

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 1905 Session of 2011

INTRODUCED BY M. K. KELLER, MARSICO, CALTAGIRONE, AUMENT, BENNINGHOFF, BOYD, BRENNAN, BUXTON, CARROLL, CLYMER, EVERETT, GEIST, GODSHALL, GRELL, HANNA, HARKINS, HARRIS, HELM, KAMPF, KAUFFMAN, KRIEGER, LAWRENCE, LONGIETTI, MANN, METCALFE, MILLARD, MILLER, MOUL, MURT, MUSTIO, OBERLANDER, O'NEILL, PICKETT, PRESTON, PYLE, QUINN, READSHAW, SAYLOR, SCHRODER, SONNEY, STERN, STURLA, TALLMAN, TOEPEL, TOOHL, TURZAI, WATSON, BARBIN, P. COSTA, MAHER, CAUSER, MARSHALL, HICKERNELL, EVANKOVICH, REED, STEVENSON, VULAKOVICH, FARRY, HESS, CULVER, BLOOM, HORNAMAN AND GILLESPIE, OCTOBER 19, 2011

AS AMENDED ON SECOND CONSIDERATION, HOUSE OF REPRESENTATIVES,
DECEMBER 6, 2011

AN ACT

1 Amending Title 20 (Decedents, Estates and Fiduciaries) of the
2 Pennsylvania Consolidated Statutes, further providing for
3 general provisions, for special rules for gifts and for
4 liability; providing for liability for refusal to accept
5 acknowledged power of attorney; and further providing for
6 validity.

7 The General Assembly of the Commonwealth of Pennsylvania
8 hereby enacts as follows:

9 Section 1. Section 5601(e) and (f) of Title 20 of the
10 Pennsylvania Consolidated Statutes are amended to read:

11 § 5601. General provisions.

12 * * *

13 (e) Fiduciary relationship.--An agent acting under a power
14 of attorney has a fiduciary relationship with the principal. The
15 following shall apply:

1 (1) In the absence of a specific provision to the
2 contrary in the power of attorney, the fiduciary relationship
3 includes the duty to:

4 [(1)] (i) Exercise the powers for the benefit of the
5 principal.

6 [(2)] (ii) Keep separate the assets of the principal
7 from those of an agent.

8 [(3)] (iii) Exercise reasonable caution and
9 prudence.

10 [(4)] (iv) Keep a full and accurate record of all
11 actions, receipts and disbursements on behalf of the
12 principal.

13 (v) Attempt to preserve the principal's estate plan,
14 to the extent actually known by the agent, if preserving
15 the plan is consistent with the principal's best interest
16 based on all relevant factors, including all of the
17 following:

18 (A) The value and nature of the principal's
19 property.

20 (B) The principal's foreseeable obligations and
21 need for maintenance.

22 (C) Minimization of taxes, including income,
23 estate, inheritance, generation-skipping transfer and
24 gift taxes.

25 (D) Eligibility for a benefit, a program or
26 assistance under a statute or regulation.

27 (2) An agent that acts in good faith shall not be liable
28 to any beneficiary of the principal's estate plan for failure
29 to preserve the plan.

30 (3) An agent that acts with care, competence and

1 diligence for the best interest of the principal shall not be
2 liable solely because the agent also benefits from the act or
3 has an individual or conflicting interest in relation to the
4 property or affairs of the principal.

5 (4) If an agent is selected by the principal because of
6 special skills or expertise possessed by the agent or in
7 reliance on the agent's representation that the agent has
8 special skills or expertise, the special skills or expertise
9 must be considered in determining whether the agent has acted
10 with care, competence and diligence under the circumstances.

11 (5) Absent a breach of duty to the principal, an agent
12 shall not be liable if the value of the principal's property
13 declines.

14 (6) An agent that exercises authority to delegate to
15 another person the authority granted by the principal or that
16 engages another person on behalf of the principal shall not
17 be liable for an act, error of judgment or default of that
18 person if the agent exercises care, competence and diligence
19 in selecting and monitoring the person.

20 * * *

21 (f) [Definition.--As used in this chapter, the term "agent"
22 means a person designated by a principal in a power of attorney
23 to act on behalf of that principal.] Definitions.--The following
24 words and phrases when used in this section shall have the
25 meanings given to them in this subsection unless the context
26 clearly indicates otherwise:

27 "Agent." A person designated by a principal in a power of
28 attorney to act on behalf of that principal.

29 "Good faith." Honesty in fact.

30 Section 1.1. Section 5601.2(a) and (d)(1) of Title 20 are

1 amended and the section is amended by adding a subsection to
2 read:

3 § 5601.2. Special rules for gifts.

4 (a) General rule.--A principal may empower an agent to make
5 a gift in a power of attorney only as provided in this section.
6 Unless the power of attorney otherwise provides, language in a
7 power of attorney granting general authority with respect to
8 gifts shall authorize the agent only to make limited gifts as
9 provided under section 5603(a)(2) (relating to implementation of
10 power of attorney).

11 * * *

12 (c.1) Agent's discretion regarding gifts.--Unless the power
13 of attorney otherwise provides, an agent may make a gift of the
14 principal's property only as the agent determines is consistent
15 with the principal's objectives if actually known by the agent
16 and, if unknown, as the agent determines is consistent with the
17 principal's best interest based on all relevant factors,
18 including:

19 (1) The value and nature of the principal's property.

20 (2) The principal's foreseeable obligations and need for
21 maintenance.

22 (3) Minimization of taxes, including income, estate,
23 inheritance, generation-skipping transfer and gift taxes.

24 (4) Eligibility for a benefit, program or assistance
25 under a statute or regulation.

26 (5) The principal's personal history of making or
27 joining in making gifts.

28 (d) Nature of gifts.--In the absence of a specific provision
29 to the contrary in the power of attorney:

30 (1) A power to make a limited gift shall be construed to

1 empower the agent to make a gift to each donee either
2 outright or in trust or to a tuition savings account or
3 prepaid tuition plan as defined in section 529 of the
4 Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. §
5 529).

6 * * *

7 Section 1.2. Section 5608 of Title 20 is amended to read:

8 § 5608. [Liability.] Acceptance of and reliance upon power of
9 attorney.

10 [(a) Third party liability.--Any person who is given
11 instructions by an agent in accordance with the terms of a power
12 of attorney shall comply with the instructions. Any person who
13 without reasonable cause fails to comply with those instructions
14 shall be subject to civil liability for any damages resulting
15 from noncompliance. Reasonable cause under this subsection shall
16 include, but not be limited to, a good faith report having been
17 made by the third party to the local protective services agency
18 regarding abuse, neglect, exploitation or abandonment pursuant
19 to section 302 of the act of November 6, 1987 (P.L.381, No.79),
20 known as the Older Adults Protective Services Act.

21 (b) Third party immunity.--Any person who acts in good faith
22 reliance on a power of attorney shall incur no liability as a
23 result of acting in accordance with the instructions of the
24 agent.]

25 (c) Genuineness.--A person that in good faith accepts
26 instructions pursuant to an acknowledged power of attorney
27 without actual knowledge that a signature or mark of any of the
28 following are not genuine may, without liability, rely upon the
29 genuineness of the signature or mark:

30 (1) The principal.

1 (2) A person directed by the principal on his or her
2 behalf in the principal's conscious presence to sign the
3 power of attorney.

4 (3) A witness.

5 (d) Immunity.--A person that in good faith accepts a power
6 of attorney without actual knowledge of any of the following
7 may, without liability, rely upon the power of attorney as if
8 the power of attorney were genuine, valid and still in effect,
9 the agent's authority were genuine, valid and still in effect
10 and the agent had not exceeded and had properly exercised the
11 authority:

12 (1) That the power of attorney is void, invalid or
13 terminated.

14 (2) That the purported agent's authority is void,
15 invalid or terminated.

16 (3) That the agent is exceeding or improperly exercising
17 the agent's authority.

18 (e) Request for information.--A person that is asked to
19 accept a power of attorney may request and, without liability,
20 rely upon, without further investigation:

21 (1) An agent's certification under penalty of perjury of
22 any factual matter concerning the principal, agent or power
23 of attorney or an affidavit under section 5606 (relating to
24 proof of continuance of powers of attorney by affidavit).

25 (2) An English translation of the power of attorney if
26 the power of attorney contains, in whole or in part, language
27 other than English.

28 (3) An opinion of counsel as to any matter of law
29 concerning the power of attorney if the person making the
30 request provides in a writing or other record the reason for

1 the request.

2 (f) Additional request for information.--A person that has
3 accepted a power of attorney, whether with or without a
4 certification or opinion of counsel under subsection (e) or an
5 affidavit under section 5606, and has acted upon it by allowing
6 the agent to exercise authority granted under the power of
7 attorney, shall not be precluded from requesting at later times
8 a certification or opinion of counsel under this subsection,
9 subsection (e) or an affidavit under section 5606 with regard to
10 any further exercise of authority by the agent under the power
11 of attorney.

12 (g) English translation.--An English translation or an
13 opinion of counsel requested under this section must be provided
14 at the principal's expense unless the request is made more than
15 seven business days after the power of attorney is presented for
16 acceptance.

17 (h) Activities through employees.--For purposes of this
18 section, a person that conducts activities through employees
19 shall be considered to be without actual knowledge of a fact
20 relating to a power of attorney, a principal or an agent if the
21 employee conducting the transaction involving the power of
22 attorney is without actual knowledge of the fact.

23 (i) Definition.--As used in this section, the term
24 "acknowledged power of attorney" means a power of attorney
25 containing signatures or marks purportedly verified before a
26 notary public or other individual authorized to take
27 acknowledgments.

28 Section 2. Title 20 is amended by adding a section to read:

29 § 5608.1. Liability for refusal to accept acknowledged power of
30 attorney.

1 (a) Acceptance required.--Except as provided under
2 subsections (b) and (d):

3 (1) A person shall either accept an acknowledged power
4 of attorney or request a certification, a translation or an
5 opinion of counsel under section 5608(e) (relating to
6 acceptance of and reliance upon power of attorney) or an
7 affidavit under section 5606 (relating to proof of
8 continuance of powers of attorney by affidavit) no later than
9 seven business days after presentation of the power of
10 attorney for acceptance.

11 (2) If a person requests a certification, a translation,
12 an opinion of counsel under section 5608(e) or an affidavit
13 under section 5606, the person shall accept the power of
14 attorney no later than five business days after receipt of
15 the certification, translation, opinion of counsel or
16 affidavit, unless the information provided by the
17 certification, translation, opinion or counsel or affidavit
18 provides a substantial basis for making a further request
19 under section 5606 or 5608(e).

20 (3) A EXCEPT AS PROVIDED UNDER SUBSECTION (D) (2), A
21 person may not require an additional or different form of
22 power of attorney for authority granted in the power of
23 attorney presented.

24 (b) Acceptance not required.--A person may not be required
25 to accept an acknowledged power of attorney if any of the
26 following applies:

27 (1) The person is not otherwise required to engage in a
28 transaction with the principal in the same circumstances.

29 (2) Engaging in a transaction with the agent or the
30 principal in the same circumstances would be inconsistent



1 with any provisions of this chapter, including:

2 (i) the failure of a power of attorney to be
3 executed in the manner required under section 5601(b)
4 (relating to general provisions); and

5 (ii) circumstances in which an agent has no
6 authority to act because of the absence of an
7 acknowledgment as provided under section 5601(d), except
8 as provided under section 5601(e.1) or (e.2).

9 (3) Engaging in a transaction with the agent in the same
10 circumstances would be inconsistent with any other law or
11 regulation.

12 (4) The person has actual knowledge of the termination
13 of the agent's authority or of the power of attorney before
14 exercise of the power.

15 (5) A request for a certification, a translation, an
16 opinion of counsel under section 5608(e) or an affidavit
17 under section 5606 is refused, including a certification, an
18 opinion of counsel or an affidavit requested to demonstrate
19 that the exercise of authority pursuant to a power of
20 attorney is proper without the notice provided for under
21 section 5601(c), except as provided under section 5601(e.1)
22 or (e.2).

23 (6) The person in good faith believes that the power of
24 attorney is not valid or that the agent does not have the
25 authority to perform the act requested, whether or not a
26 certification, a translation, an opinion of counsel under
27 section 5608(e) or an affidavit under section 5606 has been
28 requested or provided.

29 (7) The person makes a report to the local protective
30 services agency under section 302 of the act of November 6,

1 1987 (P.L.381, No.79), known as the Older Adults Protective
2 Services Act, stating a good faith belief that a principal
3 may be subject to physical or financial abuse, neglect,
4 exploitation or abandonment by the agent or someone acting
5 for or with the agent.

6 (8) The person has actual knowledge that another person
7 has made a report to the local protective services agency
8 regarding abuse, neglect, exploitation or abandonment under
9 section 302 of the Older Adults Protective Services Act.

10 (c) Violation.--A person that refuses, in violation of this
11 section, to accept an acknowledged power of attorney may be
12 subject to all of the following:

13 (1) A court order mandating acceptance of the power of
14 attorney.

15 (2) Liability for reasonable attorney fees and costs
16 incurred in any action or proceeding that confirms the
17 validity of the power of attorney or mandates acceptance of
18 the power of attorney.

19 (d) Applicability.--The requirements of this section shall
20 not apply to a power of attorney subject to the laws of another ←
21 state or jurisdiction. ANY OF THE FOLLOWING: ←

22 (1) A POWER OF ATTORNEY SUBJECT TO THE LAWS OF ANOTHER
23 STATE OR JURISDICTION.

24 (2) A POWER OF ATTORNEY PRESCRIBED BY A GOVERNMENT OR
25 GOVERNMENTAL SUBDIVISION, AGENCY OR INSTRUMENTALITY FOR A
26 GOVERNMENTAL PURPOSE.

27 (e) Activities through employees.--For purposes of this
28 section, a person that conducts activities through employees
29 shall be considered to be without actual knowledge of a fact
30 relating to a power of attorney, a principal or an agent if the

employee conducting the transaction involving the power of attorney is without actual knowledge of the fact.

(f) Definition.--As used in this section, the term "acknowledged power of attorney" shall mean a power of attorney containing signatures or marks purportedly verified before a notary public or other individual authorized to take acknowledgments.

Section 3. Section 5611 of Title 20 is amended to read:

§ 5611. Validity.

[A power of attorney executed in another state or jurisdiction and in conformity with the laws of that state or jurisdiction shall be considered valid in this Commonwealth, except to the extent that the power of attorney executed in another state or jurisdiction would allow an agent to make a decision inconsistent with the laws of this Commonwealth.]

A power of attorney executed in or under the laws of another state or jurisdiction shall be valid in this Commonwealth if, when the power of attorney was executed, the execution complied with:

(1) the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, the law of the jurisdiction in which the power of attorney was executed; or

(2) the requirements for a military power of attorney under 10 U.S.C. § 1044(b) (relating to legal assistance).

Section 4. The following shall apply:

(1) The amendment or addition of 20 Pa.C.S. §§ 5601(f), 5608, 5608.1 and 5611 shall apply to a power of attorney executed at any time.

(2) The amendment of 20 Pa.C.S. §§ 5601(f) and 5608

1 shall apply retroactively to acts performed after December
2 15, 1992.

3 (3) In interpreting and applying the amendment or
4 addition of 20 Pa.C.S. §§ 5601(f), 5608, 5608.1 and 5611, a
5 court shall give due consideration of the intent of the
6 General Assembly to reverse the interpretation of 20 Pa.C.S.
7 § 5608 as set forth in *Teresa M. Vine, v. Commonwealth of*
8 *Pennsylvania, State Employees' Retirement Board*, 9 A.3d
9 1150 (Pa. 2010).

10 Section 5. This act shall take effect immediately.