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Fiduciary Responsibilities under Washington's Power of Attorney Act

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Effective January 1, 2017, Washington adopted a version of the Uniform Power of Attorney Act (UPOAA), codified as RCW 11.125, which repealed the prior power of attorney statute, RCW 11.94, in its entirety. As of 2019, 26 states have adopted some form of the UPOAA with legislation pending in three other states and the District of Columbia.

Washington's Power of Attorney Act ("the Act") differs in key areas from the prior power of attorney statute. Some of the ways in which the Act differs from the prior power of attorney statute include new formalities required to create a power of attorney, formal methods to determine incapacity, new duties and limitations on an agent's authority, new provisions pertaining to resignation by the agent, new provisions relating to the termination of the power of attorney and new provisions relating to the obligations of third parties to accept a power of attorney. The Act applies to all powers of attorney, including those executed prior to the effective date January 1, 2017. RCW 11.125.030.

**A. Formalities required for creation of valid POA**

Under the prior statute, a power of attorney needed only be in a writing signed by the principal. Under the new Act, a power of attorney must be in a writing that refers to itself or uses the term power of attorney. It must be signed and dated by principal and acknowledged before a notary public or other individual authorized by law to take acknowledgments, or attested by two or more competent witnesses. In order to be "competent", the witness cannot be home care providers for the principal, care providers at an adult family home or long-term care facility in which the principal resides. The witnesses also cannot be related to the principal or to the agent by blood, marriage, or state registered domestic partnership. The witnesses must be present when the power of attorney is signed by the principal. RCW 11.125.050(1). A notarized power of attorney is presumed to be valid. RCW 11.125.050(3).

Powers of attorney executed prior to effectiveness date of the Act or that would be effective in the state in which the POA was executed will remain valid. RCW 11.125.00.

**B. Effectiveness of Power of Attorney**

Under the new Act, a power of attorney becomes effective when executed unless it contains language that it becomes effective at a future date or on the occurrence of a future event or

contingency has occurred, such as incapacity. A power of attorney may authorize one or more persons to determine in a writing that the event or contingency has occurred. RCW 11.125.090. The Act also grants authority to the authorized person to obtain the principal's medical records and communicate with the principal's health care provider in order to make capacity determinations.

Under the new Act, the incapacity is defined as the inability of an individual to manage property, business, personal, or health care affairs because the individual: (a) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or (b) is: (i) an absentee, as defined in chapter 11.80 RCW; or (ii) outside the United States and unable to return.

If the power of attorney becomes effective upon incapacity and the principal has not authorized a person to determine whether the principal is incapacitated or the person authorized is unable or unwilling to make the determination, the new Act provides two methods to determine incapacity. First, a determination of incapacity can be made in writing by a physician or psychologist who personally examines the principal. Second, a determination of incapacity can be made by a judge or other government official. RCW 11.125.090 This is a change from the prior power of attorney statutes, which did not specifically provide when a contingent power of attorney became effective but only provided that "persons shall place reasonable reliance on any determination of disability or incompetence as provided in the instrument that specifies the time and the circumstances under which the power of attorney document becomes effective." RCW 11.94.010(2).

### **C. Durability of the Power of Attorney**

Under the UPOAA, there is a presumption that a power of attorney is durable. However, under Washington's version of the Act, a power of attorney is assumed to terminate when the principal is incapacitated, so it is not assumed to be durable unless specific language in the document expressly provides that it survives the incapacity of the principal. This is true whether the power of attorney was created before or after the effectiveness of the Act. As a result, a power of attorney executed in Washington prior to January 1, 2017 or executed in another state does not have durability language, it will terminate if the principal becomes incapacitated.

Because the Act defines incapacity to include both disability and physical absence, a power of attorney containing the requisite durability language may authorize the agent to act not only when the principal is incapacitated but also when the principal's whereabouts are not known, or it is not known whether the principal is still alive.

#### **D. Acceptance of a Power of Attorney**

A third party accepting an acknowledged (i.e. notarized) power of attorney in good faith may rely on the presumption that the power of attorney is valid and that the agent is acting within the scope of the agent's authority. RCW 11.125.190.

The Act also contains a safeguard protecting a third party from someone using an invalid power of attorney by asking the agent to certify the power of attorney's validity. The certification must state:

- (a) The person presenting himself or herself as the agent and signing the affidavit or declaration is the person so named in the power of attorney;
- (b) If the agent is named in the power of attorney as a successor agent, the circumstances or conditions stated in the power of attorney that would cause that person to become the acting agent have occurred;
- (c) To the best of the agent's knowledge, the principal is still alive;
- (d) To the best of the agent's knowledge, at the time the power of attorney was signed, the principal was competent to execute the document and was not under undue influence to sign the document;
- (e) All events necessary to making the power of attorney effective have occurred;
- (f) The agent does not have actual knowledge of the revocation, termination, limitation, or modification of the power of attorney or of the agent's authority;
- (g) The agent does not have actual knowledge of the existence of other circumstances that would limit, modify, revoke, or terminate the power of attorney or the agent's authority to take the proposed action;
- (h) If the agent was married to or in a state registered domestic partnership with the principal at the time of execution of the power of attorney, then at the time of signing the affidavit or declaration, the marriage or state registered domestic partnership of the principal and the agent has not been dissolved or declared invalid, and no action is pending for the dissolution of the marriage or domestic partnership or for legal separation; and
- (i) The agent is acting in good faith pursuant to the authority given under the power of attorney.

RCW 11.125.190(5). The Act contains an optional certification form that can be used by agent to comply with the RCW 11.125.190. RCW 11.125.430.

Third parties have seven days in which to either accept an acknowledged power of attorney or request a certification. If an agent provides a certificate of validity, the third party must accept it within five days or be subject to liability. RCW 11.125.200. The Act also expressly states that a third party may not require an additional or different form of a power of attorney. *Id.*

If the third party refused to accept an acknowledged power of attorney, the principal, agent, the principal's spouse or registered domestic partner, the guardian of the principal's person or estate or any other interested person can file a petition seeking a court order mandating acceptance of the power of attorney, or for an award of attorney fees. RCW 11.125.160; RCW 11.125.200. Any petition is subject to the notice requirements under TEDRA, RCW 11.96A, which requires that notice be personally served on or mailed to all parties at least twenty days before the hearing on the petition unless a different period is provided by statute or ordered by the court.

Of note, the Uniform Fiduciary Access to Digital Assets Act, Ch 11.120 RCW, requires a custodian of electronic communications sent or received by the principal to be disclosed to an agent, to the extent the power of attorney grants the authority over electronic communications, RCW 11.120.090. The agent must make a written request for disclosure in physical or electronic form with a copy of the power of attorney and a certification by the agent, under penalty of perjury, that the power of attorney is in effect. If requested by the custodian, the agent must also provide a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or evidence linking the account to the principal.

#### **E. Termination and Revocation of a Power of Attorney and Agent Resignation**

A power of attorney terminates (1) upon the principal's incapacity, unless the power of attorney is durable; (2) upon the principals' death; (3) if the principal revokes the power of attorney; (4) the power of attorney provides that it terminates; (5) the purpose of the power of attorney is accomplished; or (6) the principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney. RCW 11.125.100(1).

An agent's authority terminates when (1) the principal revokes the authority; (2) the agent dies, becomes incapacitated, or resigns; (3) the power of attorney terminates. A power of attorney granted to a spouse or a domestic partner terminates upon filing for a dissolution or legal separation from the spouse or domestic partner. RCW 11.125.100(2). However, under the new Act, if the dissolution or legal separation action is dismissed with the consent of both parties or withdrawn, the power of attorney is immediately reinstated. RCW 11.125.100(3).

Importantly, the execution of a new power of attorney does not automatically revoke or terminate an existing power of attorney. The new power of attorney must expressly revoke the prior power of attorney. RCW 11.125.100(7). This can create a problem where there are concurrent powers of attorney.

A power of attorney can specify the method for resignation by an agent. Otherwise, an agent can resign by giving notice to the principal or, if the principal is incapacitated, to the principal's guardian and to any co-agent or successor agent. RCW 11.125.180. If the principal is incapacitated and there is no guardian, co-agent or successor agent, notice can be given to any person reasonably believed by the agent to have sufficient interest in the principal's welfare; to a governmental agency having authority to protect the welfare of the principal; or by filing notice with the county recorder's office in the county where the principal resides.

## **F. Guardianship**

A principal may nominate a guardian of the person or estate in a power of attorney. If a guardianship is imposed, the court is required to appoint the most recently nominated guardian unless good cause is shown. RCW 11.125.080.

Currently, a power of attorney also terminates when the court appoints a guardian for the principal. If a limited guardianship is granted, the power of attorney may continue as valid to the extent permitted by the court. RCW 11.125.080.

However, RCW 11.125.080 has been amended effective January 1, 2021, which is also the effective date of the newly enacted Uniform Adult Guardianship Act, RCW 11.130. Under RCW 11.125.080, as amended, if the court appoints a guardian of the estate or other fiduciary charged with the management of all of the principal's property, the power of attorney remains in effect subject to the provisions of RCW 11.130.335(1).

RCW 11.130.335(1), which becomes effective January 1, 2021, provides that unless authorized by the court by specific order, a guardian for an adult does not have the power to revoke or amend a power of attorney for health care or power of attorney for finances executed by the adult. If a power of attorney for health care is in effect, unless there is a court order to the contrary, a health care decision of an agent takes precedence over that of the guardian and the guardian shall cooperate with the agent to the extent feasible. If a power of attorney for finances is in effect, unless there is a court order to the contrary, a decision by the agent which the agent is authorized to make under the power of attorney for finances takes precedence over that of the guardian and the guardian shall cooperate with the agent to the extent feasible.

In addition, RCW 11.130.330, effective January 1, 2021, also provides that, in exercising power to make health care decisions, a guardian for an adult is required to defer to a decision by

an agent under a power of attorney for health care executed by the adult and cooperate to the extent feasible with the agent making the decision. RCW 11.130.435, effective January 1, 2021, provides that a conservator (i.e. guardian of the estate), may not revoke or amend a power of attorney for finances executed by the individual subject to conservatorship. If a power of attorney for finances is in effect, a decision of the agent takes precedence over that of the conservator, unless the court orders otherwise. Further, RCW 11.130.505, effective January 1, 2021, provides that, if a power of attorney for finances is in effect, a conservator shall cooperate with the agent to the extent feasible.

#### **D. Authority and Liability of Co-Agents**

The new Act provides that co-agents must exercise their authority jointly, although it does allow the delegation of authority be one co-agent to the other. RCW 11.125.110(1). If a principal wishes for the co-agents to be able to act independently, the Act requires that the power of attorney expressly authorize that the agents do so. RCW 11.125.110(2).

The Act also provides that an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent. RCW 11.125.110(3). However, an agent who has actual knowledge of a breach or imminent breach of fiduciary duty by another agent is required to notify the principal. If the principal is incapacitated, the co-agent is required to “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 the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action. RCW 11.125.110(4).

#### **E. Authority of Agent under Health Care Power of Attorney**

A power of attorney must specifically give the agent authority to give informed consent for the principal for health care decisions. RCW 11.125.400. The principal may designate an agent to make health care decisions for the principal's minor children. RCW 11.125.410. The agent has access to all of the health care information that the principal would have under the Health Insurance Portability and Accountability Act (HIPAA) without the need for a separate HIPAA waiver in the power of attorney instrument. RCW 11.125.400.

#### **G. Agent's General Powers**

Under the Act, some powers are assumed to be granted under a general power of attorney unless specifically excluded. Other powers are not assumed, but must be specifically called out in the document in order for the agent to exercise them. A power of attorney can give an agent broad authority to do all acts that a principal could do as described in RCW 11.125.260 through RCW

11.125.410 by either using words to that effect, or by incorporating the list of powers by reference to those statutes. RCW 11.125.250(1)-(3).

RCW 11.125.260 provides that an agent has the authority to engage in litigation to obtain relief, entered into contracts, execute instruments, settle claims, seek government and court assistance for the principal, hire professional advisors, prepare documents to safeguard property under a statute or regulation, communication with the government on behalf of the principal, access all types of communications, including electronic communications, on behalf of the principal and do any lawful act with respect to the subject and all property related to the subject.

If an agent is given the general powers of a principal, the agent has the authority to:

- manage real property;
- manage personal property;
- manage stocks, bonds and financial instruments;
- take actions with respect to bank accounts;
- operate a business or entity;
- manage insurance and annuities;
- act with respect to claims and litigation without appointing a guardian or guardian ad litem;
- act with respect to personal and family maintenance, including performing acts necessary to maintain the customary standard of living of the principal, the principal's spouse, domestic partner and children, and other individuals whom the principal has customarily supported or indicated the intent to support. The authority with respect to personal and family maintenance is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to gifts;
- act with respect to estate, trust and other beneficial interests, including exercising a power of appointment, transfer property into a revocable trust created by the principal, subject to limitations, and participating in any "matter" as defined under TEDRA, RCW 11.96A.030;
- act with respect to any government program, including social security, medicare and medicaid; and
- prepare, file and sign tax returns and pay taxes;

A principal can also modify any general power incorporated by reference. RCW 11.125.250(4).

## **H. Agent's Specific Powers**

Under the Act, certain specific powers listed in RCW 11.125.240 have to be expressly granted in a power of attorney, including the authority to:

- (a) Create, amend, revoke, or terminate an inter vivos trust whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise. However, an agent may, even in the absence of a specific grant of authority, make transfers of property to any trust that benefits the principal alone and does not have dispositive provisions that are different from those that would have governed the property had it not been transferred into such trust.
- (b) Make a gift, subject to RCW 11.125.390;
- (c) Create or change rights of survivorship;
- (d) Create or change a beneficiary designation;
- (e) Delegate some but not all of the authority granted under the power of attorney, except as otherwise provided in RCW 11.125.110(1);
- (f) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;
- (g) Exercise fiduciary powers that the principal has authority to delegate;
- (h) Exercise any power of appointment in favor of anyone other than the principal;
- (i) Create, amend, or revoke a community property agreement;
- (j) Cause a trustee to make distributions of property held in trust under the same conditions that the principal could;
- (k) Make any other provisions for nonprobate transfer at death contained in nontestamentary instruments described in RCW 11.02.091;
- (l) Make health care decisions for the principal, or give informed consent to health care decisions on the principal's behalf.

However, an agent that is not an ancestor, spouse, state registered domestic partner, or descendant of the principal, may not create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property.



## **I. Gifting powers**

The Act also grants the agent authority, as a general power, to make gifts but the amount of gifts is restricted to the current gift tax exclusion amount. RCW 11.125.390(1)(a); RCW 11.125.390(2)(a). In order for an agent to gift more than the annual exclusion amount, gifting powers be specifically authorized and is subject to the provisions of RCW 11.125.390. RCW 11.125.240(5). However, an agent may, even in the absence of a specific grant of authority, make any transfer of resources not prohibited under chapter 74.09 RCW when the transfer is for the purpose of qualifying the principal for medical assistance or the limited casualty program for the medically needy.

An agent is also limited to making only those gifts that are consistent with the principal's objectives, if known, or if unknown, in the principal's best interest. In determining whether a gift is in the principal's best interest, the agent must consider "all relevant factors", including but not limited to:

- (a) The value and nature of the principal's property;
- (b) The principal's foreseeable obligations and need for maintenance;
- (c) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;
- (d) Eligibility for a benefit, a program, or assistance under a statute or rule; and
- (e) The principal's personal history of making or joining in making gifts.

RCW 11.125.390(3).

## **J. Fiduciary duties and liabilities of an agent.**

The new Act applies to Washington powers of attorneys created before and after January 1, 2017 as well as to powers of attorney in other states that are valid in Washington. Thus, the fiduciary duties and liabilities under the new Act may create new duties, obligations and liabilities for an agent despite the fact that a power of attorney was ineffective prior to the enactment of the new Act.

Under the Act, an agent has a duty to:

- (a) Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
- (b) Act in good faith; and

(c) Act only within the scope of authority granted in the power of attorney.

RCW 11.125.140(1).

Except as otherwise provided in the power of attorney, an agent also the duty of loyalty and the duty to avoid of the creation of a conflict of interest that would impair the agent's impartiality to act in the principal's best interest. RCW 11.125.140(2). Furthermore, an agent also has to act with "the care, competence and diligence ordinarily exercised by agents in similar circumstances." *Id.* This is important because an agent may not be a professional fiduciary but is still held to the same standard of care as a professional. However, if an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances. RCW 11.125.140(5).

Notably, agents are now required to keep accounting records of all receipts, disbursements, and transactions made on behalf of the principal. RCW 11.125.140(2)(d). In addition, the agent has a duty to cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest. RCW 11.125.140(2)(e).

Furthermore, an agent has a duty to attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

- (i) The value and nature of the principal's property;
- (ii) The principal's foreseeable obligations and need for maintenance;
- (iii) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and
- (iii) Eligibility for a benefit, a program, or assistance under a statute or rule.

RCW 11.125.140(2)(f).

No rights under Washington's death with dignity act, chapter 70.245 RCW, may be exercised through a power of attorney. RCW 11.125.420.

There may be a tension between the duties to act in the principal's best interest with regard to health care decisions, preserving an estate plan and making the principal eligible for government assistance. For example, a conflict may arise if an agent for health care believes that it is in the principal's best interest to pay for a costly long-term living facility but the agent for finances

believes that the principal would wish to preserve their estate for their surviving spouse and children by gifting. This may also interface with the gifting limitations when attempting to make transfers to a principal's spouse or family in order to qualify for benefit programs. Similarly, a non-professional agent may lack knowledge regarding public benefits programs available and/or how to create eligibility for those programs. This may give rise to a duty by the agent to consult with a professional such as an attorney regarding these issues. 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. RCW 11.125.140(3).

Unless the power of attorney requires it, an agent does not have a duty to disclose receipts, disbursements, or transactions conducted on behalf of the principal account. However, an agent must disclose this information if ordered by a court or requested in writing by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. In such a case, the disclosure is limited to information reasonably related to the duties of the guardian, conservator or fiduciary and the agent must produce the information within 30 days. RCW 11.125.140(9)

The principal may expressly shield the agent from liability for negligence except for acts committed with dishonesty, improper motive or with gross negligence or if the provision relieving the agent from liability was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal. RCW 11.125.150. In the absence of a breach of duty, an agent is not liable for the decrease in value of property. An agent is also not held liable for discretionary acts of a hired person if the agent exercises reasonable care in hiring them. RCW 11.125.140.

An agent who commits a breach is liable for the amount required to restore the value of the principal's property to what it would have been had the violation not occurred. RCW 11.125.170.

#### **K. Judicial review of agent's action**

Judicial review to construe a power of attorney and for review of an agent's actions and authority is broadly available by filing a petition with the court. RCW 11.125.160. In applying and construing the Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it. RCW 11.125.900.

Persons entitled to file a petition under RCW 11.125.160 are: (a) the principal or the agent; (b) the spouse or state registered domestic partner of the principal; (c) the guardian of the estate or person of the principal; (d) any other interested person, as long as the person demonstrates to the court's satisfaction that the person is interested in the welfare of the principal and has a good faith belief that the court's intervention is necessary, and that the principal is incapacitated at the time

of filing the petition or otherwise unable to protect his or her own interests; and (e) a person asked to accept the power of attorney.

The petitioner may request that the court construe the power of attorney or “grant any other appropriate relief”, including but not limited to:

- (a) Whether the power of attorney is in effect or has terminated;
- (b) Compelling the agent to submit the agent's accounts or report the agent's acts, if the agent has not timely complied with a request under RCW 11.125.140(9).
- (c) Ratification of past acts or approval of proposed acts of the agent;
- (d) Issuance of an order directing the agent to exercise or refrain from exercising authority in a particular manner or for a particular purpose;
- (e) Modification of the authority of an agent;
- (f) Removal of the agent upon a determination that both the agent has violated or is unfit to perform the fiduciary duties under the power of attorney; and the removal of the agent is in the best interest of the principal.
- (g) Approval of the resignation of the agent and approval of the final accountings of the resigning agent if submitted, subject to any orders the court determines are necessary to protect the principal's interests;
- (h) Confirmation of the authority of a successor agent to act under a power of attorney upon removal or resignation of the previous agent;
- (i) Compelling a third person to honor the authority of an agent, provided that a third person may not be compelled to honor the agent's authority if the principal could not compel the third person to act in the same circumstances;
- (j) Order the agent to furnish a bond in an amount the court determines to be appropriate.

Any petition is subject to the notice requirements of TEDRA, RCW 11.96A. In addition, attorney fees under RCW 11.96A.150 are available.