

# Washington's Uniform Power of Attorney Act: Do I Have to Accept this Durable Power of Attorney?

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# Basics of Washington Law

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# Chapter 11.125 RCW

- Washington's new Uniform Power of Attorney Act ("UPAA") became effective January 1, 2017.
- Chapter 11.125 RCW repealed and replaced Washington's previous Power of Attorney Act (Chapter 11.94 RCW).
- UPAA applies to all powers of attorney, except for provisions regarding execution.
- There are some important differences between "old" statute and the UPAA.

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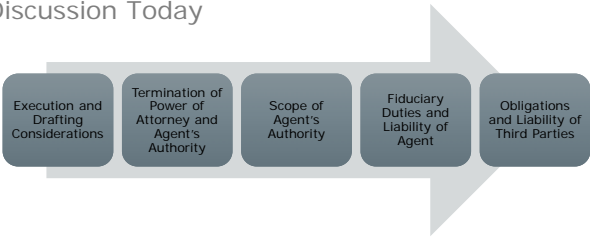
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## Highlights of the UPAA for Discussion Today



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## Execution and Drafting Requirements



- All POAs executed after January 1, 2017, must be signed and dated by the principal, and the signature must be either:
  - Acknowledged before a notary, or
  - Attested by two or more disinterested witnesses.

COMPARE: "Old" statute required only that POA be in writing and signed by principal. UPAA contains more safeguards.

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## What Does "Disinterested Witness" Mean?



**Someone who is NOT:** A home care provider or a provider at an adult family home or long term care facility in which the principal resides.

An individual who is related to the principal by blood, marriage, or domestic partnership.

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## Validity of Existing POAs

POAs executed prior to **January 1, 2017**, remain valid if they were valid before the UPAA became effective.

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## Execution and Drafting Requirements

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- Terminology under the UPAA:
  - POA must state that it is a "power of attorney"
  - "Principal" is the individual who executes the POA.
  - "Agent" is the person authorized to act on the principal's behalf ("old" statute referred to "attorney-in-fact")

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## Durability

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To continue authority beyond principal's incapacity, POA must expressly provide:

• "This power of attorney shall not be affected by the disability of the principal. . . or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's incapacity."

If POA does not expressly provide that effectiveness continues beyond principal's incapacity, then the agent's authority under the POA lapses with the principal's incapacity.

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## What Does Incapacity Mean?



"Inability of an individual to manage property, business, personal or health care affairs because the individual:



- Has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or
  - Is an absentee, as defined in chapter 11.80 RCW; or
  - Is outside the United States and unable to return."
- No longer includes incarceration in statutory definition.
- No longer provides that individual POA defines "incapacity" or "disability."

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## Effectiveness



- POA will be effective immediately *unless* POA states otherwise ("springing authority") –

- POA must provide (or use similar words to show intent):

**"This power of attorney shall become effective upon the disability of the principal."**

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## What About Coagents?



- Coagents must act jointly *unless* the POA provides that each agent may act independently.

- A coagent may delegate his or her authority to the other coagent.

- "Old" statute was silent on coagents.
- Requiring coagents to act jointly reduces risk of contradictory instructions to third parties (banks, care providers).
- Requiring coagents to act jointly can act as a check/balance system.
- Requiring coagents to act jointly can create paralysis due to conflict or unavailability in an urgent situation.

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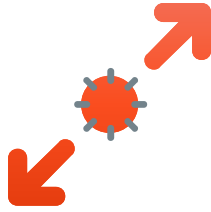
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## Termination of POA



- Death of principal
- Incapacity of principal (unless durability is specifically provided for in POA)
- Revocation by principal
- Happening of certain event specified in POA



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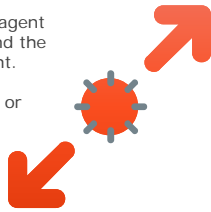
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## Termination of POA



- Purpose of POA is accomplished
- Principal revokes agent's authority or the agent dies, becomes incapacitated or resigns, and the POA does not provide for a successor agent.
- Existing POA is **not** automatically revoked or terminated upon execution of a new POA.
  - Note: Potential risks of concurrent authority.



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## Termination of Agent's Power Under POA



- Revocation by principal.
- Agent dies, becomes incapacitated, or resigns.
- In the case of an agent who is the principal's spouse, an action is filed for dissolution or annulment of marriage or domestic partnership, or for legal separation (but POA reinstated if action is withdrawn).
  - Note: Difference from "old" statute.

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# Scope of Agent's Authority

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## General Grant of Authority

*"All acts that the principal could do."*

<b>General Powers</b> RCW 11.125.260	<b>Banks and Financial Institutions</b> RCW 11.125.300
<b>Real Property</b> RCW 11.125.270	<b>Operation of Business or Entity</b> RCW 11.125.310
<b>Tangible Personal Property</b> RCW 11.125.280	<b>Insurance and Annuities</b> RCW 11.125.320
<b>Stocks, Bonds, Financial Instruments</b> RCW 11.125.290	

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## General Grant of Authority

<b>Estates, Trusts, Beneficial Interests</b> RCW 11.125.330	<b>Retirement Benefits a Deferred Compensation</b> RCW 11.125.370
<b>Claims and Litigation</b> RCW 11.125.340	<b>Taxes</b> RCW 11.125.380
<b>Personal and Family Maintenance</b> RCW 11.125.350	<b>Limited Gifting Powers</b> RCW 11.125.390
<b>Government, Civil, and Military Benefits</b> RCW 11.125.360	

References to any of these sections serves to incorporate the entire section as if laid out in full in the POA.

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## Specific Powers Restricted

Agent does *not* have authority with respect to the following matters unless expressly provided in the POA:



- Health care decisions.
- Create, amend, or terminate an inter vivos trust.
- Exercise principal's fiduciary powers.
- Create, amend or revoke a community property agreement.
- Cause a trustee to make distributions of trust property.
- Create or change beneficiary designations.
- Create or change rights of survivorship.
- See RCW 11.125.240

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## What About Gifting Under a POA?



- Unless otherwise provided, general authority allows gifting only up to annual exclusion amount.
- New POAs will require specific language to allow larger gifts that would facilitate Medicaid planning or gifting to bring estate below Washington estate tax threshold.
- Gifting must be consistent with principal's objectives or, if objectives are unknown, in principal's best interest.



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## Principal's Minor Children RCW 11.125.410



- A POA may authorize the following with respect to the principal's minor children or minor children for whom the principal is the legal guardian:
  - Grant an agent authority to make health care decisions on behalf of the minor child.
  - Nominate an agent as the guardian of the person and/or estate of the minor child (whether born or unborn at the time the POA is executed).
- Authority of a court-appointed guardian supersedes the agent's authority under a POA.
- Conflict between guardian designation in the principal's will and POA – most recent designation controls.

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# Agent's Fiduciary Duties and Liability

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## Agent's Duties

RCW 11.125.140

- Act in accordance with reasonable expectations of the principal (to the extent actually known).
- Act in principal's best interest.
- Act in good faith, loyalty, and with care, competence and diligence.
- Act within the scope of authority granted in the POA.

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## Ability to Modify Duties

POA can modify most duties and can indemnify agent for breach of duties, *except:*

- *POA cannot indemnify agent for acts committed dishonestly, with improper motive, or with gross negligence.*

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### Agent Liability RCW 11.125.170

An agent that violates the UPA is liable for *“the amount required to restore the value of the principal’s property to what it would have been had the violation not occurred.”*

- This provision does not apply to a power to make health care decisions, nor does it apply to the power to nominate a guardian for a minor child.

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### Agent Liability Under “Old” Statute

“Old” statute was silent, but Washington case law provided:

•“An attorney in fact ... becomes a fiduciary who is bound to act with the utmost good faith and loyalty...”

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### Health Care Matters

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### Powers with Respect to Health Care Decisions

- Absent an express grant of authority in the POA, the agent cannot make health care decisions on behalf of the principal.
- A general grant of health care authority is deemed to include a HIPAA waiver.

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### Powers with Respect to Health Care Decisions (cont.)

- An agent must cooperate with the principal's health care decision maker.
- Agent may exercise principal's rights under Washington's Natural Death Act (i.e., decline life sustaining treatment). *See* RCW 70.122.010.

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### Powers with Respect to Health Care Decisions (cont.)

- Agent may *not* exercise principal's rights under Washington's Death with Dignity Act (Chapter 70.245 RCW).
- Absent court authority, agent may not involuntarily commit principal, consent to convulsive therapy, psychotherapy, or procedures that restrict principal's freedom of movement.

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Who *cannot* be an agent under a health care POA?



Unless the person to be appointed is the principal's spouse, registered domestic partner, parent, adult child or sibling of the principal, none of the following can serve as agent for health care decision-making:

- Any of the principal's physicians or employees of physician; or the owners, administrators, or employees of health care or long term care facility where the principal resides or receives care.

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Third Party Obligations and Liability

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HYPOTHETICAL: DO I HAVE TO ACCEPT THIS DURABLE POWER OF ATTORNEY?



- Mabel: regular bank client, age 90.
- Veronica: agent under Mabel's DPOA from 1990.
- Veronica requests \$1M withdrawal from Mabel's account.

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## Third Party Obligations Upon Presentation of POA



Third party may not:

Insist on a certain POA form.

Refuse to accept an acknowledged POA because third party believes POA is "too old."

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## Third Party Obligations Upon Presentation of POA



Third party may, within 7 business days of receipt of an acknowledged POA, request an agent's certification (see RCW 11.125.430), and must accept the acknowledged POA within 5 business days of receipt of the certification unless:

Third party believes in good faith that the POA is not valid;

Third party believes in good faith that the agent is acting outside of his or her authority; or

Third party makes or has actual knowledge that another person has made a good faith report that the principal may be subject to physical or financial abuse by the agent.

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## Third Party Liability and Reliance



- If third party wrongfully refuses to accept an acknowledged POA, the agent can seek a court order requiring acceptance of the POA and payment of the agent's attorney's fees.
- Financial institution may refuse to process a transaction for an agent if financial institution may also refuse to process the transaction for the principal.

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## Third Party Liability and Reliance

Third party is not liable for reasonably relying on an *acknowledged* POA in good faith without actual knowledge that it is void, invalid, or terminated or being misused by the agent.

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## Financial Institutions

**Safe Harbor Under Vulnerable Adult Protection Act:** RCW 74.34.215 provides a safe harbor for a financial institution to refuse a transaction for either five or ten days based on its reasonable belief that financial exploitation of a vulnerable adult:

- may have occurred,
- may have been attempted, or
- is being attempted.

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Thank  
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