

DEC 22 2010

MEMO



Senate of Pennsylvania

December 21, 2010

TO: ALL SENATORS
FROM: Stewart J. Greenleaf *Stewart*
SUBJECT: Cosponsorship -- Powers of Attorney and other Probate Code amendments

As chairman of the Joint State Government Commission's Task Force on Decedents' Estates Laws, I am reintroducing **Senate Bill 1358** revising Pennsylvania's statute governing powers of attorney. The legislation reflects the recommendations of the Advisory Committee on Decedents' Estates Laws, a group of attorneys and judges from across Pennsylvania who for the past several decades have assisted the General Assembly by recommending improvements to the Probate, Estates and Fiduciaries Code, Title 20 of the Pennsylvania Consolidated Statutes, and related statutes.

2007-2008 House Resolution 484 directed the Joint State Government Commission to have its Advisory Committee on Decedents' Estates Laws study the Uniform Power of Attorney Act (UPAA) and Pennsylvania's current power of attorney statute to determine whether to recommend amendments. The Subcommittee on Guardianships and Powers of Attorney provided the initial review of the UPAA and Pennsylvania's current statute. Following numerous teleconference meetings during 2009 and early 2010, the subcommittee submitted a draft report containing its findings and recommendations to the full advisory committee. At its February 4, 2010 meeting, the advisory committee discussed the draft report and reached a consensus on the proposed amendments contained in this legislation.

While the advisory committee did not recommend the wholesale adoption of the UPAA, it did recommend amendments to 20 Pa.C.S. Chapter 56 to address specific concerns or problems which have been encountered by practitioners and others. The legislation includes the following changes to the law:

- (1) Section 5601 is amended to provide that two witnesses are required when any power of attorney is executed, thereby changing current law, which provides that two witnesses are only required when the power of attorney is executed by mark or by another individual. The amendment makes the execution of a power of attorney under Chapter 56 consistent with the execution of a health care power of attorney under Chapter 54.
- (2) Section 5601.2 is amended to specify that, similar to the gift provisions, a principal may authorize an agent to make changes to the principal's estate plan only in specific circumstances. An agent may act without court approval if the agent's action is otherwise authorized by the power of attorney and is consistent with the preservation of the principal's estate plan. An agent may make gifts or change the principal's estate plan only if the power of attorney expressly grants the agent that authority and the court approves the agent's action.
- (3) Section 5602 provides a list of powers that the principal may include in a power of attorney. They include the power to authorize admission into a medical, nursing, residential or similar facility, and to make anatomical gifts. These powers are deleted and inserted into the health care power of attorney statute (Chapter 54). Powers of attorney currently containing these powers will not be affected.

(4) Section 5603 is amended to clarify that an agent can make a gift of the principal's assets up to twice the amount of the annual exclusion allowed by the Internal Revenue Code if the principal's spouse indicates a willingness to "split" gifts in an amount per donee and adds a provision that limited gifts to a "family unit" can be equalized even if this means exceeding the available annual exclusion. Each child of the principal and his or her descendants would be treated as a family unit.

(5) Section 5603 also is amended to further define the power of an agent to operate a business or entity and the power of an agent to provide for the principal's personal and family maintenance. The law clarifies that "business" encompasses all modern business and entity forms. The provision relating to maintenance of the principal and family is based on common law and practice.

(6) Section 5604 is amended to require the court to determine whether an incapacitated person's durable power of attorney remains in effect and include that determination in its guardianship order.

(7) Section 5612 is added to authorize the court to order an investigation, appoint a guardian ad litem, make a referral to an appropriate agency or take any other appropriate action regarding allegations of financial abuse or mismanagement against a principal by his or her agent under a power of attorney.

(8) Section 5613 is added to provide that the venue of any matter pertaining to the exercise of a power of attorney by an agent acting under a power of attorney is in the county where the principal is domiciled, a resident or residing in a long-term care facility.

(9) Sections 5422, 5456 and 5460, relating to health care powers of attorney, are amended. Health care agents may make decisions regarding the admission of the principal into a medical, nursing, residential or similar facility. After death, the health care agent may make decisions regarding anatomical gifts, disposing of the remains or consenting to autopsies.

In March 2010 the Joint State Government Commission issued a report entitled, "Powers of Attorney: Proposed Amendments to the Probate, Estates and Fiduciaries Code." The report contains an analysis of the UPAA, including a comparison with current law, and statutory recommendations.

In June 2010 the Joint State Government Commission issued another report entitled, "The Probate, Estates and Fiduciaries Code: Proposed Amendments to Title 20 of the Pennsylvania Consolidated Statutes." The Advisory Committee on Decedents' Estates Laws periodically recommends updates to the Probate, Estates and Fiduciaries Code based on court cases and changes in Federal law. The June report reflects the advisory committee's most recent set of recommendations. The proposed changes codify the Charitable Instruments Act of 1971 as new 20 Pa.C.S. Chapter 79; make additional changes to the Uniform Trust Act; add Chapter 76 regarding powers of appointment; clarify provisions relating to when and how an estate may form a business entity; and establish a new statutory framework regarding the release of powers and interests and the disclaimer of powers.

The Joint State Government Commission reports contain the advisory committee's official comments explaining each amendment. The comments may be used in determining legislative intent.

If you would like to cosponsor this legislation, please contact Pat Snively of my office by e-mailing her at psnively@pasen.gov.