

Senate Bill 397

By: Senators Hill of the 32nd and Unterman of the 45th

A BILL TO BE ENTITLED
AN ACT

To amend Chapter 6 of Title 10 of the Official Code of Georgia Annotated, relating to agency, so as to update and conform provisions relating to powers of attorney to a uniform Act; to provide for definitions; to authorize and expound on the use of powers of attorney and financial powers of attorney; to authorize principals to perform certain actions; to revise provisions relating to conditional powers of attorney; to authorize persons to petition a court of competent jurisdiction to construe a power of attorney; to prohibit provisions that relieve an agent of liability in certain circumstances; to provide for requirements for agents; to provide for a standard of care for an agent; to provide recourse for breach of fiduciary duties; to provide for termination of an agency relationship and powers of an agent; to provide for acceptance of acknowledgment of power of attorney; to provide for effectiveness of powers of attorney executed in other states; to provide for limitations on the authority of an agent for a financial power of attorney; to provide for execution of financial powers of attorney; to provide for related matters; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Chapter 6 of Title 10 of the Official Code of Georgia Annotated, relating to agency, is amended by adding a new Code section to read as follows:

"10-6-0.1.

As used in this chapter, the term:

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

(2) 'Incapacitated' means the adult lacks sufficient capacity to make or communicate significant responsible decisions concerning the management of his or her property.

(3) '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.

(4) '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 such term is used.

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

SECTION 2.

Said chapter is further amended by revising Code Section 10-6-1, relating to when agency relationship arises, as follows:

"10-6-1.

(a) The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him or her or subsequently ratifies the acts of another in his or her behalf. A power of attorney and financial power of attorney are types of agency relationships, but they are not the exclusive type of agency relationship that can be created under the laws of this state.

(b) A principal creating a power of attorney or financial power of attorney may designate two or more persons to act as coagents. Unless the power of attorney or financial power of attorney otherwise provides, each coagent may exercise his, her, or its authority independently.

(c) A principal creating a power of attorney or financial power of attorney 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 or financial 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, have died, have become incapacitated, are no longer qualified to serve, or have declined to serve."

SECTION 3.

Said chapter is further amended by revising Code Section 10-6-4, relating to fiduciaries may convey by attorneys in fact, as follows:

"10-6-4.

(a) Executors, administrators, guardians, conservators, and trustees are authorized to sell and convey property by attorneys in fact in all cases where they may lawfully sell and convey in person.

(b) In a power of attorney or financial power of attorney, a principal may nominate a conservator or guardian of the principal's estate or person for consideration by a court of competent jurisdiction if protective proceedings for the principal's estate or person are begun after the principal executes the power of attorney or financial power of attorney. If, after a principal executes a power of attorney or financial power of attorney, a court appoints a conservator or guardian 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.

(c) An agent for hire shall, where applicable or contained in the power of attorney or financial power of attorney, 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:

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

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

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

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

SECTION 4.

Said chapter is further amended by revising Code Section 10-6-6, relating to conditional power of attorney, as follows:

"10-6-6.

(a) As used in this Code section, the term 'conditional power of attorney' means a written power of attorney stating that it becomes effective at a specified future time or on the occurrence of a specified event or contingency, including, but not limited to, the subsequent incapacity of the principal. A conditional power of attorney includes a conditional financial power of attorney.

(b) In a conditional power of attorney, the principal may designate one or more persons who, by a written declaration under penalty of false swearing, have the power to determine conclusively that the specified event or contingency has occurred. The principal may designate the attorney in fact or another person to perform this function, either alone or jointly with other persons. If a conditional 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 conditional power of attorney becomes effective upon a determination in writing or other record by:

(1) A physician or psychologist that the principal is incapacitated; or

(2) An attorney at law, a judge, or an appropriate government official that the principal is incapacitated.

(c) A power of attorney containing the designation described in subsection (b) of this Code section becomes effective when the person or persons designated in the power of attorney execute a written declaration under penalty of false swearing that the specified event or contingency has occurred; and any person may act in reliance on the written declaration without liability to the principal or to any other person, regardless of whether the specified event or contingency has actually occurred.

(d) This Code section shall apply to a power of attorney whether executed before, on, or after July 1, 1993, if the power of attorney contains the designation described in subsection (b) of this Code section.

(e) A person authorized by the principal in the conditional 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, Sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, and applicable regulations, to obtain access to the principal's health care information and communicate with the principal's health care providers.

~~(e)~~(f) Subsections (b) and (c) of this Code section do not provide the exclusive method by which a power of attorney may be limited to take effect upon the occurrence of a specified event or contingency."

SECTION 5.

Said chapter is further amended by adding a new Code section to read as follows:

"10-6-7.

(a) Unless prohibited by the power of attorney or financial power of attorney, the following persons may petition a court of competent jurisdiction to construe a power of attorney or financial power of attorney and grant appropriate relief:

(1) The principal or 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 to the principal;

(6) A person named as a beneficiary to receive any property, benefit, or contractual right upon 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) The principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and

(8) A person asked to accept the power of attorney, including a financial power of attorney.

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

(c) The rights and remedies established by this Code section shall be cumulative to those existing in law and shall not provide the exclusive means to challenge a power of attorney or financial power of attorney."

SECTION 6.

Said chapter is further amended by revising Code Section 10-6-20, relating to rights under agency for illegal purpose, as follows:

"10-6-20.

(a) No rights shall arise to either party out of an agency created for an illegal purpose.

(b) In addition to subsection (a) of this Code section, any provision in a power of attorney or financial power of attorney that seeks to relieve 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 financial 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."

SECTION 7.

Said chapter is further amended by revising Code Section 10-6-21, relating to extent of agent's authority and liability for exceeding, violating, or disregarding instructions, as follows:

"10-6-21.

(a) The agent shall act within the authority granted to him or her, reasonably interpreted; if he or she shall exceed or violate his or her instructions, he or she does it at his or her own risk, the principal having the privilege of affirming or dissenting, as his or her interest may

dictate. In cases where the power is coupled with an interest in the agent, unreasonable instructions, detrimental to the agent's interest, may be disregarded.

(b) Except as otherwise provided in the power of attorney or financial power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court of competent jurisdiction or requested by the principal, the principal's lawful guardian, conservator, or 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, the successor in interest of the principal's estate, personal representative, or executor. 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.

(c) The agent shall, to the extent such person is actually known by the agent, cooperate with a person that has been designated in an advance directive for health care to act on behalf of the principal."

SECTION 8.

Said chapter is further amended by revising Code Section 10-6-22, relating to diligence required of agent, as follows:

"10-6-22.

(a) An agent for hire shall be bound to exercise, about the business of his or her principal, that ordinary care, skill, and diligence required of a bailee for hire. A voluntary agent, without hire or reward, shall be liable only for gross neglect.

(b) If an agent identified in a power of attorney or financial power of attorney 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 the level of care imposed by subsection (a) of this Code section.

(c) An agent identified in a power of attorney or financial power of attorney that acts with the required level of care, skill, and diligence and in 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, not prohibited by this chapter, in relation to the property or affairs of the principal.

(d) An agent identified in a power of attorney or financial power of attorney that is found liable for violating this Code section shall reimburse the principal or the principal's successors in interest for the attorney's fees and costs that arise as a result of the agent's acts or omissions."

SECTION 9.

Said chapter is further amended by revising Code Section 10-6-30, relating to agents and fiduciaries to keep accounts and effect of neglect, as follows:

"10-6-30.

(a) It shall be the duty of agents, trustees, administrators, guardians, conservators, receivers, and all other fiduciaries to keep their accounts in a regular manner and to be always ready with them supported by proper vouchers; neglect of this duty shall be ground for charging them with interest on balances on hand and with costs.

(b) Except as otherwise provided in a power of attorney or financial power of attorney, a relationship created by the power of attorney or financial power of attorney that does not participate in or conceal a breach of fiduciary duty committed by another agent to the same principal, including a predecessor agent, is not liable for the actions of the other agent.

(c) An agent empowered by a power of attorney or financial power of attorney that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent to the same principal shall 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 described in this Code section that fails to notify the principal or take action as required by this subsection is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action."

SECTION 10.

Said chapter is further amended by revising Code Section 10-6-33, relating to when and how a revocation of agency is done, as follows:

"10-6-33.

(a) Generally, an agency is revocable at the will of the principal. The appointment of a new agent for the performance of the same act or the death of either principal or agent revokes the power. If, however, the power is coupled with an interest in the agent himself or herself, it is not revocable at will. In all cases, the agent may recover from the principal, for an unreasonable revocation, any damages he or she may have suffered by reason thereof.

(b) In the case of an agency relationship created by a power of attorney or financial power of attorney:

(1) The agency relationship also terminates when:

(A) The principal dies;

(B) The principal revokes the power of attorney or financial power of attorney.

Generally, an agency is revocable at the will of the principal. The appointment of a new agent for the performance of the same act or the death of either principal or agent

235 revokes the power. If, however, the power is coupled with an interest in the agent
236 himself or herself, it is not revocable at will;

237 (C) The power of attorney or financial power of attorney provides that it terminates;

238 (D) The purpose of the power of attorney or financial power of attorney is
239 accomplished; or

240 (E) The principal revokes the agent's authority, or the agent dies, becomes
241 incapacitated, or resigns, and the power of attorney does not provide for another agent
242 to act under the power of attorney or financial power of attorney;

243 (2) An agent's authority terminates when:

244 (A) The principal revokes the authority;

245 (B) The agent dies, becomes incapacitated, or resigns;

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

248 (D) The power of attorney or financial power of attorney terminates;

249 (3) Unless the power of attorney or financial power of attorney otherwise provides, an
250 agent's authority is exercisable until the authority terminates under this subsection,
251 notwithstanding a lapse of time since the execution of the power of attorney or financial
252 power of attorney;

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

258 (5) Unless provided for in the power of attorney or financial power of attorney,
259 incapacity of the principal of a power of attorney or financial power of attorney shall not
260 terminate the agency relationship; and

261 (6) An agent may resign by giving notice to the principal and, if the principal is
262 incapacitated:

263 (A) To the principal's other legal representative, if any, and a coagent or successor
264 agent;

265 (B) If there is no person described in subparagraph (A) of this paragraph, then to:

266 (i) The principal's caregiver;

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

269 (iii) A governmental agency having jurisdiction to protect the welfare of the
270 principal; or

(C) If there is no person described in either subparagraph (A) or (B) of this paragraph, by petitioning a court of competent jurisdiction for a declaration of resignation."

SECTION 11.

Said chapter is further amended by adding new Code sections to read as follows:

"10-6-90.

(a) A person that in good faith accepts an acknowledged power of attorney or financial power of attorney without actual knowledge that the signature is not genuine may presume it is a valid signature if it is notarized.

(b) A person that in good faith accepts a notarized power of attorney or financial 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 or financial power of attorney as if the power of attorney or financial 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 duty.

(c) A person that is asked to accept a notarized 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, power of attorney, or financial power of attorney;

(2) An English translation of the power of attorney or financial 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 or financial power of attorney if the person making the request provides in a writing or other record the reason for the request.

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

(e) For the purposes of this Code section, a person that conducts activities through employees is without actual knowledge of a fact relating to a power of attorney, financial power of attorney, principal, or agent if the employee conducting the transaction involving the power of attorney or financial power of attorney is without actual knowledge of the fact.

10-6-91.

(a) Except as provided in subsection (b) of this Code section:

(1) A person shall either accept a notarized power of attorney or financial power of attorney or request a certification, translation, or opinion of counsel pursuant to Code Section 10-6-90 no later than seven business days after presentation of the verified power of attorney or financial power of attorney for acceptance;

(2) If a person requests a certification, translation, or opinion of counsel pursuant to Code Section 10-6-90, the person shall accept the power of attorney or financial 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 or financial power of attorney for authority granted in the power of attorney or financial power of attorney presented.

(b) A person is not required to accept a verified power of attorney or financial power of attorney if:

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

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

(3) A request for a certification, translation, or opinion of counsel pursuant to Code Section 10-6-90 is refused;

(4) The person in good faith believes that the power of attorney or financial power of attorney is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, translation, or opinion of counsel under Code Section 10-6-90 has been requested or provided; or

(5) The person makes, or has actual knowledge that another person has made, a report to a government 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.

(c)(1) A person that refuses to accept an acknowledged power of attorney or financial power of attorney in violation of this Code section shall be subject to:

(A) A court order mandating acceptance of the power of attorney or financial power of attorney; and

(B) Liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or financial power of attorney or mandates acceptance of the power of attorney or financial power of attorney.

(2) In addition to the provisions of paragraph (1) of this subsection, a financial institution, as defined in Code Section 7-1-4, that refuses to accept an acknowledged

power of attorney or financial power of attorney in violation of this Code section shall be liable for a civil penalty not to exceed \$5,000.00. Each day during which the violation continues, except for the first day, shall constitute a separate offense. In determining the amount of penalty, the Department of Banking and Finance shall take into account the appropriateness of the penalty relative to the size of the financial resources of the financial institution, the good faith efforts of the financial institution to comply with the order, the gravity of the violation, the history of previous violations by the financial institution, and such other factors or circumstances as shall have contributed to the violation."

SECTION 12.

Said chapter is further amended by revising Code Section 10-6-140, relating to the statutory form not exclusive method of creating financial power of attorney, as follows:

"10-6-140.

(a) The Georgia Statutory Form for Financial Power of Attorney set out in Code Section 10-6-142 may be used to create a financial power of attorney; but is not the exclusive method for creating such an agency; provided, however, that on and after July 1, 2016, a financial power of attorney shall comply with the requirements of Code Section 10-6-140.2.

(b) A financial power of attorney executed other than in this state is valid in this state if:

(1) When the financial power of attorney was executed, the execution complied with the law in the jurisdiction where it was executed;

(2) The financial power of attorney indicates that it is to be governed by Georgia law and is in compliance with the requirements of this chapter; or

(3) When the financial power of attorney was executed, the execution complied with the requirements for a military power of attorney pursuant to 10 U.S.C. Section 1044b."

SECTION 13.

Said chapter is further amended by adding new Code sections to read as follows:

"10-6-140.1.

(a) A financial power of attorney authorized by this article shall not authorize any power not expressly provided for in this chapter; provided, however, that a financial power of attorney shall not authorize the agent to exercise:

(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.

(b) An agent under a financial power of attorney may do the following on behalf of the principal or with the principal's property only if the financial power of attorney expressly grants the agent the authority and exercise of authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:

(1) Create, amend, revoke, or terminate an inter vivos trust;

(2) Make a gift;

(3) Create or change rights of survivorship;

(4) Create or change a beneficiary designation;

(5) Delegate authority granted under the financial power of attorney;

(6) Waive the principal's right to be a beneficiary or joint and survivor annuity, including a survivor benefit under a retirement plan;

(7) Exercise fiduciary powers that the principal has authority to delegate;

(8) Disclaim property, including a power of appointment.

(c) Notwithstanding a grant of authority to do an act described in subsection (b) of this Code section, unless the financial power of attorney otherwise provides, an agent that is not a blood relative, spouse, or in-law of the principal may not exercise authority under a financial power of attorney to create in the agent, or in the individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

(d) Subject to the provisions of this Code section, a financial power of attorney that grants to an agent the authority to do all acts that a principal could do shall be deemed a power of attorney, and if the subjects over which authority is granted in a financial power of attorney are similar or overlap, the broadest authority controls.

(e) Authority granted in a financial power of attorney is exercisable with respect to property that the principal has when the financial power of attorney is executed or acquires later, whether or not the property is located in this state and whether or not the authority is exercised or the financial power of attorney is executed in this state.

10-6-140.2.

A financial power of attorney shall be in writing; 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 financial power of attorney; and signed by two adult witnesses, one of whom cannot be the principal's spouse or blood relative. A signature on a financial

414 power of attorney is presumed to be genuine if the principal acknowledges the signature
415 before a notary public or other individual authorized by law to take acknowledgments."

416 **SECTION 14.**

417 All laws and parts of laws in conflict with this Act are repealed.