



WISCONSIN'S NEW DURABLE POWER OF ATTORNEY LAW: MORE DURABLE THAN EVER

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With credit to Will McKinley, Summer Law Clerk

Under common law, a power of attorney becomes ineffective upon the incapacitation of the principal. However, like most states, Wisconsin adopted legislation which allowed powers of attorney to be made durable – that is, to remain effective when the principal becomes incapacitated.

Recently, in response to growing concerns about the inflexibility of durable powers of attorney, the Wisconsin Legislature adopted the new Uniform Power of Attorney Act, which will become effective on September 1, 2010. The adoption of the new Uniform Power of Attorney Act will significantly change Wisconsin's existing laws governing powers of attorney by allowing for greater flexibility in accepting an agent's authority and adding provisions to prevent and redress financial abuse.

First, Wisconsin's new law clarifies ambiguities in the old law by setting forth specific default rules which govern not only the instrument itself, but also the actions of the agent. For example, the new law provides default rules concerning the revocation of a prior power of attorney, co-agents and successor agents, reimbursement and compensation, an agent's acceptance of appointment, the agent's duties, agent liability, and agent resignation. In addition, one of the new law's most significant changes is that all powers of attorney drafted pursuant to the new law and after September 1, 2010 will be considered durable, unless the principal provides otherwise. This change overturns decades of Wisconsin law and helps solidify the fact that most principals prefer their powers of attorney to be durable.

In addition, the new law clarifies the default definition of a general power by delineating 13 specific powers, which together make up the general power. If a principal wishes to grant an agent additional powers such as making gifts; creating, amending, revoking, or terminating an inter vivos trust; creating or changing rights of survivorship; or creating beneficiary designations, the principal must expressly grant the special power to the agent.

The new law also requires that a power of attorney not only be in writing, but also *signed* by the principal, or signed by a representative of the principal in the principal's "conscious presence."

Lastly, the new law extends protection to principals by adding provisions which will prevent an agent from abusing their authority under the power. The new law sets forth that any third party being asked to accept a power of attorney (i.e., a doctor or banker) may refuse to do so and may report any suspicions to local law enforcement if they believe that "the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent." In addition, the principal, a fiduciary acting for the principal, or upon the death of the principal, a successor in interest to the principal's estate may request from the agent a copy of the receipts, disbursements, or transactions conducted on behalf of the principal.

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After reading this article, some readers may be concerned that their existing power of attorney is no longer valid under the new law. However, there is no need to worry. A power of attorney will be valid as long as it was in compliance with the law at the time it was executed. In addition, a photocopy or an electronically transmitted copy of a power of attorney will have the same effect as the original.

In summary, Wisconsin's new law provides the guidance attorneys, principals, agents, and third parties have been searching for over the past several years. It answers lingering questions and puts to rest existing doubts. If you have any questions regarding your durable power of attorney or any estate planning questions, please feel free to contact me or any of our estate planning attorneys.