

## **COMMITTEE BILL ANALYSIS**

**Bill:** Senate Bill 1092

**Printer's No.:** 1270

**Sponsor:** Senator Greenleaf

**Prepared by:** Gregg Warner

**Synopsis:** This bill amends provisions of the Probate, Estates and Fiduciaries Code (Probate Code), Title 20 of the Pennsylvania Consolidated Statutes, relating to the validity of powers of attorney and the good faith reliance on powers of attorney by third parties.

### **Summary:**

#### **Execution**

Section 5601 of the Probate Code is amended to provide that two witnesses are required when any power of attorney is executed. This changes current law which provides that two witnesses are only required when the power of attorney is executed by mark or by another individual.

A provision is added to require that a power of attorney be acknowledged by the principal and that the two witnesses to the power of attorney provide the specified affidavits.

These requirements do not apply to a power of attorney contained in an instrument used in a commercial transaction or a power of attorney which exclusively provides for health care decision making.

#### **Form**

A provision is added to section 5602 specifying that, except for the purpose of filing at the courthouse, a photocopy or electronically transmitted copy of an originally executed power of attorney has the same effect as the original.

#### **Third party liability**

Section 5608 is amended to provide that any person who is given instructions by a person claiming to be an agent acting under a document appearing to be a valid power of attorney must comply with the instructions if the action requested is authorized under the terms of the document. Reasonable cause for failing to comply is amended to include a reasonable good faith belief that (1) the document presented is void, invalid or terminated; (2) the agent's apparent authority is void, invalid or terminated; or (3) the agent is exceeding or improperly exercising the agent's apparent authority.

Reasonable cause also includes a good faith report having been made by the person to whom the instructions have been given by the agent to the local protective services agency.

### **Third party immunity**

Section 5608 is further amended to provide that any person who reasonably acts in good faith reliance on a document appearing to be a valid power of attorney shall incur no liability as a result of acting in accordance with the instructions of the person claiming to be the agent.

### **Applicability and effective date**

The provisions relating to the execution of a power of attorney shall only apply to a power of attorney executed on or after the effective date. The changes to section 5601 shall take effect in six months. The provisions relating to liability for and immunity from third party reliance on a power of attorney apply to a power of attorney executed before, on or after the effective date. The changes to sections 5602 and 5608 take effect immediately.

### **Background:**

#### **Vine decision**

In large part Senate Bill 1092 was introduced to address the State Supreme Court decision in Vine v. Commonwealth, 9 A.3d 1150 (Pa. 2010). The case involves the statutory immunity afforded to third parties that act in good faith on the instructions of an agent pursuant to a facially valid power of attorney without actual knowledge that the power of attorney is void or voidable, has expired, or that the agent is exceeding the scope of his authority.

Statutory immunity is provided for good faith reliance upon the instructions provided by an agent pursuant to a power of attorney because Pennsylvania law imposes liability for civil damages upon any person who fails to comply with the instructions of an agent absent reasonable cause. The Vine case has caused great concern among attorneys who advise clients about and draft powers of attorney and third parties, primarily financial institutions that rely on the validity of the powers of attorney that are presented to them.

In Vine a woman suffered a stroke following an automobile accident and was unable to speak. Four days after the stroke she purportedly executed a power of attorney in favor of her then-husband. Her signature on the power of attorney consisted of an "X" marked on the appropriate line. A nurse at the hospital signed as a witness and it was notarized.

A few weeks later the woman retired and her husband, as her agent, selected a retirement option for her that allowed him to make withdrawals but which paid her less than the disability retirement option. If he had selected the disability option, the woman's monthly benefits would have been greater but her accumulated deductions would not have been available to her husband for withdrawal.

A few years later, the woman's husband filed for divorce and she discovered that she had not been retired on disability. She asked the retirement system to change her election to the disability option and alleged that at the time the power of attorney was executed she was suffering from "general aphasia," a condition which rendered her unable to both speak and comprehend and that she was in a heavily medicated condition that would have impaired her judgment.

A hearing officer for the retirement system granted her request and concluded that at the time she executed the power of attorney she lacked the competence to do so. Upon review by the retirement system board, the decision of the hearing officer was reversed based upon the conclusion that the retirement system was entitled to rely in good faith upon the instructions of an agent absent any knowledge that a power of attorney is void or voidable.

Eventually the case made it to the Supreme Court which ruled that section 5608 of the Probate Code did not protect the retirement system from liability because the woman had lacked capacity to execute the power of attorney and, as a result, the power of attorney was not valid.

The Court stated that if the General Assembly had intended broader third party protection, it could have indicated as much by specifying that the protections in section 5608 extended to circumstances where the document in question had the indicia of validity regardless of its actual validity.

While anyone reading the difficult facts of the Vine case would sympathize with the woman, the Court's opinion removes the immunity third parties have had for decades in relying in good faith on facially valid powers of attorney without any knowledge of defects in the powers of attorney or the instructions provided by agents.

Third parties are now put in a position of having to investigate the circumstances surrounding the execution of a power of attorney. Instead of routinely relying on the validity of a power of attorney, they may have to seek the principal's ratification before acting. And, in turn, if the third party questions the power of attorney and does not comply with the instructions of the attorney-in-fact, the third party could find itself subject to liability for failing to comply with an agent's instructions.

In response to the Vine case, Senate Bill 1092 makes absolutely clear that the immunity under section 5608 applies to third parties that in good faith accept a facially valid power of attorney.

**Joint State Government Commission report**

The provisions of Senate Bill 1092 are generally consistent with the June 2011 report of the Advisory Committee on Decedents' Estates Laws entitled "Powers of Attorney and Health Care Decision-Making."