WEST VIRGINIA CODE CHAPTER 39B ARTICLE 1

WV Legislature

§39B-1-101. Short title.

This chapter may be cited as the Uniform Power of Attorney Act, and is cited in this chapter as "this act".

WV Legislature

§39B-1-102. Definitions.

In this act:

(1) "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact or otherwise. The term includes an original agent, coagent, successor agent and a person to which an agent's authority is delegated.

(2) "Durable," with respect to a power of attorney means not terminated by the principal's incapacity.

(3) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.

(4) "Good faith" means honesty in fact.

(5) "Incapacity" means inability of an individual to manage property or business affairs because the individual:

(A) Has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or

(B) Is:

(i) Detained, including incarcerated in a penal system; or

(ii) Outside the United States and unable to return.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality or any other legal or commercial entity.

(7) "Power of attorney" means a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used.

(8) "Presently exercisable general power of appointment," with respect to property or a property interest subject to a power of appointment, means power exercisable at the time in question to vest absolute ownership in the principal individually, the principal's estate, the principal's creditors or the creditors of the principal's estate. The term includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period only after the occurrence of the specified event, the satisfaction of the ascertainable standard or the passage of the specified period. The term does not include a power exercisable in a fiduciary capacity or only by will.

WV Legislature

(9) "Principal" means an individual who grants authority to an agent in a power of attorney.

(10) "Property" means anything that may be the subject of ownership, whether real or personal, or legal or equitable or any interest or right therein.

(11) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(12) "Sign" means, with present intent to authenticate or adopt a record:

(A) To execute or adopt a tangible symbol; or

(B) To attach to or logically associate with the record an electronic sound, symbol or process.

(13) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States.

(14) "Stocks and bonds" means stocks, bonds, mutual funds and all other types of securities and financial instruments, whether held directly, indirectly or in any other manner. The term does not include commodity futures contracts and call or put options on stocks or stock indexes.

WV Legislature

§39B-1-103. Applicability.

This act applies to all powers of attorney except:

(1) A power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction;

(2) A power to make health-care decisions;

(3) A proxy or other delegation to exercise voting rights or management rights with respect to an entity; and

(4) A power created on a form prescribed by a government or governmental subdivision, agency or instrumentality for a governmental purpose.

WV Legislature

§39B-1-104. Power of attorney is durable.

A power of attorney created under this act is durable unless it expressly provides that it is terminated by the incapacity of the principal.

WV Legislature

§39B-1-105. Execution of power of attorney.

A power of attorney must be signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney and must be acknowledged by the principal before a notary public or other individual authorized by law to take acknowledgments.

WV Legislature

§39B-1-106. Validity of power of attorney.

(a) A power of attorney executed in this state on or after the effective date of this act is valid if its execution complies with §39B-1-105 of this code.

(b) A power of attorney executed in this state before the effective date of this act is valid if its execution complied with the law of this state that existed at the time of execution.

(c) A power of attorney executed other than in this state is valid in this state if, when the power of attorney was executed, the execution complied with:

(1) The law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to §39B-1-107 of this code; or

(2) The requirements for a military power of attorney pursuant to 10 U. S. C. §1044b.

(d) Except as otherwise provided by statute other than this act, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.

(e) Notwithstanding the provisions of §39B-1-102 of this code, the fact that a person is either detained, including being incarcerated in a penal system, or is outside the United States and unable to return, does not create an inference that the person lacks the capacity to execute a power of attorney.

WV Legislature

§39B-1-107. Meaning and effect of power of attorney.

The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.

WV Legislature

§39B-1-108. Nomination of conservator or guardian; relation of agent to court-appointed fiduciary.

(a) In a power of attorney, a principal may nominate a conservator of the principal's estate or guardian of the principal's person for consideration by the court if protective proceedings for the principal's estate or person are begun after the principal executes the power of attorney. In the protective proceedings the court shall consider the nomination in accordance with the provisions of section eight, article two, chapter forty-four-a of this code.

(b) If, after a principal executes a power of attorney, a court appoints a conservator of the principal's estate or other fiduciary charged with the management of some or all of the principal's property, the agent is accountable to the fiduciary as well as to the principal. Unless otherwise ordered by the court making the appointment, the power of attorney and the agent's authority thereunder terminates upon the appointment.

WV Legislature

§39B-1-109. When power of attorney effective.

(a) A power of attorney is effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.

(b) If a power of attorney becomes effective upon the occurrence of a future event or contingency, the principal, in the power of attorney, may authorize one or more persons to determine in a writing or other record that the event or contingency has occurred.

(c) If a power of attorney becomes effective upon the principal's incapacity and the principal has not authorized a person to determine whether the principal is incapacitated, or the person authorized is unable or unwilling to make the determination, the power of attorney becomes effective upon a determination in a writing or other record by:

(1) A physician or licensed psychologist that the principal is incapacitated within the meaning of section one hundred two (5) (A) of this article; or

(2) An attorney at law, a judge or an appropriate governmental official that the principal is incapacitated within the meaning of section one hundred two (5) (B) of this article.

(d) A person authorized by the principal in the power of attorney to determine that the principal is incapacitated may act as the principal's personal representative pursuant to the Health Insurance Portability and Accountability Act, §1171 through §1179 of the Social Security Act, 42 U. S. C. §1320d, and applicable regulations, to obtain access to the principal's health-care information and communicate with the principal's health-care provider.

WV Legislature

§39B-1-110. Termination of power of attorney or agent's authority.

(a) A power of attorney terminates when:

(1) The principal dies;

(2) The principal becomes incapacitated, if the power of attorney is not durable;

(3) The principal revokes the power of attorney;

(4) The power of attorney provides that it terminates;

(5) The purpose of the power of attorney is accomplished; or

(6) The principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

(b) An agent's authority terminates when:

(1) The principal revokes the authority;

(2) The agent dies, becomes incapacitated, or resigns;

(3) An action is filed for the dissolution or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides; or

(4) The power of attorney terminates.

(c) Unless the power of attorney otherwise provides, an agent's authority is exercisable until the authority terminates pursuant to this section, notwithstanding a lapse of time since the execution of the power of attorney.

(d) Termination of an agent's authority or of a power of attorney is not effective as to the agent or another person that, without actual knowledge of the termination, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(e) Incapacity of the principal of a power of attorney that is not durable does not revoke or terminate the power of attorney as to an agent or other person who, without actual knowledge of the incapacity, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(f) The execution of a power of attorney does not revoke a power of attorney previously executed by the principal unless the subsequent power of attorney provides that the previous power of attorney is revoked or that all other powers of attorney are revoked.

WV Legislature

§39B-1-111. Coagents and successor agents.

(a) A principal may designate two or more persons to act as coagents. Unless the power of attorney otherwise provides, each coagent may exercise his or her authority independently and the consent of all coagents is not necessary for the validity of an act or transaction.

(b) A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. A principal may grant authority to designate one or more successor agents to an agent or other person designated by name, office or function. Unless the power of attorney otherwise provides, a successor agent:

(1) Has the same authority as that granted to the original agent; and

(2) May not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.

(c) Except as otherwise provided in the power of attorney and this act, an agent who does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent.

(d) An agent who has actual knowledge of a breach or imminent breach of fiduciary duty by another agent has a duty to notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal's best interest. An agent who fails to notify the principal or take action as required by this article is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action.

WV Legislature

§39B-1-112. Reimbursement and compensation of agent.

Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances: Provided, That an agent who is related to the principal as an ancestor, spouse or descendent is not entitled to compensation for services as agent, unless the power of attorney specifically provides for compensation.

WV Legislature

§39B-1-113. Agent's acceptance.

Except as otherwise provided in the power of attorney, a person accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.

WV Legislature

§39B-1-114. Agent's duties.

(a) Notwithstanding provisions in the power of attorney, an agent who has accepted appointment shall:

(1) Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;

(2) Act in good faith; and

(3) Act only within the scope of authority granted in the power of attorney.

(b) Except as otherwise provided in the power of attorney, an agent who has accepted appointment shall:

(1) Act loyally for the principal's benefit;

(2) Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;

(3) Act with the care, competence and diligence ordinarily exercised by agents in similar circumstances;

(4) Keep a record of all receipts, disbursements and transactions made on behalf of the principal;

(5) Cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and

(6) Attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

(A) The value and nature of the principal's property;

(B) The principal's foreseeable obligations and need for maintenance;

(C) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer and gift taxes; and

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

(c) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

WV Legislature

(d) An agent that acts with care, competence and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.

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

(f) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.

(g) An agent who exercises authority to delegate to another person the authority granted by the principal or who engages another person on behalf of the principal is not liable for an act, error of judgment or default of that person if the agent exercises care, competence and diligence in selecting and monitoring the person.

(h) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements or transactions conducted on behalf of the principal or provide an accounting unless: ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days. If an agent fails or refuses to comply with the provisions of this section, the court may award the principal or other authorized party requesting the disclosure reimbursement of reasonable attorneys fees and costs incurred.

WV Legislature

§39B-1-115. Exoneration of agent.

(a) A provision in a power of attorney relieving an agent of liability for breach of duty is binding on the principal and the principal's successors in interest except to the extent the provision:

(1) Relieves the agent of liability for breach of duty committed dishonestly, with an improper motive or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or

(2) Was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

WV Legislature

§39B-1-116. Judicial relief.

(a) The following persons may petition a court to construe a power of attorney or review the agent's conduct and grant appropriate relief:

(1) The principal or the agent;

(2) A guardian, conservator or other fiduciary acting for the principal;

(3) A person authorized to make health-care decisions for the principal;

(4) The principal's spouse, parent or descendant;

(5) An individual who would qualify as a presumptive heir of the principal;

(6) A person named as a beneficiary to receive any property, benefit or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;

(7) A governmental agency having regulatory authority to protect the welfare of the principal;

(8) The principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and

(9) A person asked to accept the power of attorney.

(b) Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

WV Legislature

§39B-1-117. Agent's liability.

(a) An agent that violates this act is liable to the principal or the principal's successors in interest for the amount required to:

(1) Restore the value of the principal's property to what it would have been had the violation not occurred;

(2) Reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf out of the principal's assets;

(3) Reimburse the reasonable attorneys fees and costs incurred by the principal or the principal's successors in interest in pursuing rectification of the violation by the agent; and

(4) Pay such other amounts, damages, costs or expenses as the court may award.

WV Legislature

§39B-1-118. Agent's resignation; notice.

(a) Unless the power of attorney provides a different method for an agent's resignation, an agent may resign by giving notice to the principal and, if the principal is incapacitated:

(1) To the conservator or guardian, if one has been appointed for the principal, and a coagent or successor agent; or

(2) If there is no person described in paragraph (1), to:

(A) The principal's caregiver;

(B) Another person reasonably believed by the agent to have sufficient interest in the principal's welfare; or

(C) A governmental agency having authority to protect the welfare of the principal.

WV Legislature

§39B-1-119. Acceptance of and reliance upon acknowledged power of attorney.

(a) For purposes of this section and section one hundred five of this article, "acknowledged" means purportedly verified before a notary public or other individual authorized to take acknowledgments.

(b) A person who in good faith accepts an acknowledged power of attorney without actual knowledge that the signature is not genuine may rely upon the presumption under the provisions of section one hundred five of this article that the signature is genuine.

(c) A person who in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is void, invalid or terminated, that the purported agent's authority is void, invalid or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely upon the power of attorney as if the power of attorney were genuine, valid and still in effect, the agent's authority were genuine, valid and still in effect, and the agent had not exceeded and had properly exercised the authority except as to a conveyance of interests in real property where the principal has previously filed a notice of termination of the power of attorney in the office of the clerk of the county commission in the county in which the property is located.

(d) A person who is asked to accept an acknowledged power of attorney may request, and rely upon, without further investigation:

(1) An agent's certification under penalty of perjury of any factual matter concerning the principal, agent or power of attorney;

(2) An English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English; and

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

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

(f) For purposes of this section and the act, a person who conducts activities through employees is without actual knowledge of a fact 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.

WV Legislature

§39B-1-120. Liability for refusal to accept acknowledged statutory form power of attorney.

(a) In this section, "statutory form power of attorney" means a power of attorney substantially in the form provided in this act or that meets the requirements for a military power of attorney pursuant to 10 U. S. C. §1044b.

(b) Except as otherwise provided in this section:

(1) A person shall either accept an acknowledged statutory form power of attorney or request a certification, a translation or an opinion of counsel under section one hundred nineteen subsection (d) of this article no later than seven business days after presentation of the power of attorney for acceptance;

(2) If a person requests a certification, a translation, or an opinion of counsel under section one hundred nineteen subsection (d) of this article, the person shall accept the statutory form power of attorney no later than five business days after receipt of the certification, translation or opinion of counsel; and

(3) A person may not require an additional or different form of power of attorney for authority granted in the statutory form power of attorney presented.

(c) A person is not required to accept an acknowledged statutory form power of attorney if:

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

(2) Engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;

(3) The person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;

(4) A request for a certification, a translation, or an opinion of counsel under section one hundred nineteen subsection (d) of this article is not timely provided;

(5) The person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation or an opinion of counsel under section one hundred nineteen subsection (d) of this article has been requested or provided; or

(6) The person makes, or has actual knowledge that another person has made, a report to the local adult protective services agency stating a good faith belief 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.

WV Legislature

(d) A person who refuses in violation of this section to accept an acknowledged statutory form power of attorney is subject to a court order mandating acceptance of the power of attorney. The court may at its discretion award to the principal or the principal's agent reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

WV Legislature

§39B-1-121. Principles of law and equity.

Unless displaced by a provision of this act, the principles of law and equity supplement this act.

WV Legislature

§39B-1-122. Laws applicable to financial institutions and entities.

This act does not supersede any other law applicable to financial institutions or other entities, and the other law controls if inconsistent with this act.

WV Legislature

§39B-1-123. Remedies under other law.

The remedies under this act are not exclusive and do not abrogate any right or remedy under the law of this state other than this act.

WV Legislature