

Department of Legislative Services  
Maryland General Assembly  
2009 Session

FISCAL AND POLICY NOTE

House Bill 497  
Judiciary

(Delegates Simmons and Kramer)

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Maryland Power of Attorney Form and Oversight Act

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This bill establishes the Maryland Power of Attorney Form and Oversight Act.

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Fiscal Summary

**State Effect:** Any increase in filings of powers of attorney, revocations and annual accountings can be handled with existing resources.

**Local Effect:** Potential minimal increase in expenditures due to the emergency hearings established in the bill.

**Small Business Effect:** None.

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Analysis

**Bill Summary:** The bill applies to a power of attorney executed in the State on or after October 1, 2009, except (1) a power that is coupled with an interest in the subject of a power, given as security, or given as consideration; (2) a power to make health care decisions; (3) a proxy or other delegation to exercise any and all rights with respect to an entity, or a delegation of authority to execute, become a party to, or amend a document or agreement governing an entity or entity ownership interest; (4) a power created on a form prescribed by a governmental entity for a governmental purpose; and (5) a power created as part of, or in connection with, an agreement establishing an attorney and client relationship. The bill's various provisions address:

- requirements for proper execution or revocation of a power of attorney, validity of a power of attorney or revocation of a power of attorney, and requirements for

recordation of a power of attorney or revocation of a power of attorney in the circuit court of the county in which the principal (person who has granted authority to an agent in a power of attorney) resided on the date the power of attorney was executed;

- requirements that an agent keep a record of all receipts, disbursements, and transactions made on behalf of the principal; disclose such receipts, disbursements, or transactions if ordered by a court or requested by specified persons or entities; and, except as otherwise provided in the power of attorney, file an annual accounting in the circuit court in which the power of attorney is recorded, with a certification that notice was provided to the principal and each interested person;
- the ability of the principal or an interested person to file a petition in circuit court regarding an agent's failure to keep and disclose records, failure to file an annual accounting and provide specified notice, or breach of any duty of the agent alleged to be shown from a disclosure or an accounting; a requirement that a circuit court schedule an emergency hearing to be held within seven days after the petition is filed; and appropriate relief available after such a hearing;
- persons that may petition a court to construe a power of attorney or review an agent's conduct, and grant appropriate relief;
- liability of an agent to the principal or the principal's successors in interest for breach of a duty to the principal;
- the ability of a person asked to accept a power of attorney to request a certification of a factual matter concerning the principal, agent, or power of attorney; an English translation of the power of attorney; and an opinion of counsel as to a matter of law;
- required acceptance of a *statutory form* power of attorney that meets specified requirements, with specified exceptions, and sanctions applicable to a refusal of a statutory form power of attorney required to be accepted under the bill's provisions; and
- reimbursement of expenses incurred by the agent on behalf of the principal and compensation for the agent, if provided for in the power of attorney.

The Court of Appeals is authorized to adopt rules to implement the bill. The bill includes a statutory form power of attorney and an optional form for use by an agent to certify facts concerning a power of attorney.

**Current Law:** With the exception of an instrument or portion of an instrument that is an advance directive appointing a health care agent under the Health-General Article of the Annotated Code (which is governed by that Article), when a principal designates another person as an attorney in fact or agent by a power of attorney in writing, it is a durable power of attorney unless otherwise provided by its terms.

An action taken by an attorney in fact or agent pursuant to the power of attorney during a period of disability, incompetence, or uncertainty as to whether the principal is dead or alive has the same effect and inures to the benefit of and binds the principal as if the principal was alive, competent, and not disabled.

If a guardian is appointed for a principal, the attorney in fact or agent accounts to the guardian rather than the principal. The guardian has the same power the principal would have if not for the principal's disability or incompetence, to revoke, suspend, or terminate all or any part of the power of attorney or agency.

The death, disability, or incompetence of a principal who has executed a power of attorney in writing does not revoke or terminate the agency as to the attorney in fact, agent, or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney or agency. In the absence of fraud, an affidavit executed by the attorney in fact or agent, stating that the attorney in fact or agent did not have actual knowledge of the revocation or termination of the power of attorney is conclusive proof of the nonrevocation or nontermination of the power at that time. Any action taken binds the principal and the principal's heirs, legatees, and personal representatives unless it is otherwise invalid or unenforceable.

**Background:** A power of attorney is an authorization for one person (the agent) to act on behalf of another (the principal). Under a durable power of attorney, under Maryland Law, the authorization continues despite the principal's subsequent disability or incapacity. The National Conference of Commissioners on Uniform State Laws, which has promulgated a Uniform Power of Attorney Act (2006), portions of which are similar to provisions in the bill, indicates that the concept of a durable power of attorney was viewed in the past as an inexpensive method of surrogate decision making for people of modest means, but is now widely used for incapacity planning and convenience.

**State and Local Fiscal Effect:** Expenditures may increase in the circuit courts to comply with the bill's requirement that an emergency hearing be held within seven days pursuant to the filing of a petition by the principal or an interested person, as specified. The number of petitions that may be filed cannot be reliably estimated, but any such impact is expected to be minimal. The bill's requirement that powers of attorneys and their revocations must be filed with the circuit courts for validation and that an accounting must be filed annually may also cause an increase in the workload of the circuit courts. Any such increase is expected to be minimal and can be handled with existing resources.

## **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Judiciary (Administrative Office of the Courts), Department of Legislative Services

**Fiscal Note History:** First Reader - March 10, 2009  
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