Indiana Power of Attorney Act

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INTRODUCTION

From its humble common-law origins, the power of attorney is now a preeminent estate planning tool rivaling the will as a necessary consideration. As its most recent embodiment of law on powers of attorney, Indiana adopted the Power of Attorney Act.[1] This new Act views the power of attorney as a tool to achieve planning and other goals and attempts to provide maximum flexibility in the design and use of that tool. To understand the new Indiana Power of Attorney Act, it is important to know the history of powers of attorney and the origin of many of the new provisions. This is particularly true in the rapidly changing area of surrogate health care decisionmaking.

I. OVERVIEW

A. Trust Code Analogy

In 1971, Indiana adopted the unique and innovative Trust Code.[2] The Trust Code codified many common-law concepts, consolidated scattered legislative enactments, and created universal trust provisions on powers, duties, and procedures for trusts lacking specification for these provisions. Overall, it simplified trust law in Indiana and made trusts easier to use.

In 1991, a similar situation existed for the power of attorney law in Indiana. The Uniform Durable Power of Attorney Act of 1976 provided the basic framework for durable powers, appointment of guardians, and protection of third parties.[3] Nevertheless, it failed to address procedural problems such as multiple or successor attorneys-in-fact and substantive problems such as liability of the attorney-in-fact or the liability of third persons.[4] Most importantly, it failed to delineate the powers of an attorney-in-fact.[5]

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1. Pub. L. No. 149-1991 (to be codified in IND. CODE §§ 30-5-1-1 to -12-8).
2. IND. CODE §§ 30-4-1-1 to -7-10 (1988 & Supp. 1991).
3. IND. CODE §§ 30-2-1.5-1 to -2 (repealed 1991).
4. *Id.*
5. *Id.*

In addition, Indiana had other specific statutory enactments related to powers of attorney, including statutes on powers of attorney by servicemen and statutes detailing how to record a power of attorney.[6] Both statutes were limited and potentially dangerous. For example, the recording statute created a trap by requiring that the power of attorney be recorded before the attorney-in-fact executed the document to be recorded.[7]

The Indiana Power of Attorney Act was designed to accomplish several goals: to unify all of the Indiana statutory procedures regarding powers of attorney, to provide rules to govern the procedure of multiple and successor attorneys-in-fact, to provide rules with regard to liabilities of individuals involving the attorney-in-fact, to provide detailed and specific powers which could be incorporated by reference, and finally, to address the issue of health care powers.

B. Something Borrowed

The Indiana Power of Attorney Act contains many provisions borrowed from other states. Generally, definitions and provisions related to medical health care powers came from the recently enacted Illinois statute.[8] Minnesota law provided provisions related to third parties and liability.[9] Transitional rules were adapted from the Trust Code,[10] and a rule regarding compensation was taken from the Uniform Transfers to Minors Act.[11] The basic provisions of the Uniform Durable Power of Attorney Act were also carried over with some minor changes.[12]

The extensive and detailed list of powers originally came from New York but is taken from the Minnesota adaption. Both Minnesota and New York provided a statutory form of power of attorney;[13] however, this approach has been specifically rejected in the Indiana Power of Attorney Act because of the potential abuse by individuals executing powers without legal advice.[14] Instead, Indiana opted for the incorpo-

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6. IND. CODE §§ 29-2-17-1 to -5 (repealed 1991) (serviceman); IND. CODE § 32-1-10-1 to -2 (repealed 1991) (recording powers).

7. IND. CODE § 32-1-10-2 (1988).

8. *See* ILL. REV. STAT. ch. 110 1/2, para. 801-1 to -12 (Smith-Hurd 1991).

9. *See* MINN. STAT. § 523.02 to -.25 (1990).

10. IND. CODE § 30-5-1-1 (Supp. 1991).

11. *Id.* § 30-5-4-5 (adopted from IND. CODE § 30-2-8.5-30).

12. IND. CODE §§ 30-2-1.5-1, -2 (repealed 1991).

13. MINN. STAT. ANN. §§ 523.01 to -.25 (West 1990); N.Y. GEN. OBLIG. LAW §§ 5-1501 to -1602 (McKinney 1989 & Supp. 1992).

14. *See* COLLINS ET AL., DRAFTING THE DURABLE POWER OF ATTORNEY — A SYSTEMS ARRIVAL 17 (2d ed. 1991).

ration by reference method used in Pennsylvania.[15] The intent is for a lawyer to provide advice before the power of attorney is drafted.

C. Something New

The Indiana Power of Attorney Act takes advantage of its young status to provide something new. The recording provisions are new and reverse the position of the old statute on recording powers of attorney.[16] Rules related to multiple and successor attorneys-in-fact create presumptions which are also unique to power of attorney statutes.[17] Also unique to the Power of Attorney Act is the use of a copy that has been certified by the attorney-in-fact and the ability to exonerate the attorney-in-fact for all acts except those done in bad faith.[18]

D. Health Care

Health care powers are treated separately in this presentation. In the original draft of the Indiana Power of Attorney Act, a health care power was provided for incorporation by reference similar to other property powers. The net effect of changes made during the legislative session was to make the Indiana Health Care Consent Act into a health care power of attorney whereby health care powers can be given to a health care representative in a document separate from that used for the power of attorney. While this creates a clear distinction between the designation of a health care representative with health care powers and an attorney-in-fact with property or estate powers, it also incorporates by reference two different legal concepts.

II. Power of Attorney

A. History

1. Common Law.—A power of attorney is an agency relationship between a principal and an agent; accordingly, it is controlled by the law of agency under the common law.[19] Many common-law rules relating to the nondelegability of certain powers or duties still apply in the application of powers of attorney to marriage, oath taking, and voting.[20] Similarly, many of those limitations still apply to the new Indiana Power of Attorney Act.

Perhaps the most important limitation under the common law was the termination of the power of attorney by the incapacity or disability

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15. *See* Ind. Code § 30-5-5-1 (Supp. 1991).
16. Ind. Code §§ 32-1-10-1, -2 (repealed 1991).
17. Ind. Code § 30-5-4-3, -4 (Supp. 1991).
18. *Id.* §§ 30-5-8-5, 30-5-9-1(b).
19. Collins, *supra* note 14, at 5.
20. *Id.*

of the principal. This limited the effectiveness of the power of attorney particularly when it was being used on behalf of the principal to take care of the principal's property. The Indiana Power of Attorney Act makes powers of attorney executed in accordance with its provisions effective until actual knowledge of the principal's death[21] or until the power terminates under its own provisions.[22]

Although not a limitation, the traditional use of a power of attorney under the common law was to manage property. For example, Indiana statutes concerning powers of attorney prior to the recent enactment of the Indiana Power of Attorney Act referred to powers specifically designated in the document regarding property specifically designated in the document.

2. Uniform Probate Code.—In the late 1960s, the National Conference of Commissioners on Uniform State Laws recognized that a guardianship or conservatorship had become increasingly cumbersome and expensive.[23] In 1964, it approved a Model Special Power Of Attorney for Small Property Interest Act, which was the forerunner of the durable power section of the 1969 Uniform Probate Code.[24] Later, the durable power of attorney, which remains effective even upon the incapacity of the principal, was proposed as part of the Uniform Probate Code based on a Virginia statute.[25] In addition to handling the management of property, the intent was to allow the attorney-in-fact to handle matters relating to the care and custody of the principal as well.[26]

The success of the Uniform Probate Code and durable powers is evident from the fact that all fifty states have now enacted legislation recognizing "the concept." Indiana adopted "the concept" from the Uniform Probate Code in 1976.[27] Its version recognized the durability of the power of attorney and set down some general rules regarding accounting to the guardian and the guardian's power to revoke or suspend the power.[28] It also established an affidavit requirement for the attorney-in-fact regarding knowledge of the termination of the power and introduced the concept of a "springing" power of attorney which becomes effective upon the principal's incompetence.[29]

3. Uniform Durable Power of Attorney Act.—The National Conference of Commissioners on Uniform State Laws next developed a free-

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21. IND. CODE § 30-5-10-4(b) (Supp. 1991).
22. *Id.* § 30-5-10-2.
23. *See* COLLINS, *supra* note 14, at 6.
24. *See id.* at 7-8.
25. *See id.* at 7.
26. *See id.* at 7-8.
27. IND. CODE §§ 30-2-1.5-1, -2 (repealed 1985).
28. *Id.*
29. *Id.*

standing act that could be adopted without the Uniform Probate Code. This act, known as the Uniform Durable Power of Attorney Act was adopted by Indiana in 1985, repealing the prior Uniform Probate Code provisions.[30]

The Uniform Durable Power of Attorney Act contained many improvements. The Act further specified presumptions and reasons for third parties to rely on the power of attorney.[31] It also addressed the conflict between the guardian and the attorney-in-fact by allowing the principal to nominate a guardian in the durable power of attorney and requiring the court to make the appointment in accordance with the nomination except for good cause or disqualification.[32] Despite these improvements, the Uniform Durable Power of Attorney Act was still silent on many aspects of durable powers of attorney including multiple attorneys-in-fact, successors, and powers granted under a durable power.[33]

4. Uniform Statutory Form Power of Attorney Act.—The National Conference of Commissioners on Uniform State Laws next adopted the Uniform Statutory Form Power of Attorney Act.[34] This Uniform Act was based on similar acts in Minnesota, New York, California, and Illinois.[35] The Act provides a form by which individuals can select powers to give their attorney-in-fact without detailing all of the powers to be granted. The details of the powers were included in the statute. Although Indiana has not adopted this Act, it is influential in the current trend of durable powers of attorney.

B. Requirements

1. Not Exclusive.—Under the Indiana Power of Attorney Act, "[a] power of attorney is valid if the power of attorney was valid at the time the power of attorney was executed under any of the following:

(1) This article, [The Power of Attorney Act].
(2) I.C. 30-2-11.
(3) Common law.
(4) The law of another state or foreign country."[36]

Common-law powers of attorney, powers of attorney executed under the old Durable Power of Attorney Act, and powers of attorney under

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30. IND. CODE §§ 30-2-11-1 to -7 (repealed 1991).
31. *Id.*
32. *Id.*
33. *Id.*
34. UNIF. STATUTORY FORM POWER OF ATTORNEY ACT, 8A U.L.A. 151 (Supp. 1991).
35. IND. CODE §§ 30-2-11-1 to -7 (repealed 1991).
36. IND. CODE § 30-5-3-2 (Supp. 1991).

this article, are valid. The statute provides a conflict of laws rule similar to that provided for wills through which Indiana recognizes powers of attorney executed under the laws of other states.[37] Hopefully, other states will adopt similar rules to assist in the conflict of laws problem that arises when individuals holding these powers of attorney travel to other states.[38]

The new Indiana Power of Attorney Act is not exclusive. Its intent is to provide another, hopefully simpler, way to create and use powers of attorney and not to exclude or invalidate powers of attorney not created in conformity with its provisions.[39]

2. Principal.—The new Indiana Power of Attorney Act, borrowing from the Illinois Act, includes, as a principal, individuals acting as a trustee, personal representative, or fiduciary.[40] Concerns were raised in the Indiana House of Representatives Judiciary Committee about whether or not this provision, coupled with the fiduciary powers that could be incorporated by reference, would give the fiduciary the authority to delegate all powers to an attorney-in-fact. Accordingly, additional language was added to the fiduciary powers provision, making it clear that it only applies when the fiduciary has the power to delegate.[41]

3. Formalities.—Under the new Indiana Power of Attorney Act, the power of attorney must:

- Be in writing
- Name an attorney-in-fact
- Give the attorney-in-fact the power to act on behalf of the principal
- Be signed by the principal in the presence of a notary public.[42]

The notary requirement was added by the Indiana House of Representatives Judiciary Committee to provide a safeguard before the power is executed and to assure that the document could be recorded.

C. Attorney-in-Fact

1. Qualifications.—Prior Indiana law limited the attorney-in-fact to an individual or a corporation authorized to be a fiduciary under Indiana

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37. *Id.* § 30-5-3-2(4) (adapted from MINN. STAT. § 523.02 (1990)).

38. Indiana now recognizes a power of attorney created under any state statute. This also includes any power an Indiana resident may validly execute under other state laws. Although this was not the original intent of the statute, it is not necessarily a strained interpretation. It is impossible to distinguish between a nonresident who has a certain power of attorney and a resident who has the same power of attorney and to say that one is effective in Indiana while the other is not.

39. IND. CODE § 30-5-2-8 (Supp. 1991).

40. *Id.* (adapted from ILL. REV. STAT. ch. 110, para. 802-3(e) (Smith-Hurd 1991)).

41. IND. CODE § 30-5-5-10 (Supp. 1991).

42. *Id.* § 30-5-4-1.

law. The Indiana Power of Attorney Act allows the attorney-in-fact to be the "person" designated to act for the principal under a power of attorney.[43] "Person" is defined to be "an individual at least 18 years of age, a corporation, trust or partnership."[44]

2. Multiple Attorneys-in-Fact.—Prior Indiana law was silent with respect to multiple attorneys-in-fact and their respective duties. The new Indiana Power of Attorney Act specifically recognizes that more than one person may serve as an attorney-in-fact and states that, unless the power of attorney states otherwise, each named attorney-in-fact may act independently.[45] It also provides a rule of succession whereby any successor attorney-in-fact does not serve unless all original attorneys-in-fact fail to serve.

3. Successor.—Prior Indiana law made no reference to successor attorneys-in-fact. The new Indiana Power of Attorney Act specifically recognizes the fact that a successor may be named. The following six instances will trigger the naming of a successor:

1. The attorney-in-fact dies;
2. The attorney-in-fact resigns;
3. The attorney-in-fact is adjudged incapacitated by a court;
4. The attorney-in-fact cannot be located upon reasonable inquiry;
5. The attorney-in-fact, if at one time the principal's spouse, legally is no longer the principal's spouse; or
6. A physician familiar with the condition of the current attorney-in-fact certifies in writing to the immediate successor attorney-in-fact that the current attorney-in-fact is unable to transact a significant part of the business required under the power of attorney.[46]

A problem related to successor attorneys-in-fact occurs if the original attorney-in-fact is somehow able to resume his or her duties. The statute mandates that unless the power of attorney states otherwise, the successor attorney-in-fact continues.[47] This is to avoid a "yo-yo effect" where the original attorney-in-fact may or may not fail or cease to serve.[48] The successor attorney-in-fact has all the powers of the original.[49]

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43. IND. CODE § 30-5-2-2 (Supp. 1991) (adapted from ILL. REV. STAT. ch. 110, para. 802-3(b) (Smith-Hurd 1991)).
44. *Id.* § 30-5-2-6.
45. *Id.* § 30-5-4-3.
46. *Id.* § 30-5-4-4.
47. *Id.* § 30-5-4-4(b).
48. *Id.*
49. *Id.* § 30-5-4-4(c).

4. Compensation.—Prior Indiana law made no reference to whether or not the attorney-in-fact was entitled to compensation. This led to some confusion, particularly upon the principal's death when the attorney-in-fact submitted a statement for services rendered.

The Indiana Power of Attorney Act borrows from the Uniform Transfers to Minors Act and states that, unless the power of attorney states otherwise, the "attorney-in-fact is entitled to reimbursement for all reasonable expenses advanced"[50] and is also entitled to "a reasonable fee" if the attorney-in-fact submits a request in writing to the principal for compensation within twelve months after the date the service is rendered.[51]

5. Duties

a. Not required to act

Prior Indiana law was silent with respect to whether or not the attorney-in-fact had a duty to act under the power of attorney. The Indiana Power of Attorney Act adapts from Illinois and Minnesota the provision that the attorney-in-fact is not required to exercise the powers granted under the power of attorney or to assume control or responsibility for any of the property or affairs regardless of the principal's physical or mental condition.[52] This provision is necessary, as it would be difficult to find someone to act as an attorney-in-fact if the attorney-in-fact is required to use those powers in all circumstances.

b. Due care

Prior Indiana law was silent regarding the duty of care owed by the attorney-in-fact. The Indiana Power of Attorney Act states that the attorney-in-fact is to use due care in acting for the benefit of the principal unless the power of attorney states otherwise.[53] This provision was adapted from Illinois law and is a codification of the customary agency standard derived from the law of negligence.[54]

c. Accounting

Prior Indiana law required the attorney-in-fact to be accountable to

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50. *Id.* § 30-5-4-5(a).
51. *Id.* § 30-5-4-5(b).
52. *Id.* § 30-5-6-1 (adapted from ILL. REV. STAT. ch. 110 1/2, para. 803-4 (Smith-Hurd 1991); MINN. STAT. ANN. § 529.21 (West 1991)).
53. *Id.* § 30-5-6-2.
54. *See* ILL. REV. STAT. ch. 110 1/2, para. 802-7 (Smith-Hurd 1991).

the fiduciary of the principal. The Indiana Power of Attorney Act expands the concept of accountability by requiring the attorney-in-fact to keep complete records of all transactions entered into by the attorney-in-fact on behalf of the principal.[55] The Act is somewhat contradictory in that it states that no accounting is necessary unless stated otherwise in the power of attorney, but then requires an accounting if the "accounting is requested by the principal, a guardian appointed for the principal, or, upon the death of the principal, the personal representative of the principal's estate."[56] The Act requires no accounting unless requested by those fiduciaries listed.

6. Liability

a. Standards

Prior Indiana law was silent regarding the liability of the attorney-in-fact. The new Indiana Power of Attorney Act provides that the attorney-in-fact is generally liable for the negligent exercise of the power of attorney.[57] In the exercise of health care powers, the attorney-in-fact is only liable for actions undertaken in bad faith.[58] Also, an attorney-in-fact is not liable to a beneficiary of the principal's estate plan when acting under the "estate transaction" power unless the attorney-in-fact acts in bad faith.[59]

b. Exoneration

Prior Indiana law did not have any provision regarding exoneration of the attorney-in-fact. The Indiana Power of Attorney Act allows the principal in a power of attorney to state that the attorney-in-fact is only liable if the attorney-in-fact acts in bad faith.[60] The exoneration is binding on the principal and the principal's successors in interest.[61] This exoneration provision is similar to that recently added to the Indiana Trust Code.[62]

c. Conflicts

Prior Indiana law was silent regarding conflicts the attorney-in-fact may have. The Indiana Power of Attorney Act provides that "an at-

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55. IND. CODE § 30-5-6-4(a) (Supp. 1991).

56. *Id.* § 30-5-6-4(b). This provision was adapted from the Minnesota statute which formerly had the provision written in one sentence. *See* MINN. STAT. ANN. § 523.21 (West 1990).

57. IND. CODE § 30-5-9-1(a) (Supp. 1991).

58. *Id.* § 30-5-9-1(b).

59. *Id.* § 30-5-5-15(c).

60. *Id.*

61. *Id.* § 30-5-9-5.

62. *Id.* § 30-4-3-32.

torney-in-fact who acts with due care for the benefit of the principal is not liable or limited only because the attorney-in-fact also benefits from the act; has an individual or conflicting interest in relation to the property, care, or affairs of the principal; or acts in a different manner with respect to the principal and the attorney-in-fact's individual interest."[63] The intent of this provision is to recognize certain situations in which the attorney-in-fact may have conflicts of interest and to establish a different level of "care" with regard to those transactions. The section was adapted from the Illinois provision.[64]

d. Knowledge of status

Prior Indiana law relieved the attorney-in-fact of liability if the attorney-in-fact acted without knowledge of the death of the principal and acted in good faith. A similar provision is contained in the Indiana Power of Attorney Act, which states that the attorney-in-fact is not liable for actions taken under an amended or terminated power of attorney if the attorney-in-fact does not have actual knowledge of the amendment or termination.[65] Related provisions relieve the attorney-in-fact of liability if the power of attorney is terminated by the incapacity of the principal and the incapacity is unknown to the attorney-in-fact[66] and if the death of the principal is unknown to the attorney-in-fact.[67]

e. Third party action

Prior Indiana law was silent with respect to the liability of the attorney-in-fact for actions of other persons. The Indiana Power of Attorney Act adapts an Illinois provision which states that the attorney-in-fact is not liable for loss due to an error of judgment or for the act or default of another person.[68]

f. Successor

Prior Indiana law was silent with regard to the liability of a successor attorney-in-fact. The Indiana Power of Attorney Act adapts a section from the Minnesota law that provides that a successor attorney-in-fact is not liable for the actions taken by the previous attorney-in-fact.[69]

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63. *Id.* § 30-5-9-2.
64. *See* ILL. REV. STAT. ch. 110, para. 802-7 (Smith-Hurd Supp. 1991).
65. IND. CODE § 30-5-9-3 (Supp. 1991).
66. *Id.* § 30-5-10-3.
67. *Id.* § 30-5-10-4.
68. *Id.* § 30-5-9-4 (adapted from ILL. REV. STAT. ch. 110, para. 802.7 (Smith-Hurd 1991)).
69. *Id.* § 30-5-9-6 (adapted from MINN. STAT. ANN. § 523.14 (West 1990)).

g. Multiple attorneys-in-fact

Prior Indiana law was silent regarding multiple attorneys-in-fact. The Indiana Power of Attorney Act now provides that when one of several attorneys-in-fact does not join in or consent to the action of another, that attorney-in-fact is not liable for the action of the others.[70] Moreover, "failure to object to an action is not a consent to the action."[71]

D. Effective Date

Prior Indiana law generally recognized that a power of attorney may not be effective until the disability or incapacity of the principal.[72] This became known as the "springing power." The Indiana Power of Attorney Act is more specific. It first states the general rule that the power of attorney is effective when it is signed by the principal.[73] It then allows the principal in the power of attorney to specify a specific date or occurrence upon which the power will become effective.[74]

Although this provision allows maximum drafting flexibility, the drafter should be careful to draft the power to become effective upon the occurrence of an event which is objective. For example, a power that is to become effective at the time of the incapacity or disability of the principal relies on a subjective standard. Requiring a written certification from a physician familiar with the principal's affairs stating that the principal is unable to manage the principal's affairs is a more objective standard because it requires the existence of a written document.

E. Powers

1. Fiduciary Limitation.—Prior Indiana law was silent with regard to the limitations placed on the attorney-in-fact in exercising powers given to the attorney-in-fact. The Indiana Power of Attorney Act contains a chapter that is entitled Duties of the Attorney-in-Fact.[75] Under that chapter, an "attorney-in-fact shall exercise all powers granted under the power of attorney in a fiduciary capacity."[76] One of the purposes of the provision is to provide a limitation on the use of the powers by the attorney-in-fact to counter arguments that the attorney-in-fact may

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70. *Id.* § 30-5-9-7.
71. *Id.*
72. IND. CODE §§ 30-2-11-1 to -7 (repealed 1991).
73. IND. CODE § 30-5-4-2(a) (Supp. 1991).
74. *Id.* § 30-5-4-2(b).
75. *Id.* §§ 30-5-6-1 to -5.
76. *Id.* § 30-5-6-3.

have an ownership interest in the property of the principal, particularly property that the attorney-in-fact may have given to the principal.

2. Incorporation by Reference.—Prior Indiana law did not allow incorporation of powers by reference. The Indiana Power of Attorney Act rejects what is known as the statutory form power of attorney. The statutory form power of attorney not only set forth detailed powers but also a form to be used in executing those powers. This allows the use of fill-in-the-blank forms which are sold or submitted to laymen without legal advice.

The Indiana Power of Attorney Act adopts Pennsylvania's incorporation by reference approach. The draftsman may refer to the descriptive language in the section chosen or cite the specific section chosen.[77] The incorporation by reference is "construed as though the entire section is set out in full in the power of attorney."[78] Similar or overlapping powers result in the "broadest power controlling."[79] The "power of attorney may modify any power incorporated by reference."[80]

Unlike the Trust Code, which gives all trusts certain powers unless excluded by the document, the Indiana Power of Attorney Act powers must be specifically incorporated into the document. As a result, all of the powers are optional. Furthermore, there is no requirement that any one power be used. The whole purpose for inclusion of the powers in the statute is to make the draftsman's job easier and hopefully, the power of attorney document shorter.

This raises several problems for the draftsman. First, the draftsman must read the powers in their entirety in order to be able to tell the principal that these are powers the principal wishes to give to an attorney-in-fact. Not only must the draftsman read the powers, but the draftsman must understand the powers.

The draftsman must attempt to make the principal aware of the powers being granted to the attorney-in-fact and subsequently, ensure that the attorney-in-fact is aware of the powers granted. Accordingly, the draftsman should consider submitting to the principal and to the attorney-in-fact a list of the powers incorporated by reference into the power of attorney.

The draftsman should be prepared to exclude or include any matters that specifically need to be added to or removed from the powers. For example, in Indiana Code section 30-5-5-7(a)(3)(A), reference is made to the insurance powers which are incorporated by reference. The statute incorrectly refers to "Section 8" when the reference should be to "Section

77. *Id.* § 30-5-5-1(a).
78. *Id.* § 30-5-5-1(b).
79. *Id.* § 30-5-5-1(c).
80. *Id.* § 30-5-5-1(d).

9" which is the gift power set forth later in the statute. Accordingly, the draftsman can make coordinating changes when the power is incorporated. Similar glitches may exist elsewhere, and the draftsman should be careful before incorporating these powers by reference.

3. Power of Appointment.—If the attorney-in-fact can make gifts to himself or in satisfaction of his own legal obligations, the power of attorney may be a general power of appointment.[81] If the power is a continuing one, or not exercisable within a particular period of time, then the annual non-exercise of the power will not be a lapse.[82]

The possible existence of the power of appointment creates problems if the attorney-in-fact dies holding the power of appointment or the attorney-in-fact makes transfers which exceed more than $10,000 per year per donee. The gift powers in the Indiana Power of Attorney Act avoid this problem by limiting the amount of the transfer to the attorney-in-fact or in payment of the legal obligations of an attorney-in-fact to the $10,000 per year per donee gift tax exclusion.[83]

If it is desired that the attorney-in-fact be able to make gifts to himself or in payment of his legal obligations in excess of this $10,000 per year, the draftsman may wish to consider different approaches. First, there is a strong argument that a general power of appointment is not created because the power in the power of attorney can only be exercised "in conjunction with the creator of the power." Under the Internal Revenue Code, if the power is only exercisable in conjunction with the creator of the power it is not a general power.[84] Arguably, the attorney-in-fact can only exercise the power in conjunction with the principal because the principal can revoke the power at any time.[85]

Other possible approaches include:

1. If the property exceeds $200,000, consider the adoption of a five percent limitation on the gifts to the attorney-in-fact; five percent of the amount over $200,000 exceeds $10,000 allowing a larger gift to the attorney-in-fact.
2. Only allow gifts to the attorney-in-fact or relief of legal obligations of the attorney-in-fact on an ascertainable standard related to health, maintenance, support, or education.
3. Appoint a special agent to make gifts to the attorney-in-fact. Ensure that the special agent is independent and not a permissible donee of any of the gifts.[86]

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81. *See* COLLINS, *supra* note 14, at 68-70.
82. Reg. Sec. 25-2514-3(c)(4).
83. IND. CODE § 30-5-5-9(a)(2) (Supp. 1991).
84. I.R.C. §§ 2041(b)(1)(c)(i), 2514(c)(2) (1988).
85. *See* COLLINS, *supra* note 14, at 69.
86. *See id.* at 70.

4. Consider a savings clause which invalidates any power that creates an ownership interest on behalf of the attorney-in-fact.

F. Prior Powers of Attorney

Prior powers of attorney remain valid and with increased popularity, new powers of attorney will be more prevalent. The Indiana Power of Attorney Act specifically applies to all powers of attorney created before July 1, 1991, unless the application would cause: (1) an adverse effect on the right given a principal or an attorney-in-fact; (2) the extension of a right not intended to be given at the time the power of attorney was created; (3) the imposition of a duty or liability on a person that was not intended to be imposed; or (4) the relief of a person from a duty or liability imposed by the terms of a power of attorney or the operation of law.[87] Previously discussed provisions recognize powers created under other acts and even in other states.[88] This creates a problem of interaction between various powers of attorney, especially where those powers may overlap.

The Indiana Power of Attorney Act is silent on this issue. The draftsman should consider how the new power of attorney interacts with existing powers of attorney. One approach is to revoke all existing powers of attorney. Under the new Act, a revocation contained in a new power of attorney should be sufficient to carry out that task. Nevertheless, that may be too draconian of a strategy. There may exist many little specific powers of attorney related to specific bank accounts or specific mutual funds. As a result, the draftsman may wish to revoke only other general powers of attorney which are not specific as to interests owned by the principal or specific property. Finally, the draftsman may simply wish to let all other existing powers continue; however, when these powers overlap with the new power, have the new power supersede the older powers.

G. Guardian

Prior Indiana law allowed for the nomination of a guardian in a durable power of attorney and required the appointment of the nominee except for good cause or disqualification. The Indiana Power of Attorney Act, borrowing from the Uniform Durable Power of Attorney Act,

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87. IND. CODE § 30-5-1-2 (Supp. 1991).
88. *See id.* § 31-5-3-2.

allows the naming of a guardian and requires the appointment except for good cause or disqualification.[89] The Act goes on to state that the "guardian does not have any power, duty or liability with respect to the property or personal health care conditions that are subject to a valid power of attorney."[90] This reverses the prior position in Indiana law which made the attorney-in-fact answer to the guardian. The Indiana Power of Attorney Act states that a guardian has no power to revoke or amend a valid power of attorney unless the court so orders and that such an order cannot be made without a hearing with notice given to the attorney-in-fact.[91]

H. Termination

1. Revocation.—Prior Indiana law made reference to revoking the power but did not set forth a procedure for revocation. The Indiana Power of Attorney Act states that a "power of attorney may be revoked only by a written instrument" that "identifies the power of attorney revoked" and "is signed by the principal."[92] The revocation "is not effective unless the attorney-in-fact or other person" relying on the power of attorney "has actual knowledge of the revocation."[93] Finally, if the executed power of attorney was recorded, the revocation of the power of attorney must be recorded and cross-referenced to the location where the power of attorney is recorded.[94] Recording requires notarization and preparation statements.[95]

2. Specific Date.—Prior Indiana law was silent with regard to the termination of a power of attorney on a specific date. The Indiana Power of Attorney Act now allows the principal to specify a termination date and time.[96]

3. Durable.—Prior Indiana law required that the power of attorney contain language indicating that it was to be durable, such as "this power of attorney shall not be affected by subsequent disability or incapacity of the principal or lapse in time" or "this power of attorney shall become effective upon the disability or incapacity of the principal."[97] The Indiana Power of Attorney Act adopts the Illinois approach and makes all powers of attorney durable unless stated otherwise in the

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89. *Id.* § 30-5-3-4(a).
90. *Id.* § 30-5-3-4(b).
91. *Id.*
92. *Id.* § 30-5-10-1(a).
93. *Id.* § 30-5-10-1(b).
94. *Id.* § 30-5-10-1(c).
95. *Id.* § 30-5-3-3(d).
96. *Id.* § 30-5-10-2.
97. IND. CODE § 30-2-11-1 (repealed 1991).

power of attorney.[98] If, by its own terms, the power of attorney terminates on the incapacity of the principal, the principal's incapacity does not affect the validity unless the attorney-in-fact or person relying on the power has actual knowledge of the incapacity.[99]

4. Death.—The Indiana Power of Attorney Act states that "the power of attorney terminates on the death of the principal."[100] The death of the principal does not terminate the power until the attorney-in-fact or person relying on the power has actual knowledge of the death.[101] A prior provision of Indiana law,[102] concerning notice from the United States Department of Defense of the death of the principal and the fact that a report or listing of missing in action, no longer constitutes notice of death or termination of a power of attorney under the new Indiana Power of Attorney Act.[103]

III. Health Care Powers

The new Indiana Power of Attorney Act plays a significant role in expanding the concept of surrogate health care decisionmaking in Indiana. Unfortunately, this is a rapidly changing area with recent developments in both legislation and case law that can cause confusion over the proper role of the power of attorney in this area.

A historical review illustrates that the new Indiana Power of Attorney Act is not the exclusive way of appointing a surrogate health care decisionmaker. Under common law, constitutional law, and other legislative enactments, surrogate health care decisionmakers can be designated in several ways. The Indiana Power of Attorney Act only provides an alternative means for designating such an individual. With the *In re Lawrance* case[104] and its application to the Health Care Consent Act,[105] the health care representative appointment should become the preeminent way to select surrogate health care decisionmakers in Indiana.

A. History

1. Common Law and Constitutional Law.—Indiana, like most jurisdictions, recognizes the doctrine of informed consent to medical care.[106]

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98. Ind. Code § 30-5-10-1 to -4 (Supp. 1991).
99. *Id.* § 30-5-10-3(b).
100. *Id.* § 30-5-10-4(a).
101. *Id.* § 30-5-10-4(b).
102. Ind. Code § 29-2-17-3 (repealed 1991).
103. Ind. Code § 30-5-10-4(c) (Supp. 1991).
104. 579 N.E.2d 32 (Ind. 1991).
105. Ind. Code §§ 16-8-12-1 to -13 (1988 & Supp. 1991).
106. Kranda v. Houser-Norborg Medical Corp., 419 N.E.2d 1024 (Ind. Ct. App. 1981); Revord v. Russell, 401 N.E.2d 763 (Ind. Ct. App. 1980); Joy v. Chau, 377 N.E.2d 670 (Ind. Ct. App. 1978). *See* Janet S. Ellis & Linda E. Cantor, The Right to Refuse Life-Proloning Medical Care: Common Law and Constitutional Bases, Elder Law 1991 (1991) (ICLEF) (excellent discussion used extensively in this section).

It is widely recognized that the doctrine of informed consent includes the right to refuse life-prolonging medical treatment.[107] This common-law right has been extended to individuals who are no longer competent, and is exercisable by a surrogate decisionmaker. In fact, many of the recent cases involving right-to-die decisions have involved requests by surrogate decisionmakers for authority from the courts.[108] At the judicial level, the courts often balance the right to terminate life-sustaining medical treatment against the state's interest, which is most often defined as:

- The preservation of life.
- The protection of innocent third parties.
- The prevention of suicide.
- The maintenance of the integrity of the medical profession.

In addition, at least two states, Missouri and New York, require clear and convincing evidence of the incompetent individual's intent with regard to the withholding of life-prolonging procedures.[109]

Several state court cases have also found a constitutional right of privacy which allows an individual to control his own medical decisions.[110] These cases rely on U.S. Supreme Court cases related to an individual's right to control medical decisions.[111] In determining the extent of this constitutional right, these courts also refer to the balancing test and the state's interest in the exercise of the common-law right to withhold medical treatment.

Into this mix of common and constitutional law falls the *Cruzan* case.[112] Nancy Cruzan, as a result of an automobile accident, was sustained by artificial nutrition and hydration in a persistent vegetative state for seven years. Her parents sought permission from the court to withdraw the artificial nutrition and hydration. As a result of the request, the Missouri court established a clear and convincing evidentiary standard of what Nancy's actual wishes would be under the circumstances. The

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107. Estate of Longeway, 549 N.E.2d 292 (Ind. Ct. App. 1989); Brophy v. New England Sinai Hosp., 497 N.E.2d 626 (Mass. 1986); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 (Mass. 1977); *In re* Conroy, 486 A.2d 1209 (N.J. 1985); *In re* Colyer, 660 P.2d 738 (Wash. 1983).

108. *Saikewicz*, 370 N.E.2d at 417; *In re* Haulin, 689 P.2d 1372 (Wash. 1984).

109. *See* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990); *In re* Eichner, 420 N.E.2d 64, 72 (N.Y. 1981).

110. Severns v. Wilmington Medical Ctr., Inc., 421 A.2d 1334 (Del. 1980); Guardianship of Barry, 445 So. 2d 365 (Fla. Dist. Ct. App. 1984); *In re* Spring, 405 N.E.2d 115 (Mass. 1980).

111. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Union Pacific Ry. Co. v. Botsford, 141 U.S. 250 (1891).

112. Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. at 2841 (1990).

Cruzans challenged Missouri's clear and convincing standard as unconstitutional.

The United States Supreme Court, through the majority opinion of Justice Rehnquist, found Missouri's clear and convincing standard to be constitutional.[113] In doing so, the majority opinion recognized the common-law doctrine of informed consent and the fact that it encompasses the right to refuse medical treatment.[114] The majority opinion also acknowledged that a competent person's right to refuse unwanted medical treatment may be inferred from the prior decisions of the United States Supreme Court.[115] In a footnote, Rehnquist explained that the right is more properly analyzed in the terms of the Fourteenth Amendment liberty interest than as a generalized federal right of privacy.[116] Rehnquist assumed for the purpose of the case at hand that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition. It should be noted that at least five Justices clearly found a protected liberty interest in refusing artificial nutrition and hydration. Because Nancy Cruzan was no longer competent, the decision to withhold would have to be exercised by a surrogate. The majority of the Supreme Court found that the federal Constitution did not require Missouri to accept the substituted judgment of Nancy's parents.[117]

Justice O'Connor, in her concurring opinion, made clear that the *Cruzan* decision is very narrow and does not preclude a future determination that the Constitution requires the states to implement the decisions of a patient's duly appointed surrogate.[118] In this respect, Justice O'Connor echoed a 1983 report entitled The Report of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research which stated, "The Commission found that existing legal procedures be adapted for the purpose of allowing people while competent to designate someone to act in their stead and to express their wishes about treatment."[119] The existing procedures referred to are the power of attorney statutes.

On rehearing, Nancy Cruzan's parents were allowed to terminate nutrition and hydration after additional testimony from Nancy's coworkers as to her intent was presented.[120] Because of the expense of

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113. *Id.* at 2852.
114. *Id.* at 2847.
115. *Id.* at 2851.
116. *Id.* at 2851 n.7.
117. *Id.* at 2855.
118. *Id.* at 2858 (O'Connor, J., concurring).
119. *Id.*
120. Ellis & Cantor, *supra* note 106, at 8-9.

litigation in both time and money, and the difficulty of the issues involved in surrogate health care decisionmaking, more and more courts and legislatures have taken steps to remove the courts from this decisionmaking process. This can be seen in the legislative enactments, including the Indiana Power of Attorney Act.

2. Uniform Acts.—Indiana first adopted the durable power of attorney provisions of the Uniform Probate Code and later adopted the Uniform Durable Power of Attorney Act. For years, debate raged as to whether these acts allowed principals to grant powers related to personal health care decisions to the attorney-in-fact. Many argued that the failure to include such rights in the act meant that the health care powers were not delegable to the attorney-in-fact, while others argued that the acts were broad enough to allow such a delegation.

The most recent decision related to this debate is *In re Peters*,[121] in which the New Jersey Supreme Court, in dicta, recognized the ability under the New Jersey Durable Power of Attorney Act to grant medical health care decisionmaking power to the attorney-in-fact, including the power to withhold medical treatment even though it may result in death.[122]

The National Conference of Commissioners on Uniform Laws, in 1985, adopted the Uniform Rights of the Terminally Ill Act.[123] The Act is basically a compilation of existing living will laws. The National Conference of Commissioners on Uniform State Laws is currently working on a Uniform Health Care Power of Attorney. In addition, the Probate Trust & Real Property Section of the American Bar Association also has a division with a committee working on a Model Health Care Act to meet the challenges of surrogate health care decisionmaking.

Most recently, states like Illinois are pioneering health care powers of attorney.[124] The Illinois Act and similar acts are comprehensive delegations of personal health care decisions including the right to remove or withhold medical treatment even though death may result.

3. Living Wills.—In 1985, the Indiana legislature made its first attempt to address the right to die issues that were being raised in the courts.[125] This attempt was the Living Wills and Life Prolonging Procedure Act (Living Will Act).[126] From its inception, the Act was recognized

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121. 529 A.2d 419 (N.J. 1987).

122. *Id.* at 426.

123. UNIF. RIGHTS OF TERMINALLY ILL ACT, 9B U.L.A. 607 (1982 & Supp. 1991).

124. ILL. REV. STAT. ch. 110 1/2, para. 801-1 to -12 (Smith-Hurd Supp. 1991).

125. *See* Jeffrey B. Kolb, *Indiana's Living Wills and Life-Prolonging Procedures Act*, 19 IND. L. REV. 284 (1986); Daniel R. Gordon, Living Wills, Elder Law 1991 (1991) (ICLEF).

126. IND. CODE §§ 16-8-11-1 to -12 (1988 & Supp. 1991).

as being very narrow in scope. The narrowness was partly due to the compromise reached between the legislature, the Catholic Archdiocese of Indianapolis, and right to life opposition.[127] Specifically, the definition of life-prolonging procedures which can be removed or withheld does not include nutrition and hydration. Moreover, the obligation of removing life-prolonging procedures falls upon the physician after diagnosing a "terminal condition," which is defined as a "condition caused by injury, disease or illness from which to a reasonable degree of medical certainty: (1) there can be no recovery and (2) death will occur from the terminal condition within a short period of time without the provision of life-prolonging procedures."[128] The physician must also find that the "patient's death will occur from the terminal condition whether or not life-prolonging procedures are used."[129] As a result, many doctors may find it difficult to certify to a reasonable degree of medical certainty that the terms and conditions of the living will apply. This is particularly true for an individual in a persistent vegetative state where death would not occur within a short period of time when nutrition and hydration is provided. Indiana's Living Will Act does contain an implied recognition of an attorney-in-fact who may be consulted by the doctor if the doctor does not believe that the living will was properly executed.[130] This gives some hope that Indiana will recognize surrogate health care decision-making by an attorney-in-fact.

4. Health Care Consent Act.—In 1987, Indiana adopted the Model Health Care Consent Act.[131] The Act is designed to allow individuals to appoint a health care representative who may give informed consent to medical treatment in certain circumstances. In the absence of a written delegation, the Act designates individuals who may make those decisions on behalf of others. Prior to the *Lawrance* case, there was debate over whether the Health Care Consent Act allowed the health care representative to remove or withhold medical treatment even though death may result. The Act itself provides: "This Chapter does not affect Indiana law concerning an individual's authorization to make a health care decision for the individual or another individual, or to provide, withdraw, or withhold medical care necessary to prolong or sustain life."[132] While the *Lawrance* case, discussed below, eventually determined that the Health

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127. Kolb, *supra* note 125, at 285.

128. IND. CODE § 16-8-11-9 (1988).

129. *Id.* § 16-8-11-14(a)(1)(B).

130. *Id.* § 16-8-11-14(g).

131. *Id.* §§ 16-8-12-1 to -13. *See* J. Brian Niederhauser, Indiana's Health Care Consent Law, in Elder Law 1991 (1991) (ICLEF).

132. IND. CODE § 16-8-12-11(a) (1988).

Care Consent Act is broad enough to include the area of medical treatment even though death may result, at the time of the Indiana Power of Attorney Act this issue was unresolved.

5. Indiana Power of Attorney Act.—As originally presented to the legislature, the Indiana Power of Attorney Act contained a specific power to be incorporated by reference which would allow the attorney-in-fact to remove or withhold health care based upon the previously expressed preferences of the principal.[133] Health care was defined to include the removal or withholding of nutrition and hydration provided by certain intrusive means.[134] The assumption in the drafting of the Power of Attorney Act was that the Health Care Consent Act was not clearly applicable to surrogate health care decisionmaking when it involved the removal or withholding of nutrition and hydration.

The legislature attempted to coordinate the surrogate health care decisionmaking powers in the Power of Attorney Act with the Health Care Consent Act. As a result, the Health Care Consent Act was amended to incorporate by reference the health care provisions of the Indiana Power of Attorney Act.[135] The Indiana Power of Attorney Act was changed to give the attorney-in-fact the power to remove or withhold health care only if a separate health care consent representative appointment is made by the principal and attached to the power of attorney.[136] An additional provision was added to the Indiana Power of Attorney Act, making it clear that the health care representative appointment can be separate from the power of attorney and does not need to be attached.[137] As a result, the power of attorney health care provisions became inextricably attached to the health care representative appointment under the Health Care Consent Act. Obviously, anyone wishing to make a health care representative appointment needs to do so under the Health Care Consent Act separate from the power of attorney. Nevertheless, some of the provisions of the Indiana Power of Attorney Act may be desirable and may be incorporated into the Health Care Consent Act by attaching the health care representative appointment to the power of attorney as provided by the statute.

6. Sue Ann Lawrance Case.—In the *Lawrance* case,[138] the Indiana Supreme Court recognized Indiana's common-law doctrine of informed consent based on Justice Cardozo's statement that: "Every human being of adult years and sound mind has a right to determine what shall be

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133. *Id.* § 30-5-5-17.
134. IND. CODE § 30-5-2-4 (Supp. 1991).
135. *Id.* § 16-8-12-13.
136. *Id.* § 30-5-5-17.
137. *Id.* § 30-5-8-6.
138. *In re* Lawrance, 579 N.E.2d 32 (Ind. 1991).

done with his own body."[139] The Indiana Supreme Court reviewed Indiana's various legislative enactments including the Living Will Act, the new Indiana Power of Attorney Act, and the Health Care Consent Act, and found in these legislative enactments the intent of the legislature to allow the individual the greatest amount of patient autonomy even when the patient becomes incompetent.[140] The Indiana Supreme Court focused on the Health Care Consent Act and determined that the definition of "health care" under the Act is broad enough to include the provision of nutrition and hydration.[141] In support, the court relied on various common-law decisions from other jurisdictions and legislative enactments such as the Indiana Power of Attorney Act.[142] Accordingly, Indiana's Health Care Consent Act, with its automatic designation of the surrogate health care decisionmaker or its provisions allowing the designation of a surrogate health care decisionmaker, provides the broadest relief of any jurisdiction in the country when it comes to surrogate health care decisions. The Indiana Supreme Court clearly states its belief that courts should no longer be involved in cases where the Health Care Consent Act has designated who should make these decisions.

B. Requirements

1. Health Care Representative Appointment.—The attorney-in-fact in a power of attorney may be given seven specific powers related to personal health care and medical decisions.[143] These powers are independent of a health care representative appointment. However, if the attorney-in-fact is an individual who wishes to consent or refuse health care for the principal, the principal must execute and attach either a declaration under the living will statute or a health care representative appointment to the power of attorney.[144] Similar language is contained in Indiana Code section 30-5-5-17, which states: "To empower the attorney-in-fact to act under this section the following language must be included in an appointment under IC 16-8-12 in substantially the same form set forth below."[145] Language must be added to a health care representative appointment and attached to the power of attorney for the attorney-in-fact to have authority to refuse or consent to health care. The power of attorney and health care representative appointment can be executed separately.

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139. *Id.* at 38-39.
140. *Id.* at 39.
141. *Id.*
142. *Id.* at 39-40.
143. IND. CODE § 30-5-5-16 (Supp. 1991).
144. *Id.* § 30-5-5-16(b)(2).
145. *Id.* § 30-5-5-17.

2. Principal.—The principal of a power of attorney must be an adult and be able to act in a legal capacity.[146] Indiana's Health Care Consent Act allows a consent to health care to be signed by an adult or a minor who is either emancipated, fourteen years of age, not dependent on the parent for support, married, in the military service of the United States, or authorized to consent to the health care by any other statute.[147] Certain minors can appoint a health care representative for health care but may not appoint an attorney-in-fact to take care of the minor's property.[148]

3. Formalities.—A health care representative appointment must be in writing, signed by the appointor or by a designee in the appointor's presence, and witnessed by an adult other than the representative.[149] These requirements differ from the power of attorney formalities which include the grant of a power, identification of the attorney-in-fact, and notarization.[150]

C. Health Care Representative

1. Qualification.—A health care representative can only be an individual.[151] An attorney-in-fact can be an individual, corporation, partnership, or trust.[152] A corporation, partnership, or trust should not be named as attorney-in-fact if the right to refuse medical treatment is included.

2. Multiple or Successor Attorneys-in-Fact and Compensation.—The Health Care Consent Act is silent with regard to multiple or successor health care representatives. It is also silent regarding compensation for a health care representative. If the attorney-in-fact is also appointed as health care representative in a manner contemplated by the Indiana Power of Attorney Act (the health care representative appointment is attached to the power of attorney), it appears that the law implicitly recognizes multiple and successor health care representatives also serving as attorney-in-fact. It also suggests that compensation would be allowed under the Indiana Power of Attorney Act.

3. Duties.—The attorney-in-fact who is also a health care representative has the duty of ascertaining whether or not the principal notified the principal's health care providers that a power of attorney has been

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146. *Id.* § 30-5-2-6.
147. IND. CODE § 16-8-12-2 (1988).
148. *Id.* § 16-8-12-4.
149. *Id.* § 16-8-12-6(c).
150. IND. CODE § 30-5-4-1 (Supp. 1991).
151. IND. CODE § 16-8-13-1(5) (1988).
152. IND. CODE § 30-5-2-6 (Supp. 1991).

executed.[153] The intent of the statute is to place any health care representative appointment with the language on withholding medical treatment in the medical record of the principal. The Power of Attorney Act states that if the power of attorney is not in the medical record, it is the duty of the attorney-in-fact to notify the health care providers of the existence of the power.[154] Again, this does not apply to all powers of attorney but to powers of attorney with this specific provision regarding withholding medical treatment.

There is no duty on the attorney-in-fact to act in the Indiana Power of Attorney Act.[155] The Health Care Consent Act states that if the health care representative is unwilling to act, the health care representative should inform the appointor, the appointor's legal representative, and the health care provider.[156] These provisions may not be conflicting, but are not necessarily coordinated.

4. Liability.—The Indiana Power of Attorney Act states that the attorney-in-fact is only liable under the health care powers if the attorney-in-fact acted in bad faith.[157] The Indiana Health Care Consent Law requires that a health care representative "act in the best interest of the appointor consistent with the purpose expressed in the appointment and in good faith."[158] It appears that the two provisions agree though they come at the problem from opposite directions. In addition, the Health Care Consent Law states that a health care representative "does not become personally liable for the cost of health care by virtue of that consent."[159]

D. Effective Date

A health care representative appointment becomes effective when the appointor is incapable of consenting.[160] This is different from the power of attorney which allows a specification of the effective date.[161]

E. Powers

There are seven health care powers which can be included in a power of attorney[162] or which are automatically part of a health care

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153. *Id.* § 30-5-6-5(f).
154. *Id.*
155. *Id.* § 30-5-6-1.
156. *Id.* § 16-8-12-6(i).
157. *Id.* § 30-5-9-1(b).
158. IND. CODE § 16-8-12-6(h) (1988).
159. *Id.* § 16-8-12-11(g).
160. *Id.* § 16-8-12-6(f).
161. IND. CODE § 30-5-4-2(b)(1) (Supp. 1991).
162. *Id.* § 30-5-5-16.

representative appointment.[163] The power to remove or withhold health care is contained in the Indiana Power of Attorney Act in language to be incorporated specifically into the health care representative appointment.[164] The power authorizes the withholding or withdrawal of health care which is defined to include nutrition and hydration provided by certain intrusive means.[165]

Both the Indiana Power of Attorney Act and the Health Care Consent Act allow for the delegation of powers including health care powers.[166] The Indiana Power of Attorney Act states that if the attorney-in-fact makes an anatomical gift, authorizes an autopsy, or directs disposition of the principal's body, the acts of the attorney-in-fact shall be considered the acts of the principal or of the person who has priority under law to make the necessary decisions; each person to whom the attorney-in-fact communicates a direction shall comply with the direction.[167] This unusual section is directed at the problem caused by the common-law and statutory requirement that the power of attorney terminate at death. This legislative abrogation of common law makes decisions related to these three instances effective even after the death of the principal. Arguably, it may even make the decisions effective if the decisions are made after the death of the principal.

F. Health Care Provider

The Health Care Consent Act incorporates by reference the health care consent provisions of the new Indiana Power of Attorney Act except to the extent they conflict with the Health Care Consent Act.[168] This incorporation by reference probably includes the provisions in the new Indiana Power of Attorney Act related to the health care provider's duties and liabilities.[169] A health care provider may be more comfortable if the protections of the new Indiana Power of Attorney Act clearly apply.

1. Duties.—The Indiana Power of Attorney Act sets forth specific duties for a health care provider. The health care provider furnished with a copy of a living will or a health care representative appointment is required to make the documents a part of the principal's medical records.[170] Any change is also to be noted.[171]

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163. *Id.* § 16-8-12-13(a).
164. *Id.* § 30-5-5-17.
165. *Id.* § 30-5-2-5-4.
166. *Id.* §§ 30-5-5-18, 16-8-12-5.
167. *Id.* § 30-5-7-6.
168. *Id.* § 16-8-12-13.
169. *Id.* § 30-5-9-10.
170. *Id.* § 30-5-7-2.
171. *Id.*

The health care provider is required to consult with the attorney-in-fact who has power to act for the patient under a living will or health care representative appointment or power of attorney if the health care provider "believes a patient may lack the capacity to give informed consent to health care the provider considers necessary."[172]

A health care provider must comply with the health care decision made by an attorney-in-fact under a power of attorney once the decision is communicated. The health care provider can continue to administer for the principal's comfort, care, or alleviation of pain. If the health care provider is unwilling to comply, the health care provider must notify the attorney-in-fact of the provider's unwillingness and properly take all steps necessary to transfer the responsibility of the principal's health care to another health care provider designated by the attorney-in-fact.[173]

Finally, the health care provider must give the attorney-in-fact the same access the principal has to examine and copy medical records, though the expenses are paid by the principal and are subject to reasonable rules to prevent disruption of the principal's health care.[174]

2. Liability.—A health care provider who acts in good faith reliance on a direction or decision of an attorney-in-fact that is not clearly contrary to the terms of the power of attorney is protected and released from liability to the same extent as the provider or other person who would be protected or released if the provider or other person had dealt directly with the principal as a fully competent person. Specifically, the health care provider is not subject to civil or criminal liability or discipline for unprofessional conduct even if death or injury results to the principal. The provider is not subject to civil or criminal liability or discipline if his failure to comply with the direction is substantially in accord with the reasonable medical standards at the time and the provider promptly transfers the principal to another health care provider, and the death is not suicide or homicide if it results from the withholding or withdrawing of health care in accordance with the terms of the power of attorney and does not impair or invalidate an insurance annuity or other type of contract that is conditioned on the life or death of the principal, term of the contract notwithstanding.[175]

IV. Third Parties

One of the primary concerns with any power of attorney is whether third parties will rely on it. One of the strengths of the Indiana Power

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172. *Id.* § 30-5-7-3.
173. *Id.* § 30-5-7-4.
174. *Id.* § 30-5-7-5.
175. *Id.* § 30-5-9-10.

of Attorney Act are provisions increasing the reliance by third parties on the power.

A. Binding Effect

Prior Indiana law provided that the acts of the attorney-in-fact bound the principal and principal successors in interest as though the principal had acted on the principal's own behalf.[176] The Indiana Power of Attorney Act continues the same rule which was adapted from prior Indiana law.[177]

B. Presumptions

The Indiana Power of Attorney Act creates a presumption of validity where the written power of attorney is purported to be signed by the principal unless anyone relying on the power has actual knowledge that the power was not validly executed.[178] The Power of Attorney Act goes on to state that the "signature of the attorney-in-fact that identifies the principal and the attorney-in-fact, or a similar written disclosure, is an attestation and is conclusive proof to a party relying on the attestation, except a party with actual knowledge that the attestation is false, that

- the principal was competent at the time the power was executed;
- the attorney-in-fact does not have actual knowledge of the termination of the power of attorney;
- in the case of a successor attorney-in-fact, the original attorney-in-fact has failed or ceased to serve, and the successor attorney-in-fact is empowered to act on behalf of the principal; and
- if the effective date of the power of attorney begins upon the occurrence of a certain event, that event has occurred and the attorney-in-fact is able to act under the power of attorney.[179]

C. No Duty to Investigate

A third party relying on a power of attorney and attestation of the attorney-in-fact is not required to investigate whether the power of attorney is valid, "whether the attorney-in-fact is authorized to act, [or]

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176. IND. CODE § 30-2-11-2 (repealed 1991).
177. IND. CODE § 30-5-8-1 (Supp. 1991).
178. *Id.* § 30-5-8-2.
179. *Id.* § 30-5-8-3.

what the attorney-in-fact does with the property delivered to the attorney-in-fact."[180]

D. Copy

Unique to power of attorney law is the Indiana provision that "a copy of the power of attorney has the same force and effect as the original if the attorney-in-fact certifies that the copy is a true and correct copy."[181]

E. Liability

Perhaps the most important provision of the Indiana Power of Attorney Act is the provision that "a person refusing to accept the authority of an attorney-in-fact . . . is liable to the principal and to the principal's heirs, assigns and the personal representative of the estate of the principal in the same manner as a person would be liable had the person refused to accept the authority of the principal to act on the principal's own behalf."[182] This provision does not apply to someone who has actual notice of the revocation of the power of attorney or the duration of the power has expired as specified in the power of attorney or "the person has actual knowledge of the death of the principal."[183] The provision "does not negate the liability a person would have to the principal or the attorney in fact under another form of power of attorney, under the common law, or otherwise."[184]

For protection, a good faith purchaser is not liable to the principal or heirs. The person accepting the authority of an attorney-in-fact is not liable to the principal or heirs of the principal if the person had no actual notice of revocation, the person had no actual notice of the death of the principal, or the person had no actual notice that the duration of the power of attorney specified in the power of attorney had not expired.[185]

V. General Rules

A. Construction

The Indiana Power of Attorney Act provides a rule of construction that requires that "[t]he rules of law contained in the article shall be

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180. *Id.* § 30-5-8-4.
181. *Id.* § 30-5-8-5.
182. *Id.* § 30-5-9-9(a).
183. *Id.* § 30-5-9-9(b).
184. *Id.* § 30-5-9-9(c).
185. *Id.* § 30-5-9-8.

interpreted and applied to the terms of a power of attorney to implement the intent of the principal and the purposes of the power of attorney. If the law conflicts with the terms of the power of attorney, the terms of the power of attorney control unless the law clearly prohibits or restricts what the power of attorney purport to authorize."[186]

B. Recording

Prior Indiana Law required that a power of attorney be recorded prior to the time that the attorney-in-fact executed the document to be recorded. The new Indiana Power of Attorney Act states that a power of attorney does not need to be recorded, but that if it is to be recorded, it should be recorded before the document to be recorded is presented and that the power of attorney comply with the recording requirements including notary and preparation statements. The power of attorney should be cross-referenced to the document executed by the attorney-in-fact.[187]

C. Court Guidance

Similar to the Trust Code, any interested person may ask the probate court to construe a power of attorney and then instruct the attorney-in-fact.[188] Notice of a hearing on such a petition must be as the court directs.[189] This allows any interested person to seek court substituted judgment in situations in which the attorney-in-fact may not wish to act without such instruction.

VI. Conclusion

The new Indiana Power of Attorney Act is evolutionary, not revolutionary. It borrows from existing power of attorney acts and expands and pushes forward the concept of a power of attorney which remains effective until the death of the principal. It is not the last word in power of attorney acts; however, it is conceivable that uniform acts will soon be developed which are preferable to this Act.

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186. *Id.* § 30-5-3-1.
187. *Id.* § 30-5-3-3.
188. *Id.* § 30-5-3-5.
189. *Id.*