

Loretta's Law Changes the Way
Powers of Attorney are Drafted in Maryland
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William M. Gatesman
Michael G. Day & Associates
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The article published in the January Maryland Bar Bulletin was substantially shortened to meet Bar Bulletin publishing requirements. This full version of William Gatesman's article is more comprehensive than the published article.

William M. Gatesman is a lawyer with Michael G. Day & Associates in Hagerstown, Maryland. Mr. Gatesman serves on the council of the MSBA Elder Law Section. You can reach Mr. Gatesman at 301-739-6820, or bill@mikedaylaw.com.

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The new Maryland General and Limited Power of Attorney Act, dubbed Loretta's Law, was partially the result of one family member abusing the power entrusted to her by her elderly aunt.

Loretta was Loretta Soustek, who, in 2001, gave her niece power of attorney over her finances. For five years that niece acted in disregard for her aunt's best interests and was eventually convicted of felony theft. This situation only came to light when Loretta's two great nieces were appointed as guardians for Loretta. When these great nieces discovered the abuses, they

Loretta's Law Changes the Way
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February 3, 2011
Page 2

concluded that a system that could allow such abuses to continue for that many years was flawed. They set about to bring change to the system and Loretta's Law is the fruit of those labors. The powers (of attorney) that be: What you need to know now, by Harvey S. Jacobs, Special to The Washington Post, October 2, 2010 (washingtonpost.com); See also, Making it harder to steal from family, Scott Daugherty, The Capital, hometownannapolis.com, February 21, 2008. Loretta's law is codified as Title 17 of the Maryland Code, Estates and Trusts article.

Effective October 1, 2010, any power of attorney executed in the State of Maryland, with certain exceptions, must be executed in a statutorily prescribed manner in order to be effective. Such power of attorney must be in writing, signed by the principal (or by another for the principal in the principal's presence and at the principal's express direction), acknowledged by the principal before a Notary Public, and attested to and signed by at least two adult witnesses.

While most lawyers drafted powers of Attorney before October 1 with a Notary jurat, notarization was not required. Nevertheless, it was prudent to have the instrument notarized so that the power of attorney could be recorded in the land records. Now, however, notarization is required. Moreover, contrary to what may have been the practice of many lawyers, the new law requires that the power of attorney be attested to and signed by two adult witnesses.

Commentators have observed that this witness requirement is similar to the requirements imposed by statute for the execution of a Will in the State of Maryland. While the new statute does not speak to whether an agent under the power of attorney may serve as one of the witnesses, prudence dictates that the witnesses be someone other than the agent.

Springing Power of Attorney

The new statute authorizes both immediate and springing powers of attorney. A springing power of attorney is one in which the agent's authority springs into effectiveness upon the happening of a certain event. Lawyers

have been drafting springing powers of attorney even before the new law went into effect. However, prior to October 1, 2010, if one utilized a springing power of attorney, then it was necessary to set forth the mechanism by which the agent's authority became effective. A typical formulation is when two physicians certify in writing that the principal is unable to manage his financial affairs.

Under the new law, if a power of attorney is not effective until the principal is disabled and the document does not specify who shall make such determination, then the statute attempts to provide the mechanism for establishing the principal's disability. Incorporating by reference the grounds for the appointment of a guardian for a disabled person under Maryland Code, Estates and Trusts, section 13-201, the law sets forth the criteria as to what constitutes a disability that would trigger the agent's authority. In addition to such determination being made by a physician or licensed psychologist, the law empowers an attorney, a judge, or an "appropriate governmental official" to make such determination. The statute is silent,

however, as to which governmental officials would be “appropriate.” Also, a principal who is missing, incarcerated, or outside the U.S. and unable to return is considered to be incapacitated under the statute.

Statutory Form Power of Attorney

The Statute sets forth two statutory forms, the Maryland Statutory Form Personal Financial Power of Attorney and the Maryland Statutory Form Limited Power of Attorney. Section 17-104 of the new Statute bears a heading that includes the phrase “Statutory form mandatory”. Nevertheless, one is not required to use one of the statutory forms in order to have an effective power of attorney in Maryland.

There are two reasons to use the statutory form. First, the statute provides that such form shall be sufficient for its stated purposes and that no third party may require an additional or different form of power of attorney for such purposes. This seems to directly address the practice of banks which have required that a customer use the bank's own specialized power of attorney form and which have otherwise refused to accept a general power of

attorney prepared by a lawyer.

Secondly, the new statute provides that a third party who refuses to accept an acknowledged statutory form power of attorney, or a power of attorney which is "in substantially the same form" as the statutory document, is subject to a court order mandating acceptance and liability for attorney's fees. This liability for attorney's fees is a new statutory remedy that did not exist prior to October 1, 2010, the effective date of Loretta's Law.

Given that one is not required by law to use the statutory forms, it would seem that such attorney fee remedy is the primary reason to employ the statutory form or a power of attorney which is "substantially in the same form" as the statutory document.

While the rule setting forth the attorney fee sanction may seem clear on its face, there is much debate among practitioners as to what exactly constitutes a statutory form power of attorney, or rather, to what extent the statutory form may be modified and still be "in substantially the same form."

Reasons to Modify the Statutory Form

One lawyer who was instrumental in the creation of the bill which became Loretta's Law has stated that the Maryland Statutory Form Personal Financial Power of Attorney was not designed to be a general power of attorney form. Instead, he described that document as embodying only those powers that the typical AARP individual may encounter in dealing with her day to day affairs. Indeed, the second form in the Statute, the Maryland Statutory Form Limited Power of Attorney, actually is more comprehensive than the first. This limited power of attorney consists of a series of individual powers with a space for the principal to place his initials to indicate such powers are applicable. Notwithstanding that the so-called limited power of attorney appears to be more comprehensive, most practitioners who are attempting to create a general power of attorney that is in substantially the same form as one of the statutory forms are using the Maryland Statutory Form Personal Financial Power of Attorney as the basis for such general power of attorney.

Intending to use the Maryland Statutory Form Personal Financial Power of Attorney as the basis for a general power of attorney, commentators have criticized such form for various reasons, including the following:

- the form lacks business powers
- the banking powers seem to be incomplete
- there is no gift giving power
- the retirement plan powers do not cover certain transactions such as Roth IRA conversions

The solution to the problem of missing powers that are nevertheless essential for the agency relationship is to provide those missing powers to the agent. There are various approaches that lawyers are taking to add powers while maintaining a power of attorney that is substantially in the same form as one of the statutory forms. Remember, if one's power of attorney is in substantially the same form, then the attorney fees remedy would be available if a third party refuses to honor the power of attorney.

Among these approaches is to simply add all of the lawyer's desired powers in the Special Provisions section of the statutory form. However, some fear that if the added sections exceed the number of lines that are set forth in the statutory form, eight lines, then the power of attorney will not be considered to be substantially in the same form.

Other lawyers are attempting to resolve the problem by employing a two power of attorney solution. They would do so by providing a client with both a straight statutory form power of attorney with no additional provisions and a second general power of attorney that has all of the lawyer's desired provisions. There are a number of problems with this approach. For example, how should the lawyer instruct the client as to which power of attorney form to utilize in any particular situation? If the client were to present two powers of attorney to a third party, would that third party be justified in refusing to accept both, claiming that the third party could not tell if the second document limited the powers set forth in the statutory form document? Or, if the client first presented one of the documents, which was turned away as not

applicable, and then showed up the next day with the other document, would the third party rightfully be suspicious and refuse to take any action notwithstanding that one of the documents is a statutory form? The law attempts to address this latter concern by providing that the “acts specified in the statutory forms may not be deemed to invalidate or limit the validity of other authorized acts that a principal may delegate to an agent.”

Another way to address the concern that the statutory form power of attorney is not sufficiently comprehensive is to create a power of attorney which by its terms opts out of the statute. The new law specifically provides for this. However, there is an issue as to whether one may have a durable power of attorney in Maryland if the form opts out of the statute.

Durable Power of Attorney

A power of attorney is “durable” if the powers of the agent survive the disability of the principal. The new law, like Estates and Trusts Section 13-601 which it has repealed, provides that there is an assumption of durability for powers of attorney executed after the effective date of the statute.

However, unlike 13-601, one may opt out of Title 17, and there are certain powers of attorney to which Title 17 explicitly does not apply. This gives rise to the issue of whether a power of attorney may be durable if the provisions of Title 17 are not applicable given that the statutory provisions governing durability now reside in Title 17 and, with the repeal of 13-601, nowhere else in the Maryland Code.

Whether or not such power of attorney would be durable depends on whether the instrument contains language of durability, i.e. "the agent's authority is exercisable notwithstanding the disability or incapacity of the principal" (or words of similar import), and whether such language must be supported by a statutory provision in order to be effective, or whether such words will impart durability under common law.

One thing that is clear is that if one uses a power of attorney which opts out of Title 17 and does not contain language of durability, then such power of attorney will not be durable. Moreover, a power of attorney coupled with an interest, as is the case with other instruments to which Title 17 does not

apply, cannot be a durable power of attorney if it does not have language of durability. In other words, there is no longer a presumption of durability in Maryland with respect to powers of attorney which have opted out of the new Statute or powers of attorney to which the statute does not apply. Several interest groups in the Maryland bar are discussing a possible technical corrections bill to address this issue.

Title 17, does not apply to certain types of powers of attorney, including the following:

- a power of attorney coupled with an interest
- an Advance Directive
- a governmentally prescribed power of attorney form
- a power of attorney created as part of or in connection with an agreement establishing an attorney client relationship
- a power of attorney that states that it is not subject to Title 17

Draftsman who prepare powers of attorney are well advised to review Title 17 to see which other types of powers are not governed by the statute.

Under the statute, “power of attorney” is defined as “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.” Hence, there are many instances in which a grant of authority is made which the draftsman may not consider to be a power of attorney in the traditional sense but nevertheless is subject to the strictures of Title 17.

For example, many real estate settlement documents are drafted to include a limited power of attorney for the settlement agent to correct scrivener's errors in the settlement documents. This writer recently reviewed one such document which purported to grant a limited power, but on which form no provision was made for any witnesses nor for a notary public. Under current law, such grant of authority will be unenforceable.

Termination

A power of attorney is terminated by the death of the principal, the principal's incapacity if the instrument is not durable, the revocation of the power of attorney by the principal, the happening of a termination event set

forth in the instrument, the accomplishment of the purpose of the power of attorney, or the death, incapacity, or resignation of the agent if no successor agent is named. If there is no provision to the contrary in the power of attorney and the principal and agent are married, then the agent's authority terminates upon the filing of an action for dissolution or annulment of the marriage, or the legal separation of the parties.

Notwithstanding that the principal has died or become disabled or incompetent, the agent's authority is not terminated if the agent does not have actual knowledge of the such event. Moreover, in the absence of fraud, an affidavit by the attorney-in-fact that he acted without such actual knowledge is conclusive proof that the agent's authority had not been terminated.

Under the Statute, a photocopy of a power of attorney constitutes an original, however, a clerk of the court may refuse to record a photocopy. Also, the Statute allows for authority of the agent under a power of attorney to be delegated to other agents. A properly executed power of attorney executed in Maryland is valid, according to the statute. Moreover, an out of state power

of attorney is valid in Maryland if executed pursuant to the other state's requirements.

Duties of the Agent

_____The new Statute sets forth mandatory duties and duties which may be waived by the terms of the power of attorney. Under the statute, an agent under a power of attorney has these mandatory duties. First, the agent must act in accord with the principal's reasonable expectations, if known, otherwise in the principal's best interest. Second, the agent must act with care, competence, and diligence. Third, the agent must act within the scope of the authority granted by the power of attorney.

The following duties are imposed unless expressly waived by the power of attorney. First, the agent must act loyally for the principal's benefit. One may wonder in what instances a principal would waive such a duty. One commentator has suggested that it would be appropriate to waive such duty if the principal's spouse were the agent to enable the spouse to take action for her own benefit. For example, there are legitimate estate planning objectives

for retitling assets from one spouse to the other, which action arguably may be considered not to fit squarely within the confines of the duty to act loyally for the principal's benefit. Yet, the principal may desire to give his spouse the authority to take such action under the power of attorney.

A second duty which may be waived is the duty to keep a record of receipts, disbursements, and transactions. Some draftsman waive this record-keeping requirement altogether or waive the requirement so long as a family member is serving as an agent, while others provide for such record keeping only when the principal is incapacitated.

Another duty is that the agent must preserve the principal's estate plan taking into account the value of the principal's property, the principal's needs, the ability to minimize taxes, and the principal's eligibility for benefit programs. Because very few plan ahead for possible nursing home care, the draftsman may consider waiving this duty (not to mention adding a gift giving power to the document) in the event a future illness calls for a Medicaid plan that includes making gifts to family members, however, the statutory duty

appears to take this into account by its mention of the principal's eligibility for benefit programs as one of the factors.

Other duties that may be waived are a duty to cooperate with the principal's health care agent, and a duty to act so as not to create a conflict of interest that would impair the agent from pursuing the principal's best interest. A draftsman might consider waiving this latter duty for the same reasons as those discussed above.

Title 17 also addresses an agent's liability. An agent is not liable merely because the agent benefitted from an action as long as the agent complied with the mandatory duties set forth in the law. Moreover, an agent is not liable for failure to preserve a principal's estate plan as long as the agent complies with the duties set forth in Section 17-103 of the statute. Also, an agent does not have liability for a decline in value of the principal's estate absent the breach of the agent's "duty to the principal," this latter provision being less specific in its conditions than the first two outlined above.

The statute allows an agent to delegate the agent's authority to another, and the agent is not liable for the delegee's action if the delegee is chosen with reasonable care and diligence. However, this provision does not reduce any duty imposed on an agent by existing law other than Title 17.

Under the Statute, if an agent is selected because of special skills, then a higher standard will apply to that agent. In light of that requirement, if the drafting attorney is chosen to serve as the agent under the power of attorney, not because he is a lawyer, but because there is no one else the client trusts, that draftsman might consider documenting the reason for the choice lest she unnecessarily impose a higher standard on the agency relationship than otherwise would exist under the Statute.

Among other things, the new Statute generally does not require the agent to disclose financial records except if ordered by a court, or requested to do so by the principal, conservator, or other fiduciary, or government agency charged with protecting the principal. The Statute also lists the persons who have standing to request a court to construe a power of attorney, which

include persons who would qualify as a presumptive heir of the principal or those named as a beneficiary under the principal's estate plan.

Finally, the Statute addresses reimbursement for expenses and compensation of the agent. If the power of attorney provides for compensation and does not state the basis for such compensation, then compensation will be "based on what is reasonable under the circumstances". This compensation rule for an agent under a power of attorney sets forth a broader standard than the rules governing compensation of Trustees.

Questions Regarding Implementation

Included among the forms in the statute is a new Agent Certification as to the Validity of the Power of Attorney and Agent's Authority form. One question that arises is whether banks will require that this form be submitted together with a power of attorney as a matter of course. Already, one bank has required that the agent submit the Certification in the case where the principal had executed the power of attorney only a few days before it was presented. In another instance, a credit union has announced that it will begin

charging a seventy-five dollar power of attorney review fee in all instances.

One commentator asks whether the imposition of such fee would be deemed to be a refusal to accept a statutory form which would be cause to assert the attorney fee remedy, although doing so would be penny wise and pound foolish given that the fee to file a lawsuit is more than seventy-five dollars.

The biggest question is whether the statutory form powers of attorney will become the de facto standard power of attorney in Maryland in much the same way that the statutory advance directive has become just that. If so, will financial institutions soon begin to accept nothing else, and if that is the case, how closely will such institutions interpret the substantially in the same form requirement?

Currently there is no Maryland case law interpreting Title 17, however, a number of provisions from the Uniform Power of Attorney Act were utilized in Maryland's new statutory construct. Practitioners seeking judicial interpretation of these new provisions may look for case law in other jurisdictions interpreting those uniform provisions that are replicated in

Loretta's Law Changes the Way
Powers of Attorney are Drafted in Maryland
William M. Gatesman
February 3, 2011
Page 21

Maryland's law.

As a result of the intervention of Loretta Soustek's great nieces and the legislators who took action in response to their plight, we now have Loretta's Law which sets forth new requirements with respect to powers of attorney in the State of Maryland.