

Pennsylvania Association of Elder Law Attorneys

A State Chapter of the National Academy of Elder Law Attorneys

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March 11, 2010

Stephen F. Rehrer, Esquire

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Joint State Government Commission

108 Finance Building

Harrisburg, PA 17120

Submitted via email to srehrer@legis.state.pa.us

**Re: Advisory Committee on Decedents' Estates Laws
Draft Report on Powers of Attorneys**

Dear Mr. Rehrer:

The Pennsylvania Association of Elder Law Attorneys ("PAELA") appreciates the Joint State Government Commission's invitation to comment on the draft report (the "Draft Report") on Pennsylvania's power of attorney statute prepared by your Advisory Committee on Decedents' Estates Laws pursuant to House Resolution 484 of 2007.

PAELA is an association of elder law attorneys and its mission includes ensuring the development of laws designed to enhance the lives of older persons and those with special needs. PAELA's members routinely counsel clients on the preparation and use of powers of attorneys and have considerable experience working with Chapter 56 of the Probate, Estates and Fiduciaries Code, 20 Pa.C.S. Chapter 56. As such, PAELA stands available to Commission and the legislature to provide technical assistance on these issues.

PAELA requests that the Commission consider the following recommendations in preparing its final report pursuant to House Resolution 484 of 2007.

**Certified as an Elder Law Attorney by the National Elder Law Foundation*

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Although the Draft Report begins with an acknowledgment that the Uniform Power of Attorney Act (“UPAA”) is better organized and more thorough and specific than Pennsylvania’s current power of attorney statute, it rejects its wholesale adoption. Instead the Advisory Committee recommends the adoption of certain provisions that are contrary to both the underpinnings of the UPAA and the Advisory’s Committee’s stated goal of preserving what is best about powers of attorney in Pennsylvania: their privacy, expediency and efficiency. As discussed below, the Draft Report rejects these notions by suggesting that Pennsylvania adopt changes to its power of attorney statute that would limit the effectiveness of the power of attorney and place additional burdens on the court. Those key provisions deal with the authority of an agent to make gifts and changes to a principal’s estate plan as well as the adoption of a new provision granting the court power to authorize investigations of an agent’s actions.

The Agent’s Power to Make Gifts

Under the UPAA, unless specifically authorized, the agent has limited power to make gifts of the principal’s property. Pennsylvania’s current law is similar in this respect. Under current section 5601.2(c), a principal may authorize an agent to make gifts other than a “limited gift”¹ only by specifically providing for and defining the agent’s authority in the power of attorney. The Draft Report would change 5601.2(c) so that a principal could authorize an agent to make a gift other than a “limited gift” only if the power of attorney identifies the donee and the property to be gifted or the amounts of cash gifts. The comment to this section notes that such gifts can include “gifts of any or all of a principal’s assets to the principal’s spouse, so as to effectively use both spouse’s exemptions, exclusion, credits and the like for transfer tax purposes or to implement Medicaid planning.” Presumably, therefore, one could simply add a provision to the power of attorney stating that “my agent may make gifts of all of my property to my spouse” and satisfy the requirements of proposed 5601.2(c) so as to authorize the agent to make such gifts without court approval. To the extent proposed 5601.2(c) would allow such a provision, PAELA supports the change. However, such a construction does not seem evident from the requirement of the proposed change that the power of attorney identify “the property to be gifted or the amounts of cash gifts.” At a minimum, this should be clarified.

Regardless of the construction given to proposed 5601.2 (c), PAELA recommends the adoption of a provision that makes it “easier” to permit gifts to a spouse. Such authority is important under the current Medicaid law and is desired by the vast majority of married adults. Under the current Medicaid law, a community spouse is able to retain all or a portion of the couple’s assets when their mate enters a nursing home. These protections are designed to prevent the impoverishment of the community spouse. However, to take advantage of these basic protections, the protected assets must be transferred from the institutionalized spouse to the

¹ “Limited gifts” are those defined in 20 Pa. C.S §5603(a)(2).

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community spouse within 90 days after the institutionalized spouse qualifies for Medicaid.² Quite often, however, those transfers cannot be accomplished unless the agent acting under the institutionalized spouse's power of attorney has been given the authority to make "unlimited" gifts to the community spouse. The law should make it easier for lawyers to draft powers of attorneys for these couples and thus avoid the need for a guardianship proceeding. As such, PAELA suggests the following changes to Chapter 56:

§5601.2(b.1) Gifts to spouse -- A principal may authorize an agent to make a gift as defined under section 5603(a)(u.4) (relating to implementation of power of attorney) by the inclusion of:

(1) the language quoted in section 5602(a)(26) (relating to form of power of attorney); or

(2) other language showing a similar intent on the part of the principal to empower the agent to make gifts to a spouse.

§5602(a)(26) "To make gifts to a spouse"

§5603 (u.4) Power to make gifts to a spouse -- A power "to make gifts to a spouse" shall mean that the agent may make gifts for or on behalf of the principal to the principal's spouse (including the agent) of any or all of the principal's property, either outright, in trust or otherwise.

The definition under §5603 (u.4) could include a limitation that prevents a gift to a spouse unless a majority of the principal's children who are *sui juris* and who are not the children of the spouse have consented to the gift.

In sum, the addition of a provision dealing specifically with gifts to a spouse would avoid the ambiguity under proposed §5601.2(c) and would make it easier for lawyers to draft what most married clients want.

Changes to the Estate Plan

More problematic are the suggested changes under §5601.2(c.1) that would forbid a principal from granting an agent the power to make changes to a principal's estate plan. As proposed, §5601.2(c.1) would prohibit an agent from placing property into joint names with rights of survivorship or designating a beneficiary unless such action maintains and is consistent with the preservation of the principal's estate plan, including the effect of intestacy if the

² See, 55 Pa. Code §178.125(b)

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principal does not have a will. This limitation runs directly counter to a fundamental goal of the UPAA, which is to preserve a principal's freedom to choose both the extent of an agent's authority and the principles to govern the agent's conduct. It unnecessarily limits the usefulness of the power of attorney by restricting the agent's ability to deal with changing circumstances.

PAELA recognizes that power of attorney law must strike a balance between the need for flexibility and the need to prevent financial abuse. The proposed changes to §5601.2 strike an appropriate balance between these twin goals by allowing the principal the freedom to expand the agent's authority to make *inter vivos* gifts beyond those permitted under the statutory default rules. When it comes to proposed §5601.2(c.1), there is no balance as the principal cannot grant the agent the power to make changes which are inconsistent with the current estate plan.³ PAELA recommends the adoption of uniform rules for both *inter vivos* gifts and changes to the estate plan. It simply does not make sense to allow *inter vivos* gifts by an agent that are inconsistent with a current estate plan, yet prohibit that same agent from making changes to the estate plan that will be effective only after the principal's death. The illogical result of this lack of uniformity is shown by the following example. Assume a principal has a Will leaving his entire estate to his three children in equal shares. Under proposed §5601.2(c), a principal could authorize the agent to make a gift of his real property to his son to the exclusion of the other two children. However, under proposed §5601.2(c.1), the principal cannot authorize the agent to place that same real property into joint ownership with rights of survivorship with just one of the children as that would represent a change to the principal's estate plan.

The UPAA strikes the balance between the need for flexibility and the need to prevent financial abuse by adopting the same default standard for both *inter vivos* gifts and changes to the estate plan.⁴ In both cases, the agent's action must be consistent with the principal's best interest based on all relevant factors, including: the value and nature of the principal's property; the principal's foreseeable obligations and need for maintenance; minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and eligibility for a benefit, a program, or assistance under a statute or regulation.

In addition, unlike the UPAA, the Draft Report suggests that it will be straightforward for the agent to determine the principal's estate plan. The UPAA recognizes that it is not easy to make such a determination as the default rule requires adherence to the estate plan only to the extent actually known by the agent, and relieves the agent from liability to any beneficiary as long as the agent acts in good faith.⁵ To the contrary, the Pennsylvania proposal would create a

³ It seems odd that the section dealing with changes to the estate plan would be more restrictive than the section dealing with gifts. After all, changes to the estate plan have no effect on the principal, but only impact the principal's beneficiaries. On the other hand, *inter vivos* gifts have a direct impact on the principal.

⁴ See, UPAA section 114(b)(6) pertaining to changes to the estate plan and section 217(c) pertaining to gifts.

⁵ UPAA section 114(b)(6) and 114(c).

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non-modifiable obligation on all agents to preserve the principal's estate plan.⁶ This limits the usefulness of the power of attorney and relegates the agent to the same status as a guardian. While it might be an appropriate default rule, as recognized by the UPAA, a competent principal should be free to choose both the extent of an agent's authority and the principles to govern the agent's conduct.

Section 5612

The Advisory Committee rejected the adoption of Section 116 of the UPAA, which deals with those parties who have standing to petition a court to construe a power of attorney or review the agent's conduct. In part, UPAA §116 was rejected for fear it would spawn additional litigation. Instead, the Draft Report recommends new §5612 which has no counterpart in the UPAA. New §5612 would essentially create a new cause of action and will make it very easy for any third party to make an allegation of wrongdoing by the agent that would bring the matter before the court. While §5612 does not necessarily broaden standing, it would undoubtedly increase the court supervision of agents under powers of attorney as the proposal would authorize the court to act upon a mere communication alleging abuse. This section will certainly cause an increased use of court time and financial resources and will only serve to generate the additional litigation that the Advisory Committee sought to avoid by rejecting the adoption of UPAA §116. This will be especially true if proposed §5601(e.3) is also enacted.⁷

Pennsylvania currently has procedures in place which allow interested parties to bring agents before the court. Those actions include requests for accountings and actions under the Older Adults Protective Services Act. If any change is in order, it should be done by amending those provisions of the law and not by adopting nebulous standards applicable to any action an agent may take. The adoption of §§5612 and 5601(e.3) might destroy what the Advisory Committee termed as being best about powers of attorney: their privacy, expediency and efficiency.

Conclusion

We hope the Commission finds these comments helpful. We would be pleased to discuss them with the Commission and other interested parties and look forward to assisting with

⁶ Note that the Draft Report suggests that 5601(e) be amended to add a requirement that the agent preserve the estate plan of the principal, including the effect of intestacy if the principal does not have a will. While §5601(e) states that this obligation exists in the absence of a specific provision in the power of attorney to the contrary, proposed §5601.2(c.1) would not allow the principal to change the default rule.

⁷ Section 5601(e.3) would extend judicial authority to exercise principles of equity and justice to all actions of an agent under Chapter 56.

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any revisions to the report as well as any legislation that may follow. Please contact Robert Clofine, President-Elect of PAELA, at the address below if you have any questions or desire clarification of any portion of this letter.

Sincerely,

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