institutions accepting the power of attorney when incapacity occurs. Section 2 of HB 11 lists definitions for terms relevant to the statute, including, but not limited to: "Agent", "Incapacity", and "Sign."

Section 8 provides for a principal to nominate a conservator or guardian of the principal's estate. This nomination shall be treated as an indication of the principal's preference as to the person or entity to be appointed as his or her conservator or guardian and the court is instructed to give this preference due consideration.

Further, Section 10 clarifies that when a court appoints a limited conservator, limited guardian, or guardian, the power of attorney terminates unless the court specifically provides that the power of attorney shall remain in effect.

Simple clarifications, such as what constitutes a signature<sup>15</sup>, when an agent's authority terminates<sup>16</sup> and whether a copy has the same effect as an original<sup>17</sup> are now spelled out in statutory law.

Section 9 explains how to interpret when a power of attorney is effective, and once that is determined, what steps may further be required. This section also allows an authorized agent to access relevant health care information to determine whether the principal is incapacitated, unless the power of attorney otherwise provides.

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<sup>13</sup> The effective date is July 15, 2018.

<sup>14</sup> 18 RS, House Bill 11/SCS 1, Section 6.

<sup>15</sup> *Id.* at Section 5.

<sup>16</sup> *Id.* at Section 8 and Section 10.

<sup>17</sup> *Id.* at Section 6.

If there are co-agents, each co-agent may exercise its authority independently unless the power of attorney provides otherwise.<sup>18</sup> This issue was of particular concern when there were to co-agents, the power of attorney was silent as to independent exercise of authority, and an agent needed to sign a check, for example.

#### D. Changes to Signature and Witness Requirements

This section requires a power of attorney to be signed in the presence of two disinterested witnesses. This section also allows for individuals who are not physically able to sign, for example, a quadriplegic individual, to direct another individual to sign so long as the reason for this method being used is stated somewhere in the power of attorney.

Because powers of attorney are most often necessary when principals cannot act on their own behalf, concerns of fraud, abuse and neglect often surround these documents. It is not unusual for an agent (or someone claiming to be an agent) to drain accounts and make unauthorized purchases. For these reasons, two signatures of disinterested witnesses are now required for valid power of attorney documents in Kentucky. The liability of the financial institutions receiving the power of attorney is also statutorily limited.

#### E. Responsibilities and Duties of the Agent

In a 2013 *Bench and Bar* article, written by fellow elder law attorneys, the authors mentioned that Kentucky did not have a comprehensive power of attorney statute which addresses the issues of agent accountability and liability.<sup>19</sup> The authors went on to state they believed "that to curb financial abuse of the elderly, Kentucky agents should be statutorily classified as fiduciaries."<sup>20</sup> With the passage of House Bill 11, agents are now statutorily required to act in good faith, loyally for the principal's benefit, and with care, competence and diligence.<sup>21</sup>

Agents are also required to: keep a record of receipts, disbursements, and transactions made on behalf of the principal;<sup>22</sup> cooperate with the

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<sup>18</sup> *Id.* at Section 11(1).

<sup>19</sup> Carolyn L. Kenton, Amy E. Dougherty, Robert L. McClelland, Monica M. McFarlin, "Kentucky Powers of Attorney: A Necessary Planning Tool for End of Life," *Bench & Bar* (May 2013).

<sup>20</sup> *Id.*

<sup>21</sup> Note 2, *supra* at Section 14(1-2).

<sup>22</sup> *Id.* at Section 14 (2)(d).

health care agent;<sup>23</sup> and attempt to preserve the principal's estate plan according to relevant factors.<sup>24</sup>

While there are clear duties and responsibilities, with serious repercussions, enacted for agents, an agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.<sup>25</sup> However, if an agent is selected because of special skills or expertise, the special skills must be considered in determining whether the agent has acted with care, competence, and diligence.<sup>26</sup> If an agent does not possess a special skill that is necessary to carry out an agent's responsibility, they may delegate that task to another individual.<sup>27</sup> For example, if the agent is responsible for maintaining a residence and the residence needs electrical work, the agent may hire an electrician to preserve the residence and the agent is not liable for an error or default that the electrician may make so long as the agent exercised diligence in selecting and monitoring that person.<sup>28</sup> As long as an agent acts with care, competence, and diligence for the best interest of the principal, the agent is not liable solely because the agent also received a benefit from the act.<sup>29</sup>

The agent accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.<sup>30</sup> The agent's authority terminates when the principal revokes the authority; the agent dies, becomes incapacitated, or resigns; an action is filed for the dissolution of marriage to the principal unless the power of attorney otherwise provides; or the power of attorney terminates.<sup>31</sup> If an agent's authority has been revoked without the agent's actual knowledge of the termination and the agent acts in good faith under the power of attorney, the act binds the principal unless the act would be otherwise invalid or unenforceable.<sup>32</sup>

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<sup>23</sup> *Id.* at Section 14(2)e).

<sup>24</sup> *Id.* at Section 14(2)(f).

<sup>25</sup> *Id.* at Section 14(3).

<sup>26</sup> *Id.* at Section 14(5).

<sup>27</sup> *Id.* at Section 14(7).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at Section 14(4).

<sup>30</sup> *Id.* at Section 13.

<sup>31</sup> *Id.* at Section 10(2).

<sup>32</sup> *Id.*

Agents are now required to report a breach or imminent breach of fiduciary duty by another agent of the same principal if they have actual knowledge.<sup>33</sup> The agent shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal's best interest. An agent who fails to notify the principal or take action is liable for reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action.<sup>34</sup>

For agents abusing their power under a power of attorney, other individuals racing to guardianship court was often the only option for the abuse to stop. Though improvements are being made, Kentucky guardianship proceedings can be timely, costly, and fragmented. Effective July 15, 2018, this statute will allow certain people to petition the district court to construe a power of attorney or review the agents' conduct and grant appropriate relief.<sup>35</sup> This is beneficial both in monitoring an agent's conduct, and in affording third parties accepting these documents an option to have the document interpreted.

If agents violate their duties and responsibilities, they are liable to the principal or the principal's successors in interest for the amount required to restore the value of the misused asset to what it would have been and to reimburse the principal or the principal's successors in interest for the attorney's fees and cost paid on the agent's behalf.<sup>36</sup>

#### F. Third Party Acceptance

Businesses asked to accept Kentucky powers of attorney often hesitate or refuse to accept the document. This is due, in large part, to the lack of direction the law provides in the way of what is required. This is also due to the lack of protection the law affords institutions in the way of who is liable for an agent's fraudulent behavior. Frequently, a specific and well-executed power of attorney will be deemed "powerless" if it is not on the institution's one page form. The new law throws some "teeth" into Kentucky law to specify: who is required to accept a power of attorney, what are the options if third parties are not sure of its validity, and who is liable should an agent misbehave or misappropriate funds.<sup>37</sup>

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<sup>33</sup> *Id.* at Section 11(4).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at Section 16(1).

<sup>36</sup> *Id.* at Section 17 (1&2).

<sup>37</sup> *Id.* at Sections 19 – 20.

#### G. The Good Faith Requirement

The new general rule is if someone accepts a notarized power of attorney without actual knowledge that the power of attorney is invalid or that the agent is violating their duties, the individual accepting the power of attorney may rely on the power of attorney.<sup>38</sup> The statute states that if a person accepts an acknowledged power of attorney without actual knowledge that the signature is not genuine, that person may rely on the presumption that the signature is genuine.<sup>39</sup> Further, if a person who in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney or the individual's authority is void or that the agent is exceeding authority, that person may rely upon the power of attorney as if the power of attorney were genuine, valid, and still in effect.<sup>40</sup>

Protection is afforded to the person who accepts the power of attorney so long as the person accepts and relies on the power of attorney in good faith.<sup>41</sup> Further, a person that accepts a power of attorney pursuant to these sections shall not be responsible to determine or ensure the proper application of funds or property by the agent.<sup>42</sup>

#### H. Additional Assurances are Available

If a person is asked to accept a power of attorney, that person may request and rely upon an agent's certification under penalty of perjury of any factual matter concerning the principal, agent, or power of law; an English translation; and an opinion of counsel as to any matter of law concerning the power of attorney if the person making the request provides in a writing or other record the reason for the request.<sup>43</sup> If an English translation or an opinion of counsel is requested, this must be provided at the principal's expense unless the request is made more than seven business days after the power of attorney is presented for acceptance.<sup>44</sup>

If an acknowledged power of attorney is presented, it shall either be accepted or a certification, translation, or opinion of counsel will be

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<sup>38</sup> Section 19.

<sup>39</sup> *Id.* at Section 19(2).

<sup>40</sup> *Id.* at Section 19(3).

<sup>41</sup> *Id.* at Section 20(4).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at Section 19(4).

<sup>44</sup> *Id.* at Section 19(5).

requested.<sup>45</sup> This shall be requested no later than seven business days after the presentation of the power of attorney for acceptance.<sup>46</sup> If a certification, translation, or opinion of counsel is requested, the person shall accept the power of attorney no later than five business days after its receipt.<sup>47</sup> A person may not require additional or different forms of a power of attorney for authority granted in the power of attorney presented.<sup>48</sup>

A person is not always required to accept an acknowledged power of attorney. If the acceptance of the power of attorney is inconsistent with federal law, the person has actual knowledge of terminated agent authority, a request for a certification, translation or opinion is refused, or the person believes in good faith the power is not valid, the person may refuse the power of attorney.<sup>49</sup> Similarly, if the person makes or has actual knowledge that another person has made a report to the Cabinet for Health and Family Services stating a good faith belief that the principal may be subject to financial or physical abuse, neglect or exploitation, the person may refuse the power of attorney.

For the first time in Kentucky, there are statutory consequences to anyone who refuses a power of attorney in violation of Section 20. These consequences are a court order mandating the acceptance, and liability for reasonable attorney's fees and costs.

#### I. In Summary

This statute encourages acceptance of powers of attorney by third persons, safeguards those who are incapacitated, and provides much clearer guidelines for agents and drafting attorneys. This statute provides broad protection for good faith acceptance or refusal of acknowledged powers of attorney and consequences for unreasonable refusals.

Properly advising future principals and creating detailed powers of attorneys are still serious requirements under Kentucky law, however, this law aims to afford many balanced requirements and safeguards for the principal, the agent, and the institutions accepting the power of attorney. Whether you are an attorney who has been drafting detailed powers of attorneys for several years or you are just starting out, it is important that attorneys review these updates in detail in order to comply with the new requirements and advise clients on what their responsibilities are.

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<sup>45</sup> *Id.* at Section 20(1)(a).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at Section 20(1)(b).

<sup>48</sup> *Id.* at Section 20(1)(c).

<sup>49</sup> *Id.* at Section 20(2).

J. Consumer Freeze - What If I Am Worried about Financial Exploitation Today? – [KRS 367.364](#)

For individuals who are already experiencing financial abuse from a relative or criminal, recommend that they take advantage of the consumer freeze. A consumer freeze, also known as a security freeze, allows you to restrict access to your credit report, making it more difficult for identity thieves to open new accounts in your name. This does not affect one's credit score, prevent access to the free annual credit report, keep you from opening a new account, applying for a job, renting an apartment, or buying insurance. However, if you are considering opening an account, or taking actions where your credit score will be checked, you will need to temporarily lift the freeze. This can be done for a specific time period, or for a specific person/entity.

It is important to note that this does not prevent criminals from accessing pre-existing accounts, so those will still need to be monitored.

K. What If I Am the Agent under a Principal's Power of Attorney Who Is Worried about Financial Exploitation?

As of January 1, 2018, Kentucky law permits requests for a security freeze on a "protected person's" record or credit report. A protected person under this statute includes incapacitated individuals or individuals who have had a guardian or conservator appointed. The law also includes "teeth" with liability for willful noncompliance.<sup>50</sup>

The statute creates a system for an agent, guardian, or conservator to make the freeze request.<sup>51</sup> If the individual at risk of harm is able to do so, they may submit a written notarized statement signed by a representative that "expressly describes the authority of the representative to act on behalf of a protected person."<sup>52</sup>

For additional guidance on avoiding or mitigating financial exploitation, kindly continue to the following section, "Fiscal Exploitation of the Elderly: Who's Grabbing Granny's Gold? (and How Can We Stop Them?)." This material is excerpted from the upcoming UK/CLE *Elder Law in Kentucky Handbook* (June 2018).

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<sup>50</sup> KRS 367.364

<sup>51</sup> KRS 367.364(1)(d)

<sup>52</sup> *Id.*