



**P**owers of attorney (POA) are tools that can help individuals plan for both short-term and long-term disability. These tools allow the individual (the “principal”) to choose whom they want to make decisions for them if they are unable, and decide the extent of power they want to assign in the event of incapacitation. It is a frequent misunderstanding that powers of attorney allow the agent to now act as the individual’s attorney; this is not the case. A power of attorney does not substitute for a law school degree and bar license.

Kentucky law and powers of attorney have been vague. Because our statutory law was so vague, legal drafters had prepared one page powers of attorney that did not meet Kentucky requirements or the clients’ needs. Similarly, Kentucky health-care and financial institutions have 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 incur. The result has been two-fold: 1) The power of attorney is powerless, and; 2) An advocate needed to utilize the complicated process of establishing a guardianship.

In 2006, the Uniform Power of Attorney Act was created to provide a template for states to follow.<sup>1</sup> This past session, the General Assembly tailored the Uniform Act to Kentucky’s needs by enacting House Bill 11 (“HB 11”). This article will discuss the statute, and how the statute will provide guidance, balance, and instruction to the agent, the principal, the attorney drafting the document, and the institutions ask to recognize the documents.

## DOES THIS STATUTE AFFECT ALL POWERS OF ATTORNEY?

The new statute does not apply to all powers of attorney. Section 3 exempts the following powers unless the document 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;
- 3 exercise voting rights or management right with respect to a legal 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 living outside the United States in connection with war activities as detailed in KRS Chapter 384; and
- 7 a power for the temporary delegation of parental rights.

The statute also does not affect powers of attorney that were executed prior to its effective date, July 15, 2018. Powers of attorney that were executed before the effective date of the new statute are valid so long as its execution complied with the law of the state as it existed at the time of execution.<sup>2</sup>

## DEFINITIONS AND PROCEDURES CLARIFIED

Prior to HB 11's execution, Kentucky provided little guidance, specific definitions, or procedures necessary to ensure a power of attorney's validity. Section 2 of HB 11 defines such terms of art as: '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 for the person or entity to be appointed 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 order the power of attorney remain in effect.

Simple clarifications, such as what constitutes a signature<sup>3</sup>, when an agent's authority terminates<sup>4</sup>, and whether a copy is to be given

the same effect as an original<sup>5</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 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.

If there is more than one agent, each co-agent may exercise that co-agent's authority independently unless the power of attorney otherwise provides.<sup>6</sup>

## CHANGES TO EXECUTION REQUIREMENTS

Section 5 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 recited somewhere in the power of attorney.

Because powers of attorney are most often necessary when the principal cannot act on their own behalf, concerns of fraud, abuse and neglect often surround this topic. 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 powers of attorney, making the requirements more like the requirements in a valid will.

## AN AGENT APPOINTED IN A POWER OF ATTORNEY IS NOW A FIDUCIARY

In a 2013 edition of the *Bench & Bar* the authors mentioned that Kentucky did not have a comprehensive power of attorney statute which addressed the issues of agent and attorney-in-fact accountability and liability.<sup>7</sup> The authors wrote "that to curb financial abuse of the elderly, Kentucky agents should be statutorily classified as fiduciaries."<sup>8</sup> With the passage of HB 11, agents now owe a duty of good faith and loyalty for the principal's benefit and are required to act with care, competence and diligence.<sup>9</sup> Agents must keep a record of receipts, disbursements, and transactions made on behalf of the principal,<sup>10</sup> cooperate with the health-care agent(s),<sup>11</sup> and attempt to preserve the principal's estate plan according to relevant factors.<sup>12</sup>

A defense to an agent's actions called into question is that they acted in good faith. Where an agent acts in good faith, there will be no liability to any beneficiary of the principal's estate plan for failure to preserve the plan.<sup>13</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>14</sup> If an agent does not possess a special skill that is necessary to carry out the agent's responsibilities, they may delegate these tasks to another entity.<sup>15</sup> For example, if the agent is responsible for maintaining a residence and the residence needs electrical work, the agent may hire an electrician. The agent is not responsible for the electrician's mistakes so long as the agent exercised diligence in selecting and monitoring the electrician.<sup>16</sup>

As long as an agent acts with care, competence, and diligence for the best interest of the principal, the agent has is not liable solely because the agent also received a benefit from the act.<sup>17</sup>

The agent accepts appointment by performing duties as an agent or by any other assertion or conduct indicating acceptance.<sup>18</sup> The agent's duties are fastened when the agent exercises authority, the agent's performs the agent's duties, or any other conduct indicating acceptance.

The 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 by its terms.<sup>19</sup> If an agent's authority has been revoked without the agent's actual knowledge of the termination and the agent preforms an act, the act is binding on the principal unless it was not executed in good faith or would be otherwise invalid or unenforceable.<sup>20</sup>

The fact that agent authority dissolves when an action for dissolution of marriage is filed and not when it is ordered by the court, is a recognition by the law that spouses should be prevented from handling the others assets under the power of attorney veil amid marital disorder.

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>21</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 that 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>22</sup>

Under the old statute, if an agent abused the agent's authority under the power of attorney resorting to guardianship was often the only option to stop the abuse. Though improvements are being made, Kentucky guardianship proceedings can be timely, costly, and fragmented.<sup>23</sup> Upon its effective date, HB 11 allows for specific individuals to petition the district court to review the exercise of the agent's authority and grant specific relief.<sup>24</sup>

If an agent violates the agent's duties and responsibilities, the agent is liable to the principal or the principal's successors for restitution and for attorney's fees when legal action is necessary.<sup>25</sup>

### THIRD PARTY ACCEPTANCE

Third parties that had been asked to accept Kentucky powers of attorney often hesitated to honor the power of attorney due

to the vagueness in the law of what is required and the lack of protection afforded third parties with respect to who is liable for an agent's fraudulent conduct. Frequently, well-drafted powers of attorney had been rejected if not on the third-party's internal form. HB 11 specifies who is required to accept a power of attorney, what legal options are available for the third party if unsure of its validity, and who is liable should an agent misbehave or misappropriate funds. The new law regards the third party similar to a bona fide purchaser in the UCC; if the third party acts in good faith, they are not liable for the agent's acts if the power of attorney is found invalid. In other words, the good faith rule also applies to the third party who accepts the power of attorney. A person who accepts the POA is not responsible to determine or ensure the proper applications of funds or property by the agent.

### 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 the agent's duties, the individual accepting the power of attorney may rely upon the instrument. Further, if a person accepts an acknowledged power of attorney without actual knowledge that the signature is a forgery, the third party may rely on the presumption that the signature is genuine.<sup>26</sup> Further, if a third party who in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney or the agent's authority is void, invalid, or terminated, or that the agent has exceeded the agents authority, the third party may rely upon the power of attorney as if the power of attorney were genuine, valid, and still in effect.<sup>27</sup>

### ADDITIONAL ASSURANCES ARE AVAILABLE

If a third party accepting a power of attorney is unsure of its validity or has a good faith reason for suspecting abuse of power, additional assurances are available through House Bill 11.

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If a person is asked to accept a power of attorney, they may request: an agent's certification under penalty of perjury of any related factual matter; an English translation; and an opinion of counsel as to any matter of law concerning the power of attorney.<sup>28</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>29</sup>

If an apparently valid power of attorney is presented to a third party, the third party has four choices. The third party can accept it. If the power of attorney is in another language, the third party can request a translation. The third party can request an opinion of counsel. The third party can request a certification of the power in question.

The third party must advise the agent that the third party is pursuing these options within seven days of the presentation of the instrument.<sup>30</sup> If neither a certification, translation, nor opinion of counsel is requested, the person shall accept the power of attorney no later than five business days after presentation.<sup>31</sup> A third party may not require additional or different forms of a power of attorney for authority granted in the power of attorney presented.<sup>32</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>33</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. The statute authorizes a judge to order an acceptance of a power of attorney and to order payment of costs and attorney's fees when acceptance of a POA has been unlawfully withheld.

## CONCLUSION

This statute encourages acceptance of powers of attorney by third persons, safeguards the incapacitated, and provides much clearer guidelines for agents to follow. The statute provides broad protection for good faith acceptance or refusal of acknowledged powers of attorney and consequences for unreasonable refusals. The statute aims for a balance between requirements and safeguards amount principals, agents, and third parties presented with powers of attorney. **BB**

## ABOUT THE AUTHOR

Growing up in Lexington, **SARA JOHNSTON** has an affinity towards helping Kentucky businesses and residents – especially when in a time of financial or emotional distress. Johnston provides legal solutions for the long term success of her clients. Through prudent and future-looking estate planning and asset preservation, she helps families maintain, protect, and preserve the home and other assets so that individuals may preserve their legacy.



She also enjoys practicing in a different area of asset preservation involving consumer and corporate bankruptcies. Through a combination of financial restructuring, workouts, liquidation or utilizing exemptions and other preservation techniques, Johnston works through the bankruptcy process with her debtor and creditor clients from start to finish.

Johnston is the chair of the Kentucky Bar Association's Elder Law Section's Legislative Sub-Committee, a member of the American Bankruptcy Institute, ElderCounsel, National Academy of Elder Law Attorneys, and an accredited attorney by the Department of Veterans Affairs.

## ENDNOTES

1. *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).
2. 18 RS House Bill 11, Section 6.
3. *Id.* at Section 5.
4. *Id.* at Section 8 and Section 10.
5. *Id.* at Section 6.
6. *Id.* at Section 11(1).
7. 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).
8. *Id.*
9. Note 2, *supra* at Section 14(1-2).
10. *Id.* at Section 14 (2)(d).
11. *Id.* at Section 14(2)e).
12. *Id.* at Section 14(2)(f).
13. *Id.* at Section 14(3).
14. *Id.* at Section 14(5).
15. *Id.* at Section 14(7).
16. *Id.*
17. *Id.* at Section 14(4).
18. *Id.* at Section 13.
19. *Id.* at Section 10(2).
20. *Id.*
21. *Id.* at Section 11(4).
22. *Id.*
23. The General Assembly also made updates to the Guardianship statute, subject to further revision through House Bill 5.
24. *Id.* at Section 16(1).
25. *Id.* at Section 17 (1&2).
26. *Id.* at Section 19(2).
27. *Id.* at Section 19(3).
28. *Id.* at Section 19(4).
29. *Id.* at Section 19(5).
30. *Id.*
31. *Id.* at Section 20(1)(b).
32. *Id.* at Section 20(1)(c).
33. *Id.* at Section 20(2).