

## **COMMITTEE BILL ANALYSIS**

**Bill:** House Bill 1429

**Printer's No.:** 2006

**Sponsor:** Rep. M. K. Keller

**Prepared by:** Gregg Warner

**Synopsis:** This bill amends Chapter 56 of the Probate, Estates and Fiduciaries Code, Title 20 of the Pennsylvania Consolidated Statutes, relating to powers of attorney and specifically addressing the reliance of third parties on facially valid powers of attorney.

### **Summary:**

#### **Execution**

A power of attorney shall be dated and signed by the principal. For a power of attorney executed on or after the effective date of this legislation, the signature or mark of the principal must be acknowledged before a notary public and witnessed by two individuals.

The notice provision that accompanies a power of attorney is expanded to inform the principal that the agent must act in accordance with the principal's reasonable expectations to the extent those expectations are actually known by the agent and, otherwise, the agent must act in the principal's best interest, in good faith and only within the scope of authority granted in the power of attorney.

If the principal grants broad authority to an agent, the notice warns the principal that the broad grant of authority may allow the agent to give away the principal's property while the principal is alive or substantially change how the principal's property is distributed at death. The notice advises the principal to seek the advice of an attorney.

The acknowledgement executed by the agent specifies that the agent must act with the principal's reasonable expectations to the extent that the agent actually knows them and, otherwise, in the principal's best interest. The agent must act in good faith and only within the scope of authority granted to the agent by the principal in the power of attorney.

The requirements for witnesses, notice and the agent's acknowledgment do not apply to a power contained in an instrument used in a commercial transaction which authorizes an agency relationship. The subsection has been restructured.

Also, the requirements of a notary, notice and the agent's acknowledgment and the provisions relating to an agent's duties do not apply to a power of attorney which exclusively provides for making health care decisions or mental health care decisions.

### **Agent's duties**

A section is added providing for the agent's duties. Generally, an agent must act in accordance with the principal's reasonable expectations to the extent the agent actually knows them and, otherwise, in the principal's best interest. The agent must act in good faith and only within the scope of authority granted in the power of attorney.

In addition to the general duties, the amendment lists other duties of the agent that come into play unless otherwise provided in the power of attorney. They include acting loyally for the principal's benefit; keeping the agent's funds separate from the principal's funds; acting as so not to create a conflict of interest; acting with care, competence and diligence; keeping records; cooperating with a person who has authority to make health care decisions for the principal; and attempting to preserve the principal's estate plan.

### **Nonliability of an agent**

The bill also lists when an agent is not liable. For example, an agent that acts in good faith shall not be liable to a beneficiary of the principal's estate plan for failure to preserve the plan. Absence a breach of duty to the principal, an agent shall not be liable if the value of the principal's property declines.

### **Disclosure of receipts, disbursements or transactions**

Except as otherwise provided in the power of attorney, an agent shall not be required to disclose receipts, disbursements or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, conservator, another fiduciary acting for the principal, governmental agency or, upon the principal's death, the personal representative of the principal's estate. The agent has 30 days to comply with the request or to indicate that additional time, up to an additional 30 days, is needed.

### **Specific and general grant of authority**

A section is added limiting what an agent may do with the principal's property. In these situations the power of attorney must expressly grant the agent the authority and the exercise of the authority may not have been prohibited by another instrument. The situations include powers such as creating, amending, revoking or terminating an inter vivos trust; making a gift; creating or changing rights of survivorship; and creating or changing a beneficiary designation.

### **Limited gifts**

Section 5603 is amended to provide for the power to make limited gifts. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to gifts authorizes the agent to make gifts in limited situations.

### **Third party liability**

Sections 5601(f), 5608, 5608.1, 5608.2 and 5611 all apply to third party liability. A person who in good faith accepts a power of attorney without actual knowledge that it is invalid may, without liability, rely upon the power of attorney as if the power of attorney and agent's authority were genuine, valid and still in effect and the agent had not exceeded and had properly exercised the authority.

A person who is asked to accept a power of attorney may, without liability, request further information including an agent's certification, an English translation, or an opinion of counsel relating to whether the agent is acting within the scope of authority granted by the power of attorney.

Section 5608.1 provides for when a person may refuse to accept an acknowledged power of attorney. A person shall either accept a power of attorney or request an affidavit, certification, translation or an opinion of counsel not later than seven business days after presentation of the power of attorney for acceptance.

A power of attorney need not be accepted for certain reasons such as if the person is not otherwise required to engage in a transaction with the principal in the same circumstances; a request for a certification, a translation, an affidavit, or an opinion of counsel is refused; the person in good faith believes that the power of attorney is not valid or the agent does not have the authority to perform the act requested; or the person makes a report or has actual knowledge that another person has made a report under the Older Adults Protective Services Act stating a good faith belief that the principal is being exploited.

A person who refuses, in violation of this section, to accept a power of attorney shall be subject to civil liability for pecuniary harm to the economic interests of the principal proximately caused by the person's refusal to comply.

Section 5608.2 provides for actions taken by employees. A person who conducts activities through employees shall be considered to be without actual knowledge of a fact relating to a power of attorney, a principal or an agent, if the employee conducting the transaction involving the power of attorney is without knowledge of the fact.

#### **Effective date**

This act takes effect on the first July 1 or January 1 which occurs five months or more after the enactment of this act.

**Background:** The House of Representatives passed House Bill 1429 on June 19, 2013 by a vote of 198 to 0.

#### **Vine v. Commonwealth**

House Bill 1429 addresses the State Supreme Court decision in Vine v. Commonwealth, 9 A.3d 1150 (Pa. 2010). The case involves the statutory immunity afforded to third parties that act in good faith on the instructions of an agent pursuant to a facially valid power of attorney without actual knowledge that the power of attorney is void or voidable, has expired, or that the agent is exceeding the scope of his authority.

#### **Older Adults Protection**

House Bill 1429 should also provide greater comfort to principals, often elderly, who are in the position of naming an agent to handle their affairs. The revisions to the execution requirements should provide greater assurance that the principal intended to execute the power of attorney.

#### **Legislative history**

On March 12, 2013 the Senate Judiciary Committee reported from committee nearly identical legislation, Senate Bill 620. The Senate passed Senate Bill 620 on March 18, 2013 by a 48 to 0 vote. Senate Bill 620 is pending before the House Judiciary Committee.

House Bill 1429 and Senate Bill 620 are the result of discussions among the Pennsylvania Bankers Association, the Pennsylvania Bar Association, the Pennsylvania Association of Elder Law Attorneys, and the Joint State Government Commission staff.