NEW WASHINGTON LAW REGARDING DURABLE POWERS OF ATTORNEY PROVIDES FOR SIGNIFICANT CHANGES TO PREVIOUS LAW

Date: 4 April 2017

Corporate/M&A Alert

By: Mark W. Roberts

A power of attorney is an integral part of a person's estate plan. Under a power of attorney, a person (known as the principal) gives broad powers to another party (known as an agent or attorney in fact) to act on his or her behalf. A principal may create a power of attorney to authorize an agent to act in dealing with the principal's financial matters, as well as make health care decisions on the principal's behalf. The principal may name different agents for health care and asset management purposes. A power of attorney is an effective tool when the principal is unable of managing his or her affairs for any reason, including travel out of the country or physical or mental disability.

Washington's statute relating to powers of attorney was recently replaced in its entirety by a new Washington Uniform Power of Attorney Act, effective January 1, 2017 (referred to as the "Act"). The Act provides several changes and additions to the previous law, which aim to address previous ambiguity in the law and to provide safeguards to prevent possible abuse of authority by an agent under the power of attorney. Some of the key provisions of the Act are summarized below.

AGENT/ATTORNEY IN FACT

If the principal names co-agents to act on his or her behalf, the Act now clarifies that co-agents must exercise their authority jointly, unless the document specifies that each co-agent may act independently. If your power of attorney document currently appoints two persons to serve together as your agent, you should review your document to ensure it correctly reflects your intent.

WHEN EFFECTIVE

Under the Act, a power of attorney must now expressly state that the document is not affected by the disability of the principal, or that it becomes effective upon the disability of the principal in order for the power of attorney to be "durable" and not affected by the principal's subsequent disability. The powers granted to the agent may be effective immediately upon signing or may spring into effect only when the principal becomes incapacitated. Having a durable power of attorney in place in most cases eliminates the need for a formal court guardianship with its related delay, expense, and on-going court reporting requirements. However, if a guardian is appointed by the court to manage the principal's affairs, the Act now provides that a power of attorney terminates unless the court specifies otherwise.

©2005-2026 K&L Gates LLP. All Rights Reserved.

POWERS GRANTED TO AGENT

The Act allows the principal to grant authority to the agent over broad subject matters, including but not limited to, the authority to manage the principal's real and personal property, stocks, bonds, and other financial instruments; to make gifts; to manage the principal's estate, trusts, and other beneficial interests; and to manage and operate a business. By drafting the power of attorney to refer to certain specific categories of powers the agent may be granted, the power of attorney can incorporate the more detailed descriptions of these powers set forth in the Act. This could eliminate ambiguity in the document itself regarding the scope of the agent's particular powers and may allow the power of attorney document itself to be simplified.

However, notably, under the Act, the general authority to make gifts is limited to the amount of the federal gift tax annual exclusion (currently, $14,000 per year to each recipient) unless otherwise stated in the document. This limitation affects all powers of attorney executed after the effective date, which is January 1, 2017, with respect to gifts made to qualify for Medicaid or to reduce an estate below the Washington estate tax level. Consequently, if the principal wishes to grant flexibility to allow the agent to make gifts in excess of the annual exclusion, which might often be desirable for estate tax or Medicaid planning purposes, the power of attorney documents should so specify.

The Act also incorporates Washington's existing health care provision to allow a principal to also give an agent broad authority in making health care decisions on behalf of the principal and take all actions and request any information that would otherwise be protected by the Health Insurance Portability Accountability Act.

FORMALITIES

The Act heightens the formalities required to validly execute a power of attorney for documents signed after January 1, 2017. The principal's signature must either be: (i) acknowledged by a notary; or (ii) attested by two or more witnesses, who are competent, and are not home care providers for the principal or related to either the principal or agent by blood or marriage. These increased formalities are intended to provide safeguards to reduce the incidence of fraudulent powers of attorneys and ensure that the power of attorney was not signed by the principal under undue influence or duress.

The Act applies to all powers of attorney, including those executed prior to the effective date of January 1, 2017. However, the authority granted to an agent will be determined in accordance with the law at the time the power of attorney was executed, and the execution requirements only apply to those documents executed after the effective date.

Reasons you may want to consider updating your powers of attorney include addressing changes in personal circumstances, naming a different agent to act on your behalf, and ensuring your intent is still reflected in consideration of the new Act. Please let us know if we can assist in the preparation of or updates to your powers of attorney.

©2005-2026 K&L Gates LLP. All Rights Reserved.

KEY CONTACTS



MARK W. ROBERTS
PARTNER

SEATTLE
+1.206.370.8119
MARK.ROBERTS@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.