

The Scoop on the New Illinois Power of Attorney for Health Care

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Governor Quinn signed Senate Bill 3228 into law on August 26, 2014, effective January 1, 2015, overhauling the Illinois Power of Attorney for Health Care statute.

There were changes to who may act as agent or witness the form, as well as significant changes to the lengthy Notice section and the form itself that broaden its scope and attempt to make it more user-friendly. A quick summary of the highlights follows.

Changes to Definitions

In Sec. 4-4, "Definitions," the term "health care agent" is now defined:

an individual at least 18 years old designated by the principal to make health care decisions of any type, including, but not limited to, anatomical gift, autopsy, or disposition of remains for and on behalf of the individual. A health care agent is a personal representative under state and federal law. The health care agent has the authority of a personal representative under both state and federal law unless restricted specifically by the health care agency. 755 ILCS 45/4-4(e-5).

The terms "health care professional" and "health care provider" are now interchangeable.

Gone are definitions of "[i]ncurable or irreversible condition," "[p]ermanent unconsciousness," and "[t]erminal condition" which relate in the current form to points when life support may be withdrawn (formerly 755 ILCS 45/4-4(f)-(h)). The new form no longer calls for such trigger-points.

Changes to Witness Requirements

Sec. 4-5.1, "Limitations on who may witness health care agencies," now expressly prohibits these enumerated "licensed professionals providing services to the principal" from serving as witnesses (755 ILCS 45/4-5.1(a)):

attending physician;
mental health service provider;
advanced practice nurses;
physician assistant;
dentist;
podiatric physician;
optometrist;
relatives of any such professionals.

Health care facility operators (e.g., directors and executives) may not witness, but that prohibition does not apply to "non-owner chaplains or social workers, nurses, and other employees."

Changes to the Form Itself

The new statutory short form presumes that the principal is granting broad-based authority to his or her agent to make decisions in all types of health care scenarios. The choices for life-sustaining treatment have changed significantly and the form now asks the agent to choose between quantity of life and quality of life. There are also check-box options for invoking the start of the authority (upon execution of the form or upon the physician's determination).

Notably, the new Act entirely rewrites the “Notice to the Individual Signing the Power of Attorney for Health Care,” which appears at the beginning of the health care form, and continues for roughly five pages. It adds a number of sections in Q& A format, illustrating the breadth of a POA and confronting various circumstances that may arise:

“What are the Things I Want My Health Care Agent to Know?” warns of the importance of choosing a trustworthy agent, but recommends particular topics and considerations to independently address with the prospective agent.

“What Kind of Decisions Can My Agent Make?” outlines numerous dilemmas that an agent may face and provides examples as to how the principal may limit or direct these decisions.

“Whom Should I Choose to be My Health Care Agent?” elaborates considerably upon the prior version’s mere recommendation that the agent be “trustworthy.” For example, a person should choose an agent who “would not be too upset to carry out your wishes if you became very sick” and is “comfortable talking with and questioning physicians.”

“What if My Agent is Not Available or is Not Willing to Make Decisions for Me?” explains the role of successor agents and their importance.

“What Will Happen if I Do Not Choose a Health Care Agent?” describes the surrogacy statute and the potential benefits of appointing an agent over relying on the default authority provided for by statute.

“What if I Change My Mind?” addresses how to destroy the documents or fill out a new form.

Other sections, addressing practical steps in finalizing the appointment of a health care agent, include, “What Do I Do With This Form Once I Complete It?” and “What if I Do Not Want to Use This Form?”

Under the prior act and as amended, Sec. 4–10(c)(4) describes the agent’s authority to examine, copy, and consent to disclosure of principal’s medical records. The section now clarifies that the POA is HIPAA compliant and that “[t]he agent serves as the principal’s personal representative, as that term is defined under HIPAA and regulations thereunder.”

Saving Clause

Under the Saving Clause, all powers of attorney for health care that were validly created prior to January 1, 2015 will be grandfathered in under the new statute, so unless a client’s personal preferences have changed or a client simply prefers the updated format, a revision to the estate plan is not necessitated by this statutory rewrite. Nevertheless, we always encourage our clients to review plans periodically to ensure that they still adequately address needs and now is as good a time as ever.