



Legislation Would Reduce Confusion for Health Care, Property POA Agents

Proposed legislation would clear up confusion about the power of POA agents to control the disposition of a decedent's body and get access to Totten Trust and payable-on-death accounts.

Health Care POAs and the Disposition of Remains Act

The Disposition of Remains Act, or "DORA" (PA 94-0561), passed last August and took effect January 1, 2006 (see my column at page 600 in the November 2005 *Journal*). DORA identifies who has the right to control the disposition (including cremation) of a decedent's remains. If a decedent did not execute a written designation in substantial compliance with the DORA statutory format, DORA provides a "priority list" of individuals who possess the power.

Practitioners initially expressed concern that a Health Care Power of Attorney ("HCPOA") did not satisfy the "written designation" requirements under DORA, and furthermore, an agent under a HCPOA was not authorized under the DORA "priority list." Proposed legislation (SB 2673) would recognize an agent's power to control the disposition of a decedent's remains.

Practitioners expressed concern with the initial passage of DORA, because the HCPOA law already grants an agent the authority to dispose of the principal's remains under 755 ILCS 45/4-3. Mary Cascino of Pasquesi Associates, PC opined in my November

column that the two Acts and the related statutory forms should be made complementary. That way, clients who already had an HCPOA would not need to execute an additional advance directive to address the disposal of their remains.

SB 2673 recognizes that a decedent may effectively provide for the disposition of remains or designate an agent in a will, a prepaid funeral contract, a HCPOA, a cremation authorization form, or any

written instrument that satisfies the provisions of DORA that includes a notarized signature.

Note, however, that SB 2673 would specifically provide that the HCPOA must contain "a power to direct the disposition of remains." While this power is part of the statute under 755 ILCS 45/4-3, and the statutory form provides sample language under 755 ILCS 45/4-10 that includes this direction, that language must appear in the HCPOA that was executed. The language from the statutory form provides, "My agent shall also have full power to authorize an autopsy *and direct the disposition of my remains.*"

Thus, practitioners should check their HCPOA form to ensure that they have not eliminated the statutory language directing the disposition of remains. If a HCPOA does not specifically "direct the disposition of remains," that power will pass to an individual under the "priority list" of the DORA statute, which does not include the agent under the HCPOA.

POAs and Totten Trusts, payable-on-death accounts

On March 29, 2006, the legislature passed an amendment to the Illinois Power of Attorney for Property Act by providing that an agent's powers under a power of attorney ("POA") extend to a "Totten Trust, Payable on Death Account, or comparable trust account arrangement where the terms of such trust are contained entirely on the financial institution's signature card." Amendment 1 to SB 2676. This means an agent will have access to these accounts, which was not entirely clear in the past.

This amendment was a response to the fact that some financial institutions regard a Totten Trust or a payable-on-death account as the type of trust arrangement referred to in 755 ILCS

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45/2-9 as “revocable or amendable by the principal.” This means that the agent can have access to the account only if the POA includes “specific authority and specific reference to the trust in the agency.”

The specific change to the POA Act relates to both statutory short form and general POAs. For statutory short form POAs, the definition of the typical “financial institution transactions” that an agent can access under paragraph 2 of the form and as prescribed under 755 ILCS 45/3-3 now include Totten Trusts and payable-on-death accounts. A similar modification was made to 755 ILCS 45/2-9 for general POAs to include access to these accounts without “specific authority.”

Dick Teas of Tracy Johnson & Wilson, who helped draft the amendment, notes that most banks allow the agent access to these types of accounts. The amendment should not change the practice of these institutions. Teas also points out that these accounts are really treated like bank accounts, not trusts, since the beneficiary has no control or vested interest in the account (see 205 ILCS 625/3(b) and 4(a)).

Jim Marion of LaSalle Bank Corporation believes that this amendment is a good thing because it would allow POA agents to access bank accounts without the need for court involvement. However, Bill Peithmann of The Peithmann Law Office in Farmer City offers a different perspective. He warns of the expansive nature of the amendment, saying that it could facilitate agent malfeasance by enabling agents to alter the principal’s estate plan.

Nevertheless, many practitioners find that this amendment represents the lesser of two evils. According to Lyman Welch of Sidley Austin, it does more good than harm to empower an agent to access these accounts without having to go to court and institute guardianship proceedings. Welch said that the POA Act has safeguards in place against bad acts by agents. He notes that an agent has a duty under 755 ILCS 45/2-9 to preserve the principal’s estate plan and is liable to any beneficiary for acts of bad faith.

The amendment is effective immediately upon the governor’s signature. ■