

What's new in the Power of Attorney Act?

Legislation adopted in 2018 by General Assembly strengthens agents, establishes clearer guidelines

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Powers of Attorney ("POAs") are vital tools that are designed to help individuals proactively plan for both short-term and long-term disability. These tools allow any of us (the "Principal") to choose who we want to make decisions for us if we are unable to do so and to decide the extent of the powers we want to voluntarily authorize if and when our disability arises. POA documents are crucial to continued quality of life, particularly for our elderly and disabled Kentuckians. Because they are so vital, we lawyers (and our paralegals) are frequently called upon to draft Powers of Attorney.

On July 14, 2018, our legislature adopted the Uniform Power of Attorney Act of 2006, joining a long list of states who have enacted this uniform act (the "Act"). The Act is now contained in KRS Chapter 457.

The Act was created to give a durable power of attorney in a modest-cost, flexible form that encourages acceptance by third persons while providing clearer guidelines for agents. The Act also offers protection for good faith acceptance as well as consequences for refusing to accept the power of attorney.

Before the passage of the Act, there were few statutes in Kentucky that pertained to powers of attorneys. Many of the Act's provisions do not change the current Kentucky laws, but there are some important changes for all of you to keep in mind.

TERMINOLOGY

The Act has replaced the "attorney-in-fact" terminology with the word "agent". The Act also sets forth the definition of "power to attorney" to mean a writing or other record that grants authority to an agent to act in the place of the principal (whether or not the term "power of attorney" is used.)

"Incapacity" replaces the term "disability". "Incapacity" means the inability of an individual to manage property or business affairs because the individual:

Has an impairment in the ability

to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or

Is Missing; Detained, including incarcerated in a penal system, or (iii) Outside the United States and unable to return.

"Principal" is defined as an individual who grants authority to an agent in a power of attorney.

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is terminated by the incapacity of the principal."

DURABILITY

KRS 386.093 required a power of attorney to state "(t)his power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time". Under the Act, this language is no longer necessary. Now, all powers of attorneys are durable unless one

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EXECUTION

There are new and significant execution requirements. The principal's signature must be signed in the presence of two disinterested witnesses. It is important to note that the term "disinterested" is not set out in the terminology

section and will need to be determined by the preparer. This section goes on to further state the principal's signature is presumed to be genuine if acknowledged before a notary.

VALIDITY

The Act provides that powers of attorney executed in Kentucky on or after July 14, 2018, are valid only if they comply with the Act. If the power of attorney was executed before July 14, 2018, it is valid if it complied with the Kentucky requirements at the time of the execution. The Act also provides that a photocopy or electronically transmitted copy of the original power of attorney has the same effect as the original.

ACCEPTANCE, RELIANCE AND LIABILITY

The Act defines the ramifications of accepting a power of attorney by stating a person in good faith and without actual knowledge may presume the principal's acknowledged signature is genuine. It further releases liability for a person in good faith and without actual knowledge if the power of attorney is void, invalid, terminated or if the scope of the agent's authority is exceeded.

The Act mandates acceptance of acknowledged powers of attorneys by financial institutions and further imposes penalties for refusing to accept the power of attorney. The penalties include a court order mandating acceptance and liability for attorney fees and costs incurred from the proceeding.

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