

**REVISIONS TO RCW 11.94, THE POWER OF ATTORNEY STATUTE  
Ch. 203, Laws of 2001**

**Introductory Comments**

The durable power of attorney was created in the 1970's as a device for persons of modest or little means to plan for incapacity, because the traditional vehicles for such planning, trusts and guardianships, were too costly. Often a person who became incapacitated had some assets, but the cost of establishing a guardianship to manage those assets exceeded the total value of the assets. The legislative response was to allow a power of attorney, which under common law terminated at the incapacity of the person granting the power, to continue after the person granting the power became incapacitated. The Washington legislature enacted our version of a durable power of attorney statute in 1974. Since enactment, the durable power of attorney has proved to be an extremely useful tool, providing a low cost method to provide for management of a person's affairs after becoming incapacitated. Its popularity is also due to the privacy it provides, in contrast to a guardianship proceeding. Guardianships can be extremely public and embarrassing, because all guardianships require medical records, financial records and reports on family relationships to be included in the public record.

The durable power of attorney has drawbacks, however. Its primary advantages of economy, simplicity and privacy derive from the fact that they are straightforward documents that are executed and used without court involvement. Those characteristics are also the sources of its greatest disadvantage, the lack of any supervision or checks and balances. This lack of supervision allows the possibility that the attorney-in-fact may abuse the power granted in the document, and also causes third parties, such as banks and brokerage houses, to sometimes resist accepting durable powers of attorney.

Our current durable power of attorney statute is extremely brief, particularly in light of the increasing popularity of this document. The main purpose of the task force reviewing the statute was to fill in any perceived gaps in the statute and make the power of attorney easier to use and yet harder to abuse. The revisions in this proposal address several of those gaps. However, in filling those gaps, we intended that the primary advantages of powers of attorney – low cost, privacy, efficiency – be preserved. Otherwise, if the statute requires extensive oversight of powers of attorney, then there would be little to distinguish them from guardianships, and the advantages would be lost. The legislature has expressed a policy of respecting individual choices made by power of attorney arrangements in changes to the guardianship statute, and we intended to follow that policy in these revisions.

There are further issues that we intend to address in future proposals. For example, we believe that a statutory form power of attorney will be extremely useful, and intend to present such a form at a later time for consideration by the legislature.

## Proposed revisions

### 1. NEW SECTION: Effect of Dissolution of principal's marriage to attorney-in-fact.

(a). Any appointment of a principal's spouse as attorney in fact (including appointment as successor or co-attorney in fact) under a power of attorney shall be revoked upon entry of a decree of dissolution or legal separation or declaration of invalidity of the marriage of the principal and the attorney-in-fact, unless the power of attorney or the decree provides otherwise. The effect of such revocation shall be as if the spouse resigned as attorney-in-fact (or if named as successor attorney-in-fact, renounced such appointment) as of the date of entry of the decree or declaration, and the power of attorney shall otherwise remain in effect with respect to appointments of other persons as attorney-in-fact for the principal or procedures prescribed in the power of attorney to appoint such other persons, and any terms relating to service by such persons as attorney in fact.

(b). This section shall apply with respect to all decrees of dissolution and declarations of invalidity of marriage entered after [effective date of statute].

**Comment:** Under current law, a power of attorney granted to a spouse is not revoked on the principal's divorce from the spouse. As recognized by the legislature by passage of RCW ch. 11.07 and RCW 11.12.051, persons often overlook such details as removing spouses from Wills, beneficiary designations or powers of attorney when dissolving their marriage. This section is intended to remedy that oversight, using an approach similar to 11.12.051 and 11.07. The section applies only to appointment of a spouse, and would leave in effect the power of attorney to the extent it appointed a successor attorney-in-fact.

### 2. Revisions to RCW 11.94.040 Release from liability for reliance on power of attorney

(1) Any person acting without negligence and in good faith in reasonable reliance on a power of attorney shall not incur any liability thereby.

(2) If the attorney-in-fact presents the power of attorney to a third person and requests such person to accept the attorney-in-fact's authority to act for the principal, and also presents to such person an acknowledged affidavit or declaration signed under penalty of perjury in the form designated in RCW 9A.72.085, signed and dated contemporaneously with presenting the power of attorney, which meets the requirements of paragraph (3) below, and the person accepting the power of attorney has examined the power of attorney and confirmed the identity of the attorney-in-fact, then the person's reliance on the power of attorney shall be presumed to be without negligence and in good faith in reasonable reliance, which presumption may be rebutted by clear and convincing evidence that the person accepting the power of attorney knew or should have known that one or more of the material statements in the affidavit is untrue. It

shall not be found that an organization knew or should have known of circumstances that would revoke or terminate the power of attorney or limit or modify the authority of the attorney-in-fact, unless the individual accepting the power of attorney on behalf of the organization knew or should have known of such circumstances.

(3) An affidavit presented pursuant to section (2) above shall state that:

- a. The person presenting himself or herself as the attorney-in-fact and signing the affidavit or declaration is the person so named in the power of attorney;
- b. If the attorney-in-fact is named in the power of attorney as a successor attorney-in-fact, the circumstances or conditions stated in the power of attorney that would cause that person to become the acting attorney-in-fact have occurred;
- c. To the best of the attorney-in-fact's knowledge, the principal is still alive;
- d. To the best of the attorney-in-fact's knowledge, at the time the power of attorney was signed, the principal was competent to execute the document and was not under undue influence to sign the document;
- e. All events necessary to making the power of attorney effective have occurred;
- f. The attorney-in-fact does not have actual knowledge of the revocation, termination, limitation or modification of the power of attorney or of the attorney-in-fact's authority;
- g. The attorney-in-fact does not have actual knowledge of the existence of other circumstances that would limit, modify, revoke or terminate the power of attorney or the attorney-in-fact's authority to take the proposed action;
- h. If the attorney-in-fact was married to the principal at the time of execution of the power of attorney, then at the time of signing the affidavit or declaration, the marriage of the principal and the attorney-in-fact has not been dissolved or declared invalid; and
- i. The attorney-in-fact is acting in good faith pursuant to the authority given under the power of attorney.

(4) Unless the document contains a time limit, the length of time which has elapsed from its date of execution shall not prevent a party from reasonably relying on the document.

(5) Unless the document contains a requirement that it be filed for record to be effective, a person ~~shall~~ may place reasonable reliance on it regardless of whether it is so filed.

**Comments:** Many third parties, such as banks, currently require attorneys-in-fact to sign affidavits similar to the proposed statutory form. The statutory affidavit form is intended to give a safe harbor to third parties, in order to encourage third parties to accept durable powers of attorney, without eliminating the incentive for third parties to investigate suspicious circumstances. The affidavit is also intended to require the attorney-in-fact to consider carefully the statements and give a statement under oath as to the attorney-in-fact's authority. A third party who obtains an affidavit from the attorney-in-fact can

accept a power of attorney without fear of liability, provided that the third party has no reason to know that any statements in the affidavit are untrue.

**2. NEW SECTIONS regarding procedure to petition court for instructions regarding a power of attorney.**

NEW SECTION. Petition for instructions regarding power of attorney

(1) Any person designated in [new section] may file a petition requesting that the court:

(a) Determine whether the power of attorney is in effect or has terminated.

(b) Compel the attorney-in-fact to submit the attorney-in-fact's accounts or report the attorney-in-fact's acts as attorney-in-fact to the principal, the spouse of the principal, the guardian of the person or the estate of the principal, or to any other person required by the court in its discretion, if the attorney-in-fact has failed to submit an accounting or report within 60 days after written request from the person filing the petition.

(c) Ratify past acts or approve proposed acts of the attorney-in-fact.

(d) Order the attorney-in-fact to exercise or refrain from exercising authority in a power of attorney in a particular manner or for a particular purpose.

(e) Modify the authority of an attorney-in-fact under a power of attorney.

(f) Remove the attorney-in-fact on a determination by the court of both of the following:

(1) The attorney-in-fact has violated or is unfit to perform the fiduciary duties under the power of attorney; and

(2) The removal of the attorney-in-fact is in the best interest of the principal.

(g) Approve the resignation of the attorney-in-fact and approve the final accountings of the resigning attorney-in-fact if submitted, subject to any orders the court determines are necessary to protect the principal's interests.

(h) Confirm the authority of a successor attorney-in-fact to act under a power of attorney upon removal or resignation of the previous attorney-in-fact.

(i) Compel a third person to honor the authority of an attorney-in-fact, provided that a third person may not be compelled to honor the agent's authority if the principal could not compel the third person to act in the same circumstances.

(j) Order the attorney-in-fact to furnish a bond in such amount as the court shall determine to be appropriate.

- (2) The petition shall contain a statement identifying the principal's known immediate family members, and any other persons known to petitioner to be interested in the principal's welfare or the principal's estate, stating which of said persons have an interest in the action requested in the petition and explaining the determination of who is interested in the petition.

NEW SECTION. Persons entitled to bring petition

- (1) A petition may be filed under [new section above] by any of the following persons:

- (a) The attorney-in-fact.
- (b) The principal.
- (c) The spouse of the principal.
- (d) The guardian of the estate or person of the principal.
- (e) The State of Washington or an agency thereof, if the principal is a resident of the state of Washington at the time of filing the petition;
- (f) Any other interested person, provided that such person demonstrates to the court's satisfaction that the person is interested in the welfare of the principal and has a good faith belief that the court's intervention is necessary, and that the principal is incapacitated at the time of filing the petition or otherwise unable to protect his or her own interests.

- (2) Notwithstanding [section (1)], the principal may specify in the power of attorney by name certain persons who shall have no authority to bring a petition under [above new section] with respect to the power of attorney. Such provision shall be enforceable:

- (a) if the person so named is not at the time of filing the petition the guardian of the principal;
- (b) if at the time of signing the power of attorney the principal was represented by an attorney who advised the principal regarding the power of attorney and who signed a certificate at the time of execution of the power of attorney, stating that the attorney has advised the principal concerning his or her rights, the applicable law and the effect and consequences of executing the power of attorney; or
- (c) if (a) and (b) do not apply, unless the person so named can establish that the principal was unduly influenced by another or under mistaken beliefs when excluding such person from the petition process.

NEW SECTION. Court Action on Petition

In ruling on a petition filed under [new section] and ordering any relief thereunder, the court shall consider the best interests of the principal and shall order such relief that is least restrictive to the exercise of the power of attorney while still adequate in the court's view to serve the principal's best interests. Upon entry of an order ruling on a petition, the court's oversight of the attorney's in fact's actions and of the operation of the power of attorney shall end unless another petition is filed under this chapter or unless the order

specifies further court involvement that is necessary for a resolution of the issues raised in the petition.

NEW SECTION. Attorneys fees

In any proceeding commenced by the filing of a petition under section [new] by a person other than the attorney-in-fact, the court may in its discretion award costs, including reasonable attorney's fees, to any person participating in the proceedings from any other person participating in the proceedings, or from the assets of the principal, as the court determines to be equitable. In determining what is equitable in making such award, the court shall consider whether the petition was filed without reasonable cause, and shall order costs and fees paid by the attorney-in-fact individually only if the court determines that the attorney-in-fact has clearly violated his or her fiduciary duties or has refused without justification to cooperate with the principal or the principal's guardian or personal representative. In a proceeding to compel a third party to accept a power of attorney, the court may order costs, including reasonable attorney's fees, to be paid by the third party only if the court determines that the third party did not have a good faith concern that the attorney-in-fact's exercise of authority would be improper. To the extent this section is inconsistent with RCW 11.96A.150, this section shall control the award of costs and attorneys fees in proceedings brought under [new section].

NEW SECTION. Applicability of RCW 11.96A.

The provisions of RCW ch. 11.96A, except for RCW 11.96A.260-11.96A.320, shall be applicable to proceedings commenced by the filing of a petition under [new section].

NEW SECTION. Notice

(1) The following persons shall be entitled to notice of hearing on any petition under [new section]:

- (a) The principal
- (b) The principal's spouse;
- (c) The attorney-in-fact;
- (d) The guardian of the estate or person of the principal;
- (e) Any other person identified in the petition as being interested in the action requested in the petition, or identified by the court as having a right to notice of the hearing. If a person would be excluded from bringing a petition under [new section "persons entitled ..." paragraph (2)], then that person is not entitled to notice of the hearing.

(2) Notwithstanding the foregoing, if the whereabouts of the principal are unknown or the principal is otherwise unavailable to receive notice, the court may waive the requirement of notice to the principal, and if the principal's spouse is similarly unavailable to receive notice, the court may waive the requirement of notice to the principal's spouse.

(3) Notice shall be given as required under RCW ch. 11.96A, except that the parties entitled to notice shall be determined under this section.

**Comments:** These provisions are a significant change, and are intended to provide efficient access to court to resolve issues regarding a power of attorney, such as potential abuse or negligence, while preserving the principal's wishes as much as possible. The legislature has indicated, in the 1996 amendments to the guardianship statutes, its strong support of powers of attorney as an alternative to guardianship and a preference for using the durable power of attorney when possible. *See* RCW 11.88.045(5); RCW 11.88.030(1)(i). However, under current law, there is no judicial procedure other than guardianship available to resolve problems under a power of attorney. The result is that if a concern arises, the durable power of attorney must be abandoned in favor of a guardianship. For example, if a third party refuses to accept a durable power of attorney, and the principal is incapacitated, the attorney-in-fact is forced to commence a limited guardianship in order to obtain court-appointed authority to manage the asset in the hands of the third party. Under this new procedure, the attorney-in-fact can ask for a court order compelling the third party to recognize the power of attorney, thus avoiding the guardianship proceeding.

Another example is the situation where friends or family members of the principal have some concern about the actions of an attorney-in-fact. Under current law, those concerned parties must bring a guardianship action to question the attorney-in-fact's actions. With the proposed statute, the concerned friends or family members can ask the court to order the attorney-in-fact to provide accountings to specified individuals or to order the posting of a bond, or similar oversight. If the attorney-in-fact is found to be negligent, then the attorney-in-fact can be replaced by a successor attorney-in-fact. The proposed procedure therefore would allow the court to resolve the issue with only the formality and expense required for the particular situation.

By contrast, with a guardianship proceeding, there is no flexibility: a guardian ad litem is required to investigate and report, a medical report is required, and other legal process must be followed because the court must determine the alleged incapacitated person's capacity. The current system does not provide a process of less intrusive remedies when the problems are not severe and oversight or other corrective measures are sufficient.

Another circumstance the proposal is intended to address is an action the attorney-in-fact believes is desirable but is hesitant because of potential conflicts of interest or questions raised by others about the prudence of the transaction. Under current law, the attorney-in-fact has no avenue to obtain court approval of such action and can go forward only at personal risk. For example, the principal's financial situation may require that some assets be liquidated, the most logical being a vacation property that has been in the family for generations. The attorney-in-fact, child of the principal, has the means and strong desire to purchase the property, but that transaction would be open to question. The attorney-in-fact could under these statutes, request a hearing, with interested parties given notice, and obtain a court order to complete the sale.

The proposal is therefore intended to strengthen the use and functioning of powers of attorney so that relatively minor issues can be resolved with assistance from the court, without resorting to a guardianship. Access to the court to resolve issues is particularly critical for efficient functioning of durable powers of attorney where the principal is incapacitated. However, our intent was not to convert durable powers of attorney into court-supervised arrangements that would vary little from guardianships. We attempted to simplify the procedure so that it would be used in isolated incidents when necessary to resolve issues, but that aside from those resolutions of isolated issues, the durable power of attorney arrangement would operate without court supervision, as under current law. Court supervision should always be as limited as possible, in order to retain the primary advantages of durable powers of attorney: efficiency, economy and privacy.

Section (2) of the “Persons entitled to file petition” section is intended to allow the principal to exclude certain individuals whom the principal does not want to input into the principal’s affairs. Occasionally families will have one family member who is particularly litigious or troublesome, and this designation would allow the principal to prevent that family member from abusing the petition process. However, if the principal did not prepare the power of attorney with assistance of an attorney (who would presumably guard against undue influence), the exclusion of a person can be overcome if the excluded person could prove that the principal’s exclusion was due to mistaken belief or undue influence.

Also, to prevent abuse of the petition process, the court has the discretion to award attorney’s fees as it sees just. A person bringing a meritless petition therefore risks being charged with attorneys fees. Also, a third party refusing to accept a power of attorney without grounds for that refusal may be charged with attorneys fees.

The State of Washington is included as a person who has the right to bring a petition under this section, in order to allow Adult Protective Services, or the Attorney General’s office on their behalf, to seek court involvement when a durable power of attorney is involved.

The determination of persons entitled to notice is intended to be somewhat restrictive. Because the principal would still be living, persons interested in the principal’s estate would have no direct interest but only an expectancy. Also, the range of issues that can be raised in the petition is very broad, affecting different persons related to the principal. Some issues would be extremely narrow. Therefore, the issue of notice is to be determined on a case-by-case basis.

The provisions of TEDRA are made applicable, both for consistency with respect to Title 11 proceedings, and because those provisions provide a thorough and efficient procedural scheme. However, the arbitration and mediation provisions are made inapplicable, because the issues to be resolved under the proposed section do not lend themselves to those processes.

#### 4. Conforming revisions to 11.96A

##### § 11.96A.040. Original jurisdiction in probate and trust matters -- Powers of court

(1) The superior court of every county has original subject matter jurisdiction over the probate of wills and the administration of estates of incapacitated, missing, and deceased individuals in all instances, including without limitation:

- (a) When a resident of the state dies;
- (b) When a nonresident of the state dies in the state; or
- (c) When a nonresident of the state dies outside the state.

(2) The superior court of every county has original subject matter jurisdiction over trusts and all matters relating to trusts.

(3) The superior courts may: Probate or refuse to probate wills, appoint personal representatives, administer and settle the affairs and the estates of incapacitated, missing, or deceased individuals including but not limited to decedents' nonprobate assets; administer and settle matters that relate to nonprobate assets and arise under chapter 11.18 or 11.42 RCW; administer and settle all matters relating to trusts; administer and settle matters that relate to powers of attorney; award processes and cause to come before them all persons whom the courts deem it necessary to examine; order and cause to be issued all such writs and any other orders as are proper or necessary; and do all other things proper or incident to the exercise of jurisdiction under this section.

(4) The subject matter jurisdiction of the superior court applies without regard to venue. A proceeding or action by or before a superior court is not defective or invalid because of the selected venue if the court has jurisdiction of the subject matter of the action.

##### § 11.96A.050. Venue in proceedings involving probate or trust matters

(1) Venue for proceedings pertaining to trusts shall be:

(a) For testamentary trusts established under wills probated in the state of Washington, in the superior court of the county where letters testamentary were granted to a personal representative of the estate subject to the will or, in the alternative, the superior court of the county of the situs of the trust; and

(b) For all other trusts, in the superior court of the county in which the situs of the trust is located, or, if the situs is not located in the state of Washington, in any county.

(2) Venue for proceedings subject to chapter 11.88 or 11.92 RCW shall be determined under the provisions of those chapters.

(3) Venue for proceedings pertaining to the probate of wills, the administration and disposition of a decedent's property, including nonprobate assets, and any other matter not identified in subsection (1) or (2) of this section, may be in any county in the state of Washington. A party to a proceeding may request that venue be changed if the request is

made within four months of the mailing of the notice of appointment and pendency of probate required by RCW 11.28.237, and except for good cause shown, venue must be moved as follows:

(a) If the decedent was a resident of the state of Washington at the time of death, to the county of the decedent's residence; or

(b) If the decedent was not a resident of the state of Washington at the time of death, to any of the following:

(i) Any county in which any part of the probate estate might be;

(ii) If there are no probate assets, any county where any nonprobate asset might be; or

(iii) The county in which the decedent died.

(3) Once letters testamentary or of administration have been granted in the state of Washington, all orders, settlements, trials, and other proceedings under this title shall be had or made in the county in which such letters have been granted unless venue is moved as provided in subsection (2) of this section.

(5) Venue for proceedings pertaining to powers of attorney shall be in the superior court of the county of the principal's residence, except for good cause shown.

(6) If venue is moved, an action taken before venue is changed is not invalid because of the venue.

(7) Any request to change venue that is made more than four months after the commencement of the action may be granted in the discretion of the court.

#### § 11.96A.120. Application of doctrine of virtual representation

(1) This section is intended to adopt the common law concept of virtual representation. This section supplements the common law relating to the doctrine of virtual representation and shall not be construed as limiting the application of that common law doctrine.

(2) Any notice requirement in this title is satisfied if notice is given as follows:

(a) Where an interest in an estate, trust, or nonprobate asset or an interest that may be affected by a power of attorney has been given to persons who comprise a certain class upon the happening of a certain event, notice may be given to the living persons who would constitute the class if the event had happened immediately before the commencement of the proceeding requiring notice, and the persons shall virtually represent all other members of the class;

(b) Where an interest in an estate, trust, or nonprobate asset or an interest that may be affected by a power of attorney has been given to a living person, and the same interest, or a share in it, is to pass to the surviving spouse or to persons who are, or might be, the distributees, heirs, issue, or other kindred of that living person upon the happening

of a future event, notice may be given to that living person, and the living person shall virtually represent the surviving spouse, distributees, heirs, issue, or other kindred of the person; and

(c) Except as otherwise provided in this subsection, where an interest in an estate, trust, or nonprobate asset or an interest that may be affected by a power of attorney has been given to a person or a class of persons, or both, upon the happening of any future event, and the same interest or a share of the interest is to pass to another person or class of persons, or both, upon the happening of an additional future event, notice may be given to the living person or persons who would take the interest upon the happening of the first event, and the living person or persons shall virtually represent the persons and classes of persons who might take on the happening of the additional future event.

(3) A party is not virtually represented by a person receiving notice if a conflict of interest involving the matter is known to exist between the notified person and the party.

(4) An action taken by the court is conclusive and binding upon each person receiving actual or constructive notice or who is otherwise virtually represented.

**Comments:** The changes add references to power of attorney issues where needed in the TEDRA provisions.

5. Revisions to § 11.94.050. Attorney or agent granted principal's powers -- Powers to be specifically provided for -- Transfer of resources by principal's attorney or agent

(1) Although a designated attorney in fact or agent has all powers of absolute ownership of the principal, or the document has language to indicate that the attorney in fact or agent shall have all the powers the principal would have if alive and competent, the attorney in fact or agent shall not have the power to make, amend, alter, or revoke the principal's wills or codicils, and shall not have the power, unless specifically provided otherwise in the document: To make, amend, alter, or revoke any of the principal's wills, codicils, life insurance, annuity or similar contract beneficiary designations, employee benefit plan beneficiary designations, trust agreements, registration of the principal's securities in beneficiary form, payable on death or transfer on death beneficiary designations, designation of persons as joint tenants with right of survivorship with the principal with respect to any of the principal's property, community property agreements, or any other provisions for nonprobate transfer at death contained in nontestamentary instruments described in RCW 11.02.091; to make any gifts of property owned by the principal; to make transfers of property to any trust (whether or not created by the principal) unless the trust benefits the principal alone and does not have dispositive provisions which are different from those which would have governed the property had it not been transferred into the trust, or to disclaim property.

(2) Nothing in subsection (1) of this section prohibits an attorney in fact or agent from making any transfer of resources not prohibited under chapter 74.09 RCW when the transfer is for the purpose of qualifying the principal for medical assistance or the limited casualty program for the medically needy.

**Comments:** These changes are intended to clarify that even when authorized, an attorney-in-fact cannot execute a Will or Codicil for the principal, because execution of a Will or Codicil by an agent, outside of the principal's presence, would not comply with the Statute of Wills (RCW 11.12.020). Also, because the intention of the statute is to exclude from the general power of attorneys-in-fact, unless specifically authorized, the power to make gratuitous transfers or to change the disposition of the principal's assets at death, reference to other nonprobate transfers was added.